



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 23, 2012

Mr. Gerard A. Calderon
Assistant Criminal District Attorney
Bexar County
300 Delarosa, 5th Floor
San Antonio, Texas 78205

OR2012-02824

Dear Mr. Calderon:

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# 446270.

The Bexar County District Attorney's Office (the "district attorney") received a request for copies of the notary record books of ten Bexar County employees who are commissioned as notaries public. You claim that the requested information is not subject to the Act. We have considered your arguments.

You claim that the requested notary books are not public information subject to the Act because the notary books stay in the possession of the employee who is the notary, and therefore, the district attorney does not maintain this information. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) 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.

Gov't Code § 552.002(a). 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 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)). This office has found that information in a public official's personal records may be subject to the Act where the public official uses the records to conduct public business. *See* ORD 635 at 6-12 (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 state that the requested notary books are not subject to the Act because each employee who is a notary public takes their notary book with them when they leave the district attorney's office. We note the current requestor requested the notary books of two other district attorney employees, for which the district attorney submitted two requests for rulings to this office, along with representative samples of the responsive notary books. Pursuant to section 552.303(c) of the Government Code, on February 2, 2012, this office sent you a notice via facsimile requesting that you explain what distinguishes the current request from the previous requests and why the district attorney does not maintain the notary books responsive to the current request. The notice also requested that you provide the requested information, or a representative sample thereof, as required by section 552.301 of the Government Code. In your response to our inquiry, you state that since your previous requests, you have discovered that the Secretary of State has enforcement jurisdiction over notaries public and notaries' acts are governed under chapter 406 of the Government Code. Further, you assert, because Bexar County itself is not a notary public, the notarizations of district attorney employees commissioned as notaries public are not records of Bexar County.

However, we note information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See* Gov't Code § 552.002(a). A governmental body may not circumvent the applicability of the Act by conducting official public business in a private medium. *See* ORDs 635 at 12, 425 at 2. In this instance, because each notary the requestor specified is employed by the district attorney, any responsive information is maintained by a district attorney employee. Thus, to the extent the notary books maintained by the district attorney employees relate to the official business of the district attorney, they are subject to the Act. To the extent the employees' notary books do not relate to the official business of the district attorney, they are not subject to the Act.

Next, we must address the district attorney's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records 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)(1)(D). The district attorney received the request for information on December 2, 2011. Accordingly, you were required to provide the information required by section 552.301(e) by December 16, 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 conclude the district attorney failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 of the Government Code 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. Gov't Code § 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 (Tex. App.—Austin 1990, no writ); *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). We note you have not raised any exceptions to disclosure, and, as you acknowledge, the requested information is expressly made public by section 406.014 of the Government Code. *See* Gov't Code § 406.014 (information in a notary's log book is public). Furthermore, by failing to submit any information for our review, we have no basis for finding any of the requested information confidential under the mandatory exceptions. Thus, we have no choice but to order the requested information released pursuant to section 552.302, to the extent the information is maintained by a district attorney employee. 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 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, reading "Kathryn R. Mattingly". The signature is written in black ink and is positioned above the typed name and title.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/sdk

Ref: ID# 446270

c: Requestor
(w/o enclosures)