



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 26, 2019

Mr. George Hyde  
Counsel for City of Buda  
Russell, Rodriguez, Hyde & Bullock, L. L. P.  
1633 Williams Drive ,Building 2, Suite 200  
Georgetown, Texas 78628

OR2019-20521

Dear Mr. Hyde:

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# 776271 (Reference No. BU-2019-025).

The City of Buda (the "city"), which you represent, received a request for the call logs of named individuals during a defined period of time. You state the city does not have some of the requested information.<sup>1</sup> Additionally, you state some of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.136 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state the information you have marked is not responsive to the instant request because it is outside the specified date range. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request.

---

<sup>1</sup>The 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).

Next, we address the city's assertion the submitted information is not subject to the Act because it is not "public information." The Act applies only to public information. Gov't Code § 552.021. Section 552.002 of the Act 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 information that is 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 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 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 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 (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 the information you have indicated is not public information as defined by section 552.002 because it "does not relate to any matter over which the [c]ity or any other governmental body has authority, administrative duties or advisory duties." You also state the account numbers and invoice numbers were not "created, transmitted, received or maintained in connection with the transaction of official business[.]" However, you acknowledge the named individuals use their personal cellular telephones while performing their job duties. We reiterate that information is within the scope of the Act if it relates to the official business of a government body and is maintained by a public official or employee of the governmental body. *See* Gov't Code § 552.002(a). Based on your representations and our review, we find some of the information at issue does not constitute public information for purposes of section 552.002 of the Government Code. *See* ORD 635 at 4. Therefore, this information, which we have indicated, is not subject to the Act, and the city need not release it in response to this request.<sup>2</sup> However, we find the remaining information relates to the named individuals' use of their personal cellular telephones while performing their job duties. Thus, the remaining 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.

---

<sup>2</sup>As we are able to make this determination, we need not address your remaining arguments for this information.

Accordingly, we will address your remaining arguments against disclosure of the remaining information.

Section 552.103 of the Government Code provides, in relevant part, 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.

*Id.* § 552.103(a), (c). The 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 that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). The city states, prior to its receipt of the request for information, the requestor filed a complaint against it with the Texas Workforce Commission and the Equal Employment Opportunity Commission. Upon review, we find the city has demonstrated litigation was reasonably anticipated when it received the request for information. Our review of the information at issue also shows it is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree the city may withhold the remaining responsive under section 552.103 of the Government Code.<sup>3</sup>

However, we note once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open

---

<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

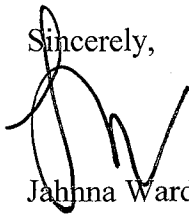
Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the information we have indicated is not subject to the Act, and the city need not release it in response to this request. The city may withhold the remaining responsive under section 552.103 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Jahna Ward  
Assistant Attorney General  
Open Records Division

JW/jxd

Ref: ID# 776271

Enc. Submitted documents

c: Requestor  
(w/o enclosures)