



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2011

Mr. Jaime J. Munoz
Law Office of Jaime J. Munoz
P.O. Box 47
San Juan, Texas 78589

OR2011-13256

Dear Mr. Munoz:

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# 429897.

The City of San Juan (the "city"), which you represent, received a request for all text messages and e-mails between the city's commission members, the city secretary, and all senior personnel during a specified meeting. You state the requested information is not public information under the Act. Alternatively, you state the requested information is excepted from disclosure under sections 552.109 and 552.117 of the Government Code. We have considered your arguments.

We first address your assertion that the requested text messages and e-mails are not public information subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "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." *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* 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).

You state the city has no right of access to the cellular telephones and telephone accounts related to the text messages and e-mails, and does not collect, assemble, or maintain these messages. However, the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body or whether a governmental body has a particular policy or procedure that establishes a 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 official or employee 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)). Thus, if the information at issue relates to city business, the mere fact that the city does not possess the information at issue does not take the information outside the scope of the Act. *See* ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act).

You also claim that the requested text messages and e-mails are unrelated to the individuals' transaction of official city business and could not have been made in connection with city business at a duly posted meeting. Additionally, you allege that the requested text messages and e-mails simply recount official business that has already occurred and thus do not pertain to official city business. We disagree. By enacting the Act, the legislature has clearly stated that citizens are entitled, with few exceptions, to *complete* information about the affairs of their government. *See generally* Gov't Code § 552.001. To conclude the city could withhold information which clearly relates to official business on the grounds that the information pertains to past official business would allow the city to easily and with impunity circumvent the Act's disclosure requirements. The legislature could not have possibly intended such an outcome. Thus, we decline to limit the Act's applicability to records created at a posted meeting of the commission or to discussions related to future city business.

Accordingly, we conclude to the extent the requested cellular telephone text messages and e-mails maintained by the individuals at issue relate to the official business of the city, they are subject to the Act. To the extent the cellular telephone text messages and e-mails do not relate to the official business of the city, they are not subject to the Act and need not be released.

Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written

comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You inform us that the city received this request on July 5, 2011. However, as of the date of this letter, you have not submitted to this office a copy or representative sample of the information requested. Consequently, we find the city has failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you argue the requested text messages and e-mails are excepted from disclosure under sections 552.109 and 552.117 of the Government Code, which are mandatory exceptions to disclosure, because you have not submitted the requested information for our review, we have no basis for finding it confidential under sections 552.109 and 552.117. Thus, to the extent the requested cellular telephone text messages and e-mails maintained by the individuals at issue relate to the official business of the city, we have no choice but to order these messages released pursuant to section 552.302.¹ If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

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

¹We note that section 552.117 of the Government Code 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. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official, or former employee or official chooses not to allow public access to the information. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as amendments to Gov't Code §§ 552.117, .024(c)).

responsibilities, please visit our website at 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,

A handwritten signature in cursive script that reads "Kirsten Brew".

Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 429897

c: Requestor
(w/o enclosures)