



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 26, 2013

Ms. Erin Higginbotham  
Counsel for the City of El Paso  
Denton, Navarro, Rocha & Bernal  
2500 West William Cannon, Suite 609  
Austin, Texas 78745

OR2013-06892

Dear Ms. Higginbotham:

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# 484002.

The City of El Paso (the "city"), which you represent, received two requests from the same requestor for all written communications pertaining to certain content from a specified e-mail, all communications to or from a named individual including certain content sent or received during a specified time period, and all communications to and from two named individuals that contain certain language. You state you will make some of the requested information available to the requestor. You claim the remaining requested information is not subject to the Act. We have considered your arguments.

We address your contention that the e-mails existing only in the personal accounts of city officials and employees are not subject to the Act because the city does not collect, maintain, or have a right of access to this information. 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 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 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 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 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 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, 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 explain the remaining requested information consists of information related to personal e-mail accounts. You assert the city does not collect, assemble, or maintain the information at issue pursuant to any law or ordinance nor does it own or have a right of access to the information. However, you do not explain whether the information at issue constitutes the transaction of official business of the city. 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. Thus, to the extent the information in the employees' personal e-mail accounts constitutes the transaction of official business of the city, this information is subject to the Act, and must be released unless it is excepted from disclosure. To the extent the information in the employees' personal e-mail accounts does not constitute official business of the city, it is not subject to the Act and need not be released.

To the extent the information in the employees' personal e-mail accounts constitutes official business of the city, we note that, 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 the city received the requests on January 22, 2013 and February 7, 2013. However, as of the date of this letter, you have not submitted to this office a copy or representative sample of the personal e-mails

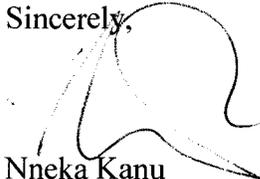
requested. Consequently, we find the city has failed to comply with the procedural requirements of section 552.301 with respect to the e-mails at issue.

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). As you raise no exceptions to disclosure, to the extent the requested information in the employees' personal e-mail accounts constitutes official business of the city, the city must release this information pursuant to section 552.302 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](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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/bhf

Ref: ID# 484002

Enc. Submitted documents

c: Requestor