



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 17, 2019

Ms. Paige H. Saenz
Counsel for the City of Leander
The Knight Law Firm, L. L. P.
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2019-19240A

Dear Ms. Saenz:

Our office issued Open Records Letter No. 2019 19240 (2019) on July 16, 2019. We have examined our letter and determined that there was an error. Where this office determines an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued letter. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on July 16, 2019. *See generally* Gov't Code § 552.011 (providing Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")). Your request was assigned ID# 775347.

The City of Leander (the "city"), which you represent, received two requests from different requestors for all communications between the city's mayor and three named entities during defined time periods. You state you will release some of the requested information. 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 and 552.109 of the Government Code. Further, you state you notified one of the named individuals of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See id.* § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

You argue the submitted information is not subject to the Act. The Act is only applicable to "public information." *See id.* § 552.021. Section 552.002(a) defines "public information" as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (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.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). 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). Further, information that is written, produced, collected, assembled, or maintained by an individual officer or employee of a governmental body in the officer's or employee's official capacity may be subject to disclosure under the Act if the information pertains to official business of the governmental body. Gov't Code § 552.002(a)(3). 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 id.* § 552.002(a 1). Moreover, section 552.001 of the Act provides, unless otherwise expressly provided by law, it is the policy of this state that each

person is entitled 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 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) (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 at 2-3 (1985) (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 city’s business, the mere fact it is not in the city’s possession does not remove the information from the scope of the Act. *See* ORD 635 at 6 8 (information maintained on a privately owned medium and actually used in connection with transaction of official business would be subject to the Act).

The city informs us the submitted information consists of a cellular telephone text message received by the city manager from a representative of one of the named entities. The city states the underlying content of the text message is an e-mail that was sent from a computer that is not paid for by the city and the underlying e-mail was not collected, assembled, or maintained by the city. The city also asserts the underlying e-mail does not pertain to official business of the city but, rather, pertains to a personal discussion. Thus, the city asserts the submitted information does not consist of public information that is subject to disclosure under the Act. However, the city acknowledges the communication at issue was sent “in connection with the [c]ity taking action on a contract[.]” We reiterate 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). Upon review, we find the submitted information relates to the transaction of official city business. Thus, this information constitutes “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the city. *See id.* Therefore, we conclude the submitted information is subject to the Act and the city must release it, unless the information falls within an exception to public disclosure under the Act.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses the doctrine of 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 satisfied. *Id.* at 681 82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have failed to demonstrate any of the information in the submitted information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city

may not withhold any portion of the submitted information under section 552.101 of the Government Code on that basis.

Section 552.109 of the Government Code excepts from 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 common law privacy standard under section 552.101, as discussed above. *Indus. Found.*, 540 S.W.2d at 682. Upon review, we find you have failed to demonstrate any of the submitted information constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the city may not withhold any of the submitted information under section 552.109 of the Government Code. As no further exceptions to disclosure are raised, the city must release the submitted information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/eb

Ref: ID# 775347

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)