



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 4, 2005

Ms. Judith Sachitano Rawls  
Assistant City Attorney/Police Administrative Legal Counsel  
Beaumont Police Department  
P. O. Box 3827  
Beaumont, Texas 77704-3827

OR2005-07052

Dear Ms. Rawls:

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# 229689.

The City of Beaumont (the "city") received a request for "the phone numbers for every city-owned cell phone being used by city employees and who that phone is checked out or listed to." You state that some of the requested cell phone numbers and names have been released. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that ordinarily the names of a governmental body's employees and officers are subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(2) (emphasis added). Thus, section 552.022(a)(2) requires the release of the names of city employees, unless that information is expressly confidential

under other law. Section 552.108 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived; as such, it does not constitute other law for purposes of section 552.022(a)(2). *See* Open Records Decision No. 177 (1977). However, section 552.101 of the Government Code constitutes other law for purposes of section 552.022; therefore we will consider the applicability of this section to the submitted information.

But first, we will address your claim under section 552.108 regarding the information that is not subject to section 552.022 of the Government Code. Section 552.108(b)(1) of the Government Code excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." This provision is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).

To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You indicate that the information you seek to withhold consists of cell phone numbers used by police officers, fire, and EMS personnel. You inform us that fire marshals are peace officers in the State of Texas. *Cf.* Open Record Decision No. 127 (1976) (Arson Investigation Division of Dallas Fire Department deemed to be law enforcement agency for purposes of statutory predecessor to Gov't Code § 552.108). You assert that the release of this information would interfere with law enforcement. In Open Records Decision No. 506 (1988), we determined that the statutory predecessor to section 552.108(b) excepted from disclosure "the cellular mobile phone numbers assigned to [Harris C]ounty officials and employees with specific law enforcement responsibilities." Open Records Decision No. 506 at 2 (1988). We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* After considering your arguments,

we conclude that you have demonstrated that the cell phone numbers assigned to police officers and fire marshals would interfere with law enforcement and therefore may be withheld from the requestor under section 552.108(b)(1). However you have not met your burden of explaining how and why release of the remaining cell phone numbers would interfere with law enforcement and crime prevention. Thus, no portion of the remaining information may be withheld under 552.108 of the Government Code.

We now address your claims under section 552.101 for the remaining information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes. Section 418.176 provides in part:

**Sec. 418.176. CONFIDENTIALITY OF CERTAIN INFORMATION RELATING TO EMERGENCY RESPONSE PROVIDERS.**

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Gov't Code § 418.176. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

We understand you to claim that the submitted names and cell phone numbers of fire and EMS employees are part of the city's emergency response plan team that responds to terrorist and biological attacks. You represent that the city's "emergency response plan relies on the ability to provide vital information-warnings, alerts, directions, and updates-to select personnel via e-mail sent to their cell phones." You further represent "Should these numbers

become available to the public, there is nothing to prevent massive overload of messages or calls sent to these numbers. The devices cannot deal with such overloads and would quickly become useless.” Based on your representations, we conclude that the cell phone numbers of the submitted fire and EMS employees that are part of the emergency response plan team are confidential under section 418.176 and must be withheld under section 552.101 of the Government Code. However, you have failed to explain how the remaining names and cell phone numbers constitutes “information [that] is collected, assembled, or maintained by or for a governmental entity *for the purpose of* preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity.” Gov’t Code § 418.176 (emphasis added). We therefore find that you have failed to demonstrate how section 418.176 applies to the remaining information, and none of it may be withheld on the basis of this provision. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

You also claim that section 773.091 of the Health and Safety Code would allow the city to withhold the remaining names of police, fire , and EMS personnel. Section 773.091 is applicable to information that relates to the provision of emergency medical services and provides in part:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(a)-(c). We find, however, that this section is not applicable to any of the information in question. Therefore, the city may not withhold any of the remaining information under section 552.101 in conjunction with section 773.091 of the Health and Safety Code.

We will next consider your claim that 49 C. F. R. 1520 applies to the remaining requested information. Congress enacted the Aviation and Transportation Security Act (“ATSA”), which created the United States Transportation Security Administration (“TSA”), a new

agency within the United States Department of Transportation (“DOT”) headed by the Undersecretary of Transportation for Security (the “undersecretary”). See 49 U.S.C. § 114(a), (b)(1). ATSA provides that, by November 19, 2002, the responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers will be transferred from the Federal Aviation Administration (“FAA”) administrator to the undersecretary as head of TSA. The undersecretary is authorized to prescribe regulations that prohibit disclosure of information requested not only under FOIA, but also under other disclosure statutes. Cf. *Public Citizen, Inc. v. Federal Aviation Administration*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized FAA administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under FOIA). Thus, section 40119(b)(1) authorizes the undersecretary to prescribe regulations that prohibit disclosure of information requested under chapter 552 of the Government Code.

Pursuant to the mandate and authority of section 40119, DOT’s FAA and TSA jointly published new regulations pertaining to civil aviation security, which are found at title 49 of the Code of Federal Regulations and which took effect February 17, 2002. See 67 Fed. Reg. 8340. Section 1520.1(a) of these regulations explains that the regulations govern the release, by TSA “and by other persons, of records and information that has [sic] been obtained or developed during security activities or research and development activities.” 49 C.F.R. § 1520.1(a) (emphasis added). The “other persons” to which these regulations apply include local governmental entities such as the city. See 49 U.S.C. § 40102(a)(32) (“person” includes “a governmental authority”); see also 67 Fed. Reg. at 8342 (definition of “person” is based on 49 U.S.C. § 40102). Thus, the regulations at title 49 of the Code of Federal Regulations apply to the city.

Section 1520.3(a) of title 49 of the Code of Federal Regulations provides in part that, “notwithstanding the [FOIA] or other laws,” records that meet the definition in section 1520.7 are not available for public inspection or copying, nor is information contained in those records to be released to the public. See 49 C.F.R. § 1520.3(a). Such information is defined to include “[a]ny information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack.” *Id.* § 1520.7(h). This information includes, but is not limited to, “details of inspections, investigations, and alleged violations and findings of violations.” See *id.* As to the release of information by persons other than TSA, section 1520.5 provides that those covered by the regulation, which includes airport and aircraft operators and their employees, contractors, and agents, among others, “must restrict disclosure of and access to sensitive security information . . . to persons with a need to know and must refer requests by other persons for such information to TSA or the applicable DOT administration[.]” *Id.* § 1520.5(a) (emphasis added). Upon review of the remaining submitted information we conclude that it does not contain any names of aviation employees. If, however, some of the requested names are those of aviation employees then the decision to release these names or to withhold these names are not for this office or the city to make, but rather is a decision for the undersecretary as head of TSA. See *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (state law preempted to extent it actually conflicts with federal law); see also *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986) (federal agency acting within scope of its

congressionally delegated authority may preempt state regulation). Consequently, we conclude that any of the responsive information relating to aviation department employees need not be released until a decision is made by the undersecretary as head of TSA.

Finally, section 552.101 also encompasses the common law right to privacy. Ordinarily, information is protected by common law privacy only if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, *and* (2) the information is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S. W.2nd 668 (Tex. 1976), 685. However, information also may be withheld under section 552.101 in conjunction with common law privacy upon a showing of certain “special circumstances.” *See Open Records Decision No. 169* (1977). This office considers “special circumstances” to refer to a very narrow set of situations in which the release of information would likely cause someone to face “an imminent threat of physical danger.” *Id.* at 6. Such “special circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.* The city asserts that to release the names of the officers who are working undercover “could present a threat or physical danger to the individual officers.” Based on your representations, we conclude that in this instance only the names of officers working undercover are confidential under section 552.101 in conjunction with common law privacy and must be withheld from the requestor. *See* ORD 169. The remaining submitted information may not be withheld on this basis.

In summary, the city may withhold the cell phone numbers of police officers and fire marshals under section 552.108 of the Government Code. The city must withhold the cell phone numbers of the city’s emergency response plan team under section 552.101 in conjunction with section 418.176 of the Government Code. The city must withhold the names of all “undercover” police officers under section 552.101 in conjunction with common law privacy. Any of the responsive information relating to aviation department employees need not be released until a decision is made by undersecretary as head of TSA. The remaining cell phone numbers and names must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Louis T. Dubuque  
Assistant Attorney General  
Open Records Division

LTD/krl

Ref: ID# 229689

Enc. Submitted documents

c: Mr. Jerry Jordan  
The Examiner Newspaper  
470 Orleans, Suite 1006  
Beaumont, Texas 77701  
(w/o enclosures)