



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2013

Mr. Steven E. Meyer
Assistant City Attorney
Legal Division
Arlington Police Department
P.O. Box 1065, Mail Stop 04-0200
Arlington, Texas 76004-1065

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2013-11844

Dear Mr. Meyer:

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# 492903 (APD Reference No. 11216).

The Arlington Police Department (the "department") received a request for a named officer's cellular telephone records during a specified time period. You claim the submitted information is not subject to the Act. Alternatively, you claim the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.136 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, you argue the submitted information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

¹We 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.

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 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).

You state the named officer, not the department, contracted for the cellular telephone service and owns the device, and the officer has sole access to his cellular telephone records. You further state the cellular telephone bills are sent to the officer's home, and the officer does not maintain the records for the department. However, you acknowledge the department provides the officer with a monthly stipend to off-set the cost of the cellular telephone service. We note the characterization of information as "public information" for purposes of the Act is not dependent on whether the information is 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) (concluding that information does not fall outside the Act's definition of "public information" merely because an individual official or employee of a governmental body possesses the information rather than the governmental body as a 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 the official business of a governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, if the information at issue is related to the department's business, the mere fact it is not in the department's possession does not remove the information from the scope of the Act. *See* ORD 635 at 6-8 (stating that 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 state "the majority of these records have no connection with the transaction of official business." Thus, we understand portions of the submitted records relate to the transaction of official business. Accordingly, to the extent the cellular telephone records maintained by the officer relate to the official business of the department, they are subject to the Act. To the extent the officer's

cellular telephone records do not relate to the official business of the department, they are not subject to the Act and need not be released.

To the extent the submitted cellular telephone records relate to official business of the department and are subject to the Act, we will address your arguments under sections 552.101, 552.117, and 552.136 of the Government Code. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 established. *Id.* at 681-82. The types of information considered intimate or 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. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also concluded personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. See Open Records Decision No. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Furthermore, this office has concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. See, e.g., Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. See Open Records Decision No. 373 (1983). Upon review, we find you have failed to demonstrate any of the information at issue is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the department may not withhold any of the

information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See Gov't Code § 552.117(a)(2)*. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). As previously noted, you inform us the named individual's cellular telephone services are paid for, in part, with department funds. Accordingly, the department may not withhold the named individual's cellular telephone number under section 552.117(a)(2). However, the records at issue contain the home address of a peace officer who was employed by the department. Additionally, you assert the remaining information in Exhibit A may include the personal telephone numbers of current or former department officials or employees. Accordingly, to the extent the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, the department must withhold the information we have marked, as well as any personal home or cellular telephone numbers of any other licensed peace officers employed by the department, under section 552.117(a)(2) of the Government Code; however, the department may only withhold the officers' cellular telephone numbers if the services are not paid for by a governmental body. Conversely, if the individuals whose information is at issue are no longer licensed peace officers as defined by article 2.12, then the department may not withhold the information at issue under section 552.117(a)(2).

If the marked information or any of the remaining telephone numbers pertain to individuals who are not currently licensed peace officers, this information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former official or employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See ORD 506 at 5-6*. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the individuals whose information is at issue are not currently licensed peace officers as defined

by article 2.12 and timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked, as well as any personal home or cellular telephone numbers of department employees, under section 552.117(a)(1) of the Government Code; however, the department may only withhold the cellular telephone numbers if the services are not paid for by a governmental body. To the extent the individuals whose information is at issue are not licensed peace officers as defined by article 2.12 and did not timely request confidentiality under section 552.024 of the Government Code, the department may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.136 of the Government Code provides “[n]otwithstanding any other provision of this chapter, 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.” Gov’t Code § 552.136. Accordingly, we find the department must withhold the cellular telephone account number we have marked under section 552.136 of the Government Code.

We note the submitted information 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, to the extent the cellular telephone records do not relate to official business of the department, they are not subject to the Act and need not be released. To the extent the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, the department must withhold the information we marked, as well as any personal home or cellular telephone numbers of any other licensed peace officers employed by the department, under section 552.117(a)(2) of the Government Code; however, the department may only withhold the officers’ cellular telephone numbers if the services are not paid for by a governmental body. To the extent the individuals whose information is at issue are not licensed peace officers as defined by article 2.12 and timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked, as well as any personal home or cellular telephone numbers of department employees, under section 552.117(a)(1) of the Government Code; however, the department may only withhold the cellular telephone numbers if the services are not paid for by a governmental body. The department must withhold the cellular telephone account numbers we have marked under section 552.136 of the Government Code. The department must release the remaining information, but any information subject to 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 492903

Enc. Submitted documents

c: Requestor
(w/o enclosures)

MAR - 3 2016

At 3:44 P.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-13-002521

CITY OF ARLINGTON, TEXAS,
Plaintiff,

VS.

KEN PAXTON, ATTORNEY
GENERAL, STATE OF TEXAS
Defendant.

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IN THE DISTRICT COURT

353RD JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

ORDER GRANTING ARLINGTON'S
AMENDED MOTION FOR SUMMARY JUDGMENT

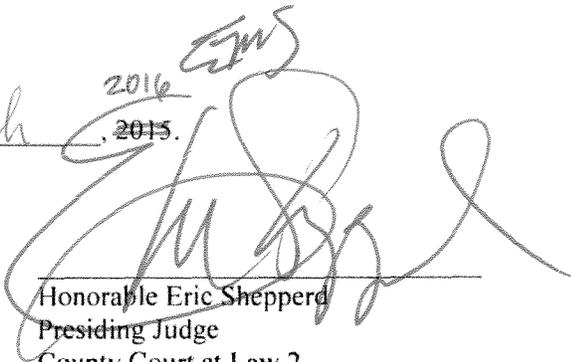
On April 2, 2015, came on to be heard Arlington's Amended Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. Having read and considered both motions and all responses, including the response of intervenor Kevin Southard, and having considered and having heard the arguments of counsel and intervenor Kevin Southard (pro se), the Court finds that Arlington's Amended Motion for Summary Judgment should be GRANTED in full.

It is, therefore, ORDERED, ADJUDGED, and DECREED as follows:

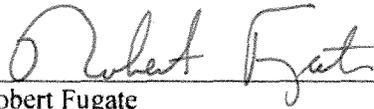
1. Arlington's Amended Motion for Summary Judgment is GRANTED in full.
2. Defendant's Cross-Motion for Summary Judgment is DENIED in full.
3. The parties shall bear their own costs of court and attorneys' fees.

It is further ORDERED, ADJUDGED and DECREED that this Judgment finally disposes of all claims asserted by Plaintiff, Defendant, and Intervenor and is appealable. All relief not expressly granted herein is DENIED. Accordingly, the Judgment is and shall be a FINAL JUDGMENT as to all claims asserted by the parties named herein and the intervenor.

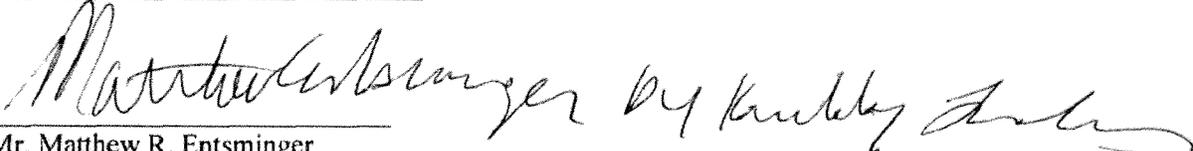
Signed this 3 day of March, ~~2015~~ ²⁰¹⁶.


Honorable Eric Shepperd
Presiding Judge
County Court at Law 2
Travis County, Texas

APPROVED AS TO FORM AND SUBSTANCE:


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*by Kimberly Fuchs
w/ permission*

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