



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 16, 2020

Ms. Cheryn L. Netz
Assistant General Counsel
Texas State Securities Board
P.O. Box 13167
Austin, Texas 78711-3167

OR2020-31511

Dear Ms. Netz:

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# 857379.

The Texas State Securities Board (the "board") received a request for the call history, phone logs, and text messages sent or received by a named individual for a particular period of time.¹ You state the board does not have information responsive to portions of the request.² You state the board will redact information subject to section 552.117 of the Government Code pursuant to section 552.024(c) of the Government Code and will withhold certain

¹ You state the board sought and received clarifications of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request). Further, you inform us the board sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See id.* § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the board received the required deposit on September 24, 2020. *See id.* § 552.263(e)(if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

² 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).

information pursuant to Open Records Letter No. 2004-0239 (2004).³ You also state the board is releasing some information to the requestor. You assert some of the submitted information is not subject to the Act. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. Additionally, you state release of some of the submitted information may implicate the interests of the United States Department of Justice (the “DOJ”). Accordingly, you state, and provide documentation showing, the board notified the DOJ 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.⁴ *See* Gov’t Code § 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, portions of which consist of representative samples.⁵

Initially, we note the Act is only applicable to “public information.” *See id.* § 552.021. Section 552.002 of the Government Code defines “public information” as the following:

(a) [I]nformation that 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 Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2). Open Records Letter No. 2004-0239 is a previous determination issued to the board authorizing it to withhold information obtained by the board in connection with an investigation to prevent or detect a violation of the Texas Securities Act (the “TSA”) or a board rule or order without requesting a ruling from this office.

⁴ As of the date of this letter, this office has not received comments from the DOJ explaining why any of the submitted information should not be released.

⁵ We assume 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 those records contain substantially different types of information than that submitted to this office.

(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 board's business, the mere fact it is not in the board'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 board informs us the information it marked consists of personal cellular telephone text messages communicated between the named employee and other board employees from the named employee's personal cellular telephone. The board states the personal cellular telephone is not paid for by the board, and the text messages at issue are not collected, assembled, or maintained by the board. The board also asserts the text messages at issue do not pertain to official business of the board but, rather, consist of purely personal exchanges. Based on the board's representations and our review of the information at issue, we find most of the information you marked does not constitute "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 board. *See* Gov't Code § 552.002. Therefore, with the exception of the information we have marked, we conclude the information you marked does not constitute public information for purposes of section 552.002 of the Government Code. Accordingly, with the exception of the information we have marked, the board is not required to release the information you marked in response to the request for information.⁶

However, we note the remaining information at issue references matters related to the board. 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 this information relates to the transaction of official board 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 board. *See id.* Therefore, we conclude the remaining information at issue, which we have marked, is subject to the Act and the board must release it, unless the information falls within an exception to public disclosure under the Act.

Next, you state some of the remaining information is not responsive because it does not pertain to the individual named in the request, because it is outside the time period requested, or because the requestor specifically excluded it from the present request. This ruling does not address the public availability of any information that is not responsive to the request, and the board is not required to release that information in response to the request.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. Article 581-28(A) of the Texas Securities Act (the "TSA") provides, in pertinent part:

Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of [the TSA] or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the

⁶ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by [the TSA] to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided, however, that all information of every kind and nature received in connection with an investigation and all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential by the Commissioner and shall not be disclosed to the public except under order of court for good cause shown.

V.T.C.S. art. 581-28(A). You state the information you marked was made by the board in connection with an investigation to prevent or detect a violation of the TSA or board rule or order. Based on your representations and our review of the information at issue, we agree this information consists of internal notes, memoranda, reports, or communications made in connection with an investigation. Accordingly, the board must withhold the information you marked under section 552.101 of the Government Code in conjunction with article 581-28(A) of the TSA.⁷

Section 552.101 of the Government Code also 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note, however, the public generally has a legitimate interest in information relating to public employment and public employees. *See* Open Records Decision Nos. 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 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), 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, information pertaining to leave of public employees is generally a matter of legitimate public interest. *See* Open Records Decision No. 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private). Upon review, we find no portion of the information at issue is highly intimate or embarrassing and of no legitimate public concern, and the board may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

As noted above, you state the board will withhold information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code. We note the remaining responsive information contains additional information subject to

⁷ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

section 552.117. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official 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)*. 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. You state the individual whose information is at issue timely elected to keep his personal information confidential. Therefore, the board must withhold the additional information we have marked under section 552.117(a)(1) of the Government Code.

In summary, with the exception of the information we have marked, the information you marked does not constitute public information for purposes of section 552.002 of the Government and the board is not required to release it. The board must withhold the information it marked under section 552.101 of the Government Code in conjunction with article 581-28(A) of the TSA. The board must withhold the additional information we have marked under section 552.117(a)(1) of the Government Code. The board must release the remaining responsive information.

Finally, you request this office issue a "previous determination" that would permit the board in the future to withhold from disclosure records made by the board in connection with an investigation to prevent or detect a violation of the TSA, board rule, or order without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time. Accordingly, 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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/mo

Ref: ID# 857379

Enc. Submitted documents

c: Requestor
(w/o enclosures)