



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 23, 2012

Mr. William Keith Davis
Hay, Wittenburg, Davis, Caldwell & Bale, L.L.P.
P.O. Box 271
San Angelo, Texas 76902-0271

OR2012-01069

Dear Mr. Davis:

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# 443208.

The Tom Green County Attorney's Office (the "county"), which you represent, received fifty-four requests for information from the same individual, including information pertaining to requests for insurance, personnel, and retirement information pertaining to a named individual, and e-mails and other correspondence between several named individuals during various time periods. You state you are withdrawing your request for a ruling pertaining to retirement fund enrollment records because such records are exempt from the provisions of the Act pursuant to section 552.0038 of the Government Code.¹ You state the county will withhold certain information under sections 552.130(c), 552.136(c), and 552.147(b) of the Government Code, as well as under sections 552.130 and 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You indicate the county has released

¹Section 552.0038(c) states a governmental entity that maintains records of a participant in a retirement system's retirement program in cooperation with or on behalf of the retirement system is not required to accept or comply with a request for such information or to seek an opinion from the attorney general because the records are exempt from the provisions of the Act. Gov't Code §552.0038(c).

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov't Code §552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See* Gov't Code § 552.136(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas license plate number under section 552.130 of the Government Code and 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.

all information responsive to five of the requests for information, as well as additional information responsive to some of the remaining requests. You claim some of the submitted information is not subject to the Act. You claim the remaining submitted information responsive to the remaining seven requests for information is excepted from disclosure under sections 552.101, 552.102, 552.109, and 552.124 of the Government Code.³ We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state the county has requested clarification of forty-two of the requests for information. You do not indicate the county has received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, for those requests for information for which the county has not received clarification, we find the county is not required to release information in response to those requests. However, if the requestor clarifies any or all of the remaining requests for information, the county must seek a ruling from this office before withholding any responsive information from the requestor.

Next, you state some of the requested information, including e-mails between several named individuals during specified time periods, is no longer maintained by the county on its server. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

In general, computer software programs keep track of the location of files by storing the location of data in the “file allocation table” (FAT) of a computer’s hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is “deleted,” it is not actually deleted, but the display of the location is merely shown to be moved to a “trash bin” or “recycle bin.” Later, when files are “deleted” or “emptied” from these “trash bins,” the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

³Although you initially claimed section 552.111 of the Government Code, you state you now withdraw your claim under that section. Accordingly, we do not address the applicability of section 552.111 to the submitted information.

You state the county does not maintain some of the requested information because it is stored on backup tapes that are created through Team for Texas (IBM). You state the county does not have a way to search the backup tapes electronically for responsive information or to separate out the responsive information. Based on your representations, we determine the locations of the files have been deleted from the FAT system. Accordingly, we find the deleted information was no longer being "maintained" by the county at the time of the request, and is not public information subject to disclosure under the Act. *Bustamante*, 562 S.W.2d at 266; *see also* Gov't Code §§ 552.002, .021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude in this instance, the Act does not require the county to recover and release any information that was stored only remotely on the county's backup tapes on the date the present request was received.

Next, you argue some of the submitted information is not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information 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." *Id.* § 552.002(a). You state some of the e-mails at issue consist of personal e-mails that do not relate to the transaction of official county business. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Upon review of the e-mails you have marked, we agree they do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county. *See* Gov't Code § 552.021. Thus, we conclude the e-mails at issue, which you have marked, are not subject to the Act and need not be released in response to this request.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989). Upon review, we find the information

we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any portion of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the county may not withhold any of the remaining information on that basis.

You claim some of the remaining information is subject to section 552.109 of the Government Code. Section 552.109 excepts from 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*, 540 S.W.2d at 685, for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. As noted above, common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. As further noted above, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, no portion of the remaining information may be withheld on the basis of section 552.109.

Next, you argue some of the remaining information is protected by section 552.124 of the Government Code, which makes confidential, with certain exceptions that are not applicable here, “[a] record of a library or library system, supported in whole or in part by public funds, that identifies or serves to identify a person who requested, obtained, or used a library material or service[.]” Gov’t Code § 552.124(a); *see also* Open Records Decision No. 100 at 3 (1975) (identifying information of library patrons in connection with object of their attentions is confidential by constitutional law). Only the names, addresses, and other information specifically identifying library patrons may be withheld under section 552.124. *See* Open Records Decision No. 649 at 3 (1996) (confidentiality provisions strictly construed). You state some of the submitted information consists of e-mails between the Audio Visual Librarian for the Tom Green County Library (the “library”) and a patron of the library. Accordingly, the county must withhold the identifying information of a library patron, which we have marked, under section 552.124 of the Government Code. The

remaining information at issue does not identify library patrons and, thus, may not be withheld under section 552.124.

In summary, the e-mails you have marked are not subject to the Act and need not be released in response to this request. The county must withhold (1) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy, and (2) the information we marked under section 552.124 of the Government Code. The remaining information must be released.

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 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/agn

Ref: ID# 443208

Enc. Submitted documents

c: Requestor
(w/o enclosures)