



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 24, 2017

Ms. Carol Simpson
Counsel for the Fort Stockton Independent School District
Eichelbaum Wardell Hansen Powell & Mehl, P.C.
5801 Tennyson Parkway, Suite 360
Plano, Texas 75024

OR2017-19424

Dear Ms. Simpson:

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# 672732.

The Fort Stockton Independent School District (the "district"), which you represent, received three requests for information from the same requestor for information pertaining to specified e-mail addresses and telephone numbers of named district board members during a specified time period.¹ You state the district does not maintain information responsive to a portion of the requests.² You argue some of the requested information is not public information under the Act. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the

¹The requestor modified his request in response to the district's request for clarification. *See* Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, the requestor contends the district failed to comply with the procedural requirements of the Act in requesting a ruling from this office. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request for information. *See id.* § 552.301(b). The district informs this office the first request was received on June 1, 2017. The district states it was closed for business on June 2, 2017, June 9, 2017, and June 16, 2017. This office does not count the date the request was received or holidays, including skeleton crew days observed by a governmental body, as business days for the purposes of calculating a governmental body's deadlines under the Act. Therefore, the district's ten-business-day deadline under section 552.301(b) of the Government Code was June 20, 2017. Thus, the district's request was timely submitted on June 19, 2017. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Therefore, upon review, we find the district complied with the procedural requirements of section 552.301 of the Government Code in requesting a decision from our office.

Next, we note the requestor claims he submitted four requests for information to the district. However, the district informs this office it received three requests for information. Whether or not a proper request for information was made to the district is a question of fact that we are unable to resolve in the opinion process. *See* Open Records Decision No. 592 at 2 (1991). Where a fact issue is not resolvable as a matter of law, we must rely on the facts alleged to us by the government body requesting our decision, or upon those facts discernable from the documents submitted for our inspection. *See id.* at 4. Thus, based on the district's representation and our review, we find the district received three requests for information.

The district argues some of the information responsive to the request for telephone bills is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

- (a) . . . information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

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.

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

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. Information that is written, produced, collected, assembled, or maintained by a third party, including an individual officer or employee of a governmental body in his or her official capacity, may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov't Code § 552.002(a-1). 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 id.* § 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)). Thus, if the information at issue is related to the district's business, the mere fact it is not in the district'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 contend some of the information in Exhibit I is not public information as defined by section 552.002. You explain two of the named individuals' specified telephone numbers belong to personal cellular telephones that are "owned by the two men individually, and the bills are paid for personally." Additionally, you state the accounts are not "owned or controlled by the district, nor are any [d]istrict funds used to pay for the . . . service." You assert most of the information at issue relates to purely private and personal matters unrelated to official district business. However, you acknowledge the named individuals occasionally use their personal cellular telephones while performing district related business. Based on your representations and our review, with the exception of entries related to official business of the named individuals, we find Exhibit I does not constitute public information for purposes of section 552.002 of the Government Code. *See* ORD 635 at 4. Therefore, this information is not subject to the Act, and the district need not release it in response to these requests.⁴ However, to the extent the information in the named individuals' personal cellular telephone bills relate to the named individuals' use of their personal cellular telephones to perform district business, the information is subject to the Act, and must be released unless an exception to disclosure applies to the information. *See* Gov't Code §§ 552.301 (a), .302. Accordingly, we will consider your arguments against disclosure of this information.

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

⁴As we are able to make this determination, we need not address your remaining arguments or the requestor's remaining arguments for this information.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The district states, and provides documentation demonstrating, a lawsuit styled *Fort Stockton Independent School District v. Sandridge Energy, Inc.*, Cause No. 16-03174 was filed by the district and was pending in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, when the district received the first request for information. You state the information at issue is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the district received the first request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the district may withhold the information subject to the Act under section 552.103(a) of the Government Code.⁵

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the information in Exhibit I does not relate to the named individuals' use of their personal cellular telephones to perform district related business, it is not subject to the Act and need not be released. The district may withhold the information subject to the Act under section 552.103(a) 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.

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,

A handwritten signature in black ink that reads "Emily Kunst". The signature is written in a cursive, flowing style.

Emily Kunst
Attorney
Open Records Division

EK/eb

Ref: ID# 672732

Enc. Submitted documents

c: Requestor
(w/o enclosures)