



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 22, 2003

Mr. Boyd Kennedy
Staff Attorney
Law Enforcement Division
Texas Parks & Wildlife
4200 Smith School Road
Austin, Texas 78744-3291

OR2003-3468

Dear Mr. Kennedy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181440.

The Texas Parks and Wildlife Department (the "department") received a request for records and information responsive to 1) usage of department office telephones and the cellular telephones of three named department peace officers, 2) personnel files and work assignments of named department peace officers, and 3) certain department policies. You have made available to the requestor much of the responsive information. You claim, however, that the requested information concerning the cellular telephone records of two of the named peace officers are not subject to disclosure under the Public Information Act (the "Act"). Alternatively, you argue that portions of the records of these two officers, as well as portions of the records of the third officer are excepted from disclosure under sections 552.101, 552.108, 552.117 and 552.136 of the Government Code. We have considered your arguments and reviewed representative samples of the submitted information.¹

¹ We 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.

We begin by considering your assertion that the records of two of the named peace officers² (the “officers”) are not public information and therefore are not subject to disclosure under the Act. Section 552.002(a) defines “public information” as:

[I]nformation 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.

Gov’t Code § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act, if a governmental body owns or has a right of access to the information. *See* Open Records Decision Nos. 462 (1987), 445 (1986); *cf.* Open Records Decision No. 499 (1988). Further, this office has found that information does not fall outside the definition of “public information” in the Act merely because an individual member of a governmental body possesses the information rather than the governmental body as whole. *See* Open Records Decision No. 635 at 3-4 (1995). In addition, section 552.001 of the Government Code states 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 that the department “contacted a cellular phone provider and arranged for the company to make a cell phone service plan available to [the officers].” You state that the officers use the cellular telephone for law enforcement purposes related to their duties at the department, but are also free to use the telephones for personal use. You state that the department pays for a certain amount of minutes per month, which you refer to as the “basic plan,” and that the officers pay for “all minutes in excess of the basic plan.” Billings are made in the name of the department and go to the officers at home. The department pays the amount constituting the basic plan out of state funds.

Given the totality of the circumstances of this arrangement, we conclude that the submitted cellular telephone bills are public information in their entirety.

Next, we address the department’s obligations section 552.301 of the Government Code with respect to the request for information. Subsections 552.301(a) and (b) provide:

² We note that no argument is made that the cellular telephone records of the third named peace officer are not public information under the Act.

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

In your brief, you state that the department received the request for information on February 10, 2003. You should have submitted your request for an attorney general opinion no later than February 25, 2003. Our office received your letter requesting an opinion on March 20, 2003. Therefore, we find that you did not request a ruling from this office within the prescribed period. *See* Gov't Code § 552.301(b) (requiring governmental body to ask for the attorney general's decision no later than the tenth business day after the date of receiving the written request). Consequently, we conclude the department failed to comply with 552.301(b) by submitting an untimely request for a decision from this office. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, when some other source of law makes the information confidential or the information impacts the interests of a third party, a compelling interest exists. Open Records Decision No. 150 at 2 (1977). You assert sections 552.101, 552.108, 552.136 and 552.117 of the Government Code. We note, however, that section 552.108 is a discretionary exception under the Act and does not constitute a compelling reason sufficient to overcome the presumption of openness, and as such, does not make information confidential.³ *See* Open Records Decision No. 586 (1991) (governmental body may waive section 552.108), 522 (1989) (discretionary exceptions in general). *See also* Gov't Code § 552.007. You claim that the telephone numbers of informants contained within the

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

submitted records are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Generally, a claim under section 552.101 constitutes a compelling reason to withhold information from disclosure. However, a claim under the common-law informer's privilege may be waived by a governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 at 6 (1990). In this instance, you waived your interest in this claim by failing to comply with the requirements of section 552.301. Therefore, we conclude that the common-law informer's privilege cannot provide a compelling interest in this instance. Accordingly, the caller's identity may not be withheld from disclosure pursuant to section 552.101 in conjunction with the common-law informer's privilege.

However, you also argue that the phone numbers of informants contained in the telephone billing records are made confidential under Rule 508 of the Texas Rules of Evidence. In the recent case of *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." The information at issue consists of cellular phone bills which are subject to section 552.022(a)(3) of the Government Code. This provision makes "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" expressly public unless confidential under another law. Gov't Code § 552.022(a)(3). Thus we will address the applicability of Rule 508 to the submitted records. Rule 508 provides, in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

You inform us that the officers use their cellular telephones in the performance of their official duties, and in so doing, make calls to and receive calls from witnesses and/or confidential informants who report violations. You explain that the primary function of the department's Law Enforcement Division is to investigate crimes and to enforce the criminal laws. Based on your arguments, we agree that release of the telephone numbers of confidential informants and witnesses from the cellular telephone bill at issue would "disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer." Therefore, we

conclude that the department may withhold the information you have highlighted in pink from the submitted records under Rule 508 of the Texas Rules of Evidence.

Section 552.101 also encompasses the doctrine of common-law privacy, which also constitutes a compelling reason to overcome the presumption of openness under section 552.302. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We note that telephone numbers are generally not protected under common-law privacy. *See* Open Records Decision No. 455 (1987) (absent special circumstances, home addresses and telephone numbers of private citizens generally not protected under Act's privacy exceptions). However, this office has also determined that information that ordinarily would be subject to disclosure may be withheld under section 552.101 in conjunction with common-law privacy upon a showing of "special circumstances." *See, e.g.*, Open Records Decision No. 123 (1976). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause a person to face "an imminent threat of physical danger." Open Records Decision 169 at 6-7 (1977) (describing special circumstances under which certain home addresses are private). Such special circumstances do not include "a generalized and speculative fear of harassment or retribution." *Id.*

In this case, you contend that the requestor has harassed and threatened department employees, and you believe that the requestor's harassing behavior will continue if the requested information is released. In support, you have submitted a sample of communications sent by the requestor to department officials, agents, and employees for our review. Furthermore, you also assert that the requestor has "directed harassing communications to government employees in the past and as a result, has been the subject of a temporary restraining order" restraining him from contacting employees of a school district.⁴ Based on the totality of the circumstances surrounding this case, we conclude that you have established the presence of special circumstances sufficient to justify withholding the telephone numbers of officers, which you have marked in blue, in the responsive

⁴ The 153rd District Court of Tarrant County issued a temporary restraining order against the requestor, and pursuant to the order, the requestor was restrained from contacting "[the district superintendent] or any Board member, employee, or official of the [district] by e-mail, letter, fax, or other form of communication." The order also prohibits the requestor from "[p]lacing unsolicited telephone calls, or e-mails to any person known by [the requestor] to be related to any person employed by [the district], in any capacity." Furthermore, the order prohibits the requestor from attending meetings of the district board of trustees, from entering district property without the written consent of the district, and from "[t]hreatening the physical safety of any student, parent, staff member, employee, or agent of [the district] at any place or time." The temporary restraining order states that "a serious risk exists that the staff, officials, agents, and teachers of the school may be subjected to defamation or physical attack." *See* Open Letter Ruling 2003-1428. (Emphasis added).

materials, pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

The requested records also contain information that is excepted from disclosure under section 552.117(2), which also constitutes a compelling reason to overcome the presumption of openness under section 552.302 of the Government Code. Section 552.117(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members. "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure. You inform us that the officers are peace officers under article 2.12(10) of the Code of Criminal Procedure. The department must withhold those portions of the records that reveal the officers' home addresses and telephone numbers, personal cell phone numbers and the numbers of any family members of the officers, which you have marked in yellow, under section 552.117(2).

You also raise section 552.136 of the Government Code with regard to certain account numbers appearing in the submitted records. Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. Therefore, the department must withhold both the cellular telephone account numbers and the credit card numbers you have marked in yellow in the responsive materials under section 552.136.

To summarize, we conclude that the submitted cellular telephone records are public information and must be released to the requestor with the following exceptions: all telephone numbers you have marked in blue must be withheld from disclosure under section 552.101 in conjunction with common-law privacy; all numbers you have marked in pink may be withheld under Rule 508 of the Texas Rules of Evidence; the home address and telephone number information marked in yellow must be withheld from disclosure under

section 552.117(2); and both the cellular telephone account numbers and the credit card numbers you have also marked in yellow must be withheld under section 552.136.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

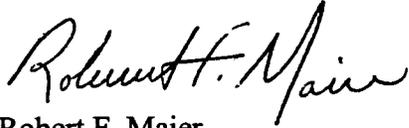
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Robert F. Maier".

Robert F. Maier
Assistant Attorney General
Open Records Division

RFM/seg

Ref: ID# 181440

Enc. Submitted documents

c: Mr. Tom Purcell
P.O. Box 1167
Keller, Texas 76244
(w/o enclosures)