



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 6, 2011

Ms. Courtney Kuykendall  
Abernathy Roeder Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2011-12833

Dear Ms. Kuykendall:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 428992.

The City of Wylie (the "city"), which you represent, received four requests from the same requestor for e-mails and correspondence sent to or received by particular individuals regarding the requestor and two other named individuals during specified time periods, and specified cellular telephone bills during a particular period of time.<sup>1</sup> You indicate some responsive information has been released to the requestor. You claim that the submitted information is not subject to the Act, or, alternatively, is excepted from disclosure under sections 552.109, 552.117, 552.136, and 552.137 of the Government Code, and privileged under Texas Rule of Evidence 503.<sup>2</sup> We have considered your claims and reviewed the

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<sup>1</sup>We note the requestor subsequently provided clarification of two of the requests. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, while you raise rule 192.5, you have provided no arguments regarding the applicability of this rule. Since you have not submitted arguments concerning rule 192.5, we assume that you no longer urge it. *See* Gov't Code §§ 552.301(b), (e), .302.

submitted information.<sup>3</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We begin by noting that some of the submitted documents are not responsive to the instant requests for information, as they were created after the date the city received the requests. This ruling does not address the public availability of any information that is not responsive to these requests, and the city need not release that information in response to these requests. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

You claim the submitted information in Exhibit B is not subject to the Act. The Act applies to “public information,” which is defined in section 552.002 of the Government Code as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov't Code § 552.001(a).

We further note that the characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a

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<sup>3</sup>We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Furthermore, this office has found information in a public official's personal e-mail account and home telephone records may be subject to the Act where the public official uses the personal e-mail account and home telephone to conduct public business. *See* ORD 635 at 6-7 (appointment calendar owned by a public official or employee is subject to the Act when it is maintained by another public employee and used for public business).

You assert "a review of the Information enclosed herewith conclusively establishes that it is not work related" and therefore does not relate to the transaction of official city business. The submitted information consists of e-mails between and among city staff and city officials regarding city business; copies of the requestor's blog entries about the city council which were compiled for and delivered to city staff; and cellular telephone bills of the mayor and city council members. Upon review, we find the city has failed to demonstrate that the submitted information was not collected or assembled or is not maintained in connection with the transaction of official city business. Thus, we find the submitted information constitutes "public information" as defined by section 552.002(a). Accordingly, the submitted information is subject to the Act, and we will, therefore, consider your arguments against disclosure of this information.

We note information has been redacted from the submitted documents. Section 552.301 of the Government Code prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(e) requires a governmental body to submit the specific information at issue to this office, or representative samples if the information is voluminous, unless the governmental body is authorized to withhold the information pursuant to sections 552.024(c) or 552.147 of the Government Code or a previous determination. *See id.* § 552.301(e)(1)(D); Open Records Decision No. 673 (2001) (previous determinations). Section 552.024(c) authorizes a governmental body to withhold a current or former official or employee's home address and home telephone number, emergency contact information, social security number, and information that reveals whether the employee has family members, to the extent the employee chooses not to allow public access to the information, without requesting a decision. *See* Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 1 (to be codified as an amendment to Gov't Code § 552.024(a)). Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without requesting a decision. *See id.* § 552.147(b). This office issued a previous determination in Open Records Decision No. 670 (2001) authorizing all governmental bodies to withhold certain information relating to a peace officer under section 552.117(a)(2) of the Government Code without requesting a decision. *See* ORD 670

at 6-7. This office also issued a previous determination in Open Records Decision No. 684 (2009) authorizing all governmental bodies to withhold ten other categories of information without requesting an attorney general decision under the Act. *See* ORD 684 at 14-15. We know of no other authority for the city to withhold information under the Act without requesting a decision. In this instance, we are unable to ascertain the nature of the redacted information. Therefore, the redacted information must be released, except for any information the city is authorized to withhold under sections 552.024(c) and 552.147(b) of the Government Code or Open Records Decision Nos. 670 and 684. *See* Gov't Code §§ 552.301, .302. In the future, the city should refrain from redacting information from records submitted to this office in connection with a request for a decision under the Act unless the city is authorized to withhold the information pursuant to sections 552.024(c) or 552.147(b) or a previous determination.

We next note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). In this instance, the submitted information contains cellular telephone bills, which are subject to section 552.022(a)(3). Information subject to section 552.022(a)(3) may only be withheld if it is confidential under other law. *See id.*

The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. We will also consider your claims for this information under sections 552.109, 552.117, 552.136, and 552.137 of the Government Code, which constitute "other law" for purposes of section 552.022. Additionally, we will address your arguments for the information not subject to section 552.022.

Rule 503 of the Texas Rules of Evidence provides in relevant part as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Upon review, we find you have failed to establish how the cellular telephone bills constitute attorney-client communications made confidential by rule 503. Therefore, because you failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the information subject to section 552.022, we determine this information is not privileged and it may not be withheld under rule 503. *See* ORD 676.

You next contend the information contained in the cellular telephone bills is excepted from disclosure under section 552.109 of the Government Code.<sup>4</sup> Section 552.109 excepts from

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<sup>4</sup>Although you also assert "text messages" are excepted under section 552.109, we note you have not submitted any text messages for our review.

public disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.<sup>5</sup>

In *Industrial Foundation*, the Texas Supreme Court held information is protected by common-law privacy if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy).

Upon review, we find the cellular telephone bills do not constitute correspondence of an elected office holder. Thus, you have failed to demonstrate how any of this information constitutes highly intimate or embarrassing information of no legitimate public interest. Therefore, the city may not withhold the cellular telephone bills under section 552.109 of the Government Code.

We next turn to your assertion of the attorney-client privilege for the submitted information which is not subject to section 552.022 of the Government Code. Although you raise rule 503 for this information, we note section 552.107(1) of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2. Thus, we will address your assertion of the attorney-client privilege for this information under section 552.107.

The test for determining whether information is protected under the attorney-client privilege under section 552.107 is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate the information constitutes or

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<sup>5</sup>Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101.

documents a communication. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” ORD 676.

Upon review, we find you have failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the information at issue. Therefore, this information is not privileged and may not be withheld under section 552.107(1) of the Government Code. *See id.*

You represent the submitted records contain “information which relates to the home address, home telephone number, social security number and/or family members of peace officers[,]” which you claim is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the officer elected under section 552.024 or section 552.1175 of the Government Code to keep such information confidential.<sup>6</sup> Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). We note that section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use).

You have failed to identify any information that may relate to peace officers or their family members. Thus, we must rule conditionally. To the extent you determine any of the submitted information consists of the current and former home addresses, home or personal cellular telephone numbers, emergency contact information, or social security number of a peace officer, as well as information that reveals whether the peace officer has family members, that information must be withheld under section 552.117(a)(2) of the Government Code. To the extent the submitted records do not consist of such information, that information may not be withheld under section 552.117(a)(2).

We note some of the submitted information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who

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<sup>6</sup>“Peace officer” is defined by article 2.12 of the Texas Code of Criminal Procedure.

request that this information be kept confidential under section 552.024 of the Government Code. Section 552.117 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* ORD 506 at 5-6 (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

To the extent you determine any of the submitted information consists of the home addresses, home or personal cellular telephone numbers, emergency contact information, social security number, or family member information of a former or current employee or official of the city, that information must be withheld under section 552.117(a)(1), provided the official or employee made a timely election under section 552.024. To the extent the submitted records do not consist of such information, that information may not be withheld under section 552.117(a)(1).

You assert that “any part of the [submitted] Information which contains an access device number” is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides in part that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the city must withhold cellular telephone account numbers, a representative sample of which we have marked, under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to its release.<sup>7</sup>

To summarize: To the extent you determine any of the submitted information consists of the current and former home addresses, home or personal cellular telephone numbers, emergency

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<sup>7</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

contact information, or social security number of a peace officer, as well as information that reveals whether the peace officer has family members, that information must be withheld under section 552.117(a)(2) of the Government Code. To the extent the submitted records do not consist of such information, they may not be withheld under section 552.117(a)(2). To the extent the submitted information consists of the home addresses, home or personal cellular telephone numbers, emergency contact information, social security number, or family member information of a former or current employee or official of the city, that information must be withheld under section 552.117(a)(1) of the Government Code, provided the official or employee made a timely election under section 552.024. To the extent the submitted records do not consist of such information, they may not be withheld under section 552.117(a)(1). The city must withhold cellular telephone account numbers, a representative sample of which we have marked, under section 552.136 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to its release. The remaining responsive information must be released to the requestor.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 428992

Enc. Submitted documents

c: Requestor  
(w/o enclosures)