



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2011

Honorable Dale Spurgin
Jones County Judge
P.O. Box 148
Anson, Texas 79501

OR2011-13980

Dear Judge Spurgin:

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# 431110.

Jones County (the "county") received a request for information related to a named employee. You state you have released some of the requested information to the requestor. You state you do not maintain some of the requested information.¹ You claim a portion of the requested information is not subject to the Act. Additionally, you claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.108, 552.136, and 552.137 of the Government Code.² We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.³

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

²We understand you to assert section 552.101 of the Government Code based on the substance of your arguments.

³We 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.

You contend Exhibit C is not subject to the Act. The Act is applicable only to “public information.” See Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as consisting 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 the information in a governmental body’s physical possession constitutes public information and 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 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). You state Exhibit C consists of personal messages that have no connection with the county’s business and constitute incidental uses of e-mail by a county employee. You also state these communications were not collected or assembled and are not maintained pursuant to any law or ordinance or in connection with the transaction of the county’s business. You explain the county has an e-mail and internet usage policy that recognizes and allows incidental use of electronic mail by employees. Based on your representations and our review of the information at issue, we find Exhibit C does not constitute public information for purposes of section 552.002 of the Government Code. See Open Records Decision No. 635 at 4 (1995) (Gov’t Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). We therefore conclude Exhibit C is not subject to the Act and need not be released in response to this request for information.

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. Section 552.101 encompasses information protected by other statutes, such as section 58.007 of the Family Code. Section 58.007 provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Law enforcement records relating to juvenile conduct, whether delinquent conduct or conduct in need of supervision, that occurred on or after September 1, 1997, are confidential under section 58.007 of the Family Code. *See id.* § 51.03 (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of title 3 of Fam. Code). For purposes of section 58.007, “child” means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). You claim that portions of the submitted information are subject to section 58.007. Upon review, we find no portion of the submitted information identifies a juvenile suspect or offender for purposes of section 58.007(c) of the Family Code. Consequently, no portion of the information at issue may be withheld under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code.

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The types of information considered intimate and 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. *See id.* at 683. Upon review, we find that a portion of the submitted information is highly intimate or embarrassing and not of legitimate public concern. Thus, the county must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(a)(2) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *Id.*; *see id.* § 552.301(e)(1)(A). You inform us the information you have marked relates to an investigation “that *has not yet* resulted in a conviction or deferred adjudication” (emphasis added). We note section 552.108(a)(2) is applicable only if the information at issue is related

to a *concluded* criminal case “that did not result in conviction or deferred adjudication.” *Id.* § 552.108(a)(2). Thus, having considered your representations, we find you have not demonstrated the information you have marked falls within the scope of section 552.108(a)(2). We therefore conclude the county may not withhold the information at issue under section 552.108(a)(2) of the Government Code.

We note that some of the remaining information may be subject to section 552.117 of the Government Code.⁴ 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 request that this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). 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). The county may only withhold information under section 552.117(a)(1) if the individual concerned elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the employee whose personal information is at issue timely elected to keep his personal information confidential, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold his personal information, the county may not withhold the information at issue under section 552.117(a)(1).

Section 552.136(b) of the Government Code states 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). You state the submitted username and password may be used to obtain a thing of value as county employees use the submitted username and password to access the county’s “paid on-line research tool.” Upon review, we find the county must withhold the information you have marked, in addition to the bank account and bank routing numbers we have marked, pursuant to section 552.136 of the Government Code.

Section 552.137 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). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the county must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code.

We note that some of the remaining information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, Exhibit C is not subject to the Act and need not be released in response to this request for information. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the employee whose personal information is at issue timely elected to keep his personal information confidential, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold his personal information, the county may not withhold the information at issue under section 552.117(a)(1). The county must withhold the information you have marked, as well as the bank account and bank routing numbers we have marked under section 552.136 of the Government Code. The county must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code.⁵ The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.

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, 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

⁵We 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.

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 black ink, appearing to read 'VB', followed by a long horizontal line extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 431110

Enc. Submitted documents

c: Requestor
(w/o enclosures)