



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2006

Ms. Ann Marie Lee
Certified Public Accountant
Henderson County Auditor
100 East Tyler Street, Room 300
Athens, Texas 75751

OR2006-11647

Dear Ms. Lee:

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# 261156.

The County of Henderson (the "county") received a request for the county's cellular telephone bills from Cellular One for a specified time period.¹ You assert that some of the responsive information is not subject to the Act pursuant to section 552.003 of the Government Code and the remainder is excepted from public disclosure under sections 552.101, 552.108, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your assertion that a portion of the submitted information constitutes a record of the judiciary that is not subject to the Act. We note that the Act only applies to information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." Gov't Code § 552.002(a)(1). It does not apply to records of the judiciary. *See id.* § 552.003(1)(B). Information that is "collected, assembled or maintained by or for the judiciary" is not subject to the Act. *See id.* § 552.0035(a); *see also* Tex. Sup. Ct. R. 12. Consequently, records of the judiciary need not be released under the Act. *See* Attorney General Opinion DM-166 (1992).

¹Because you have not provided a copy of the written request for information, we take our description from your brief.

But see Benavides v. Lee, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ); Open Records Decision No. 646 (1996) at 4 (“function that a governmental entity performs determines whether the entity falls within the judiciary exception to the Open Records Act.”). To the extent the submitted information consists of phone records maintained for the judiciary, these records are records of the judiciary and are not subject to the Act. However, if these phone records are not maintained on behalf of the judiciary, then they are subject to the Act and may only be withheld if an exception to disclosure under the Act applies as described below.

Next, we must address the county’s procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body that wishes to withhold requested information is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov’t Code § 552.301(e). As of the date of this letter, you have not submitted to this office a copy of the written request for information. Thus, we find that you have failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of 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 id.* § 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 section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). The need of a governmental body, other than the county, to withhold information under section 552.108 of the Government Code can provide a compelling reason to withhold information from disclosure. Open Records Decision No. 586 (1991). Because we have received a brief from the Henderson County Sheriff’s Office (the “sheriff”) objecting to the release of the requested information, we will consider the sheriff’s arguments regarding section 552.108. Additionally, you claim sections 552.101, 552.117, and 552.136 of the Government Code as exceptions to disclosure. These exceptions are mandatory and can provide compelling reasons for overcoming the presumption of openness. *See* Open Records Decision No. 150 at 2 (1977). Accordingly, we will address arguments under these sections.

Section 552.108(b) 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 Ft. Worth v. Cornyn, 86 S.W.3d 320, 327 (Tex. App.—Austin, 2002, no pet.). This office has determined that the statutory predecessor to section 552.108(b) excepts from disclosure “the cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” Open Records Decision No. 506 at 2 (1988). In that decision, we noted that the purpose of the cellular telephones is to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* at 2. The sheriff indicates that release of the submitted cellular telephone records would jeopardize the safety of law enforcement officials and interfere with law enforcement. Having reviewed the submitted arguments and information, we agree that release of the cellular telephone numbers of under-cover officers would interfere with law enforcement or crime prevention. Accordingly, the county may withhold the cellular telephone numbers of under-cover officers under section 552.108(b)(1) of the Government Code. However, the sheriff has failed to demonstrate the applicability of section 552.108 to any of the remaining submitted telephone numbers.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 418.176 of the Government Code provides in pertinent part:

(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[.]

Gov’t Code § 418.176(a)(1). 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 provisions 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). You claim that a portion of the submitted information pertains to the means by which the county responds to “an act of terrorism.” However, you have not provided any arguments explaining how any of the information at issue falls within the scope of this provision. Therefore, you have failed to demonstrate the applicability of this provision to the submitted information. As such, none of the submitted information may be withheld under section 418.176 of the Government Code.

You contend that a portion of the submitted information is excepted under common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review of the submitted information and your arguments, we find that you have failed to explain how any of the remaining submitted information constitutes highly intimate or embarrassing information for the purposes of common-law privacy. Therefore, none of the remaining submitted information may be withheld on this basis.

You claim that portions of the remaining submitted information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, pager number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175.² Gov't Code § 552.117(a)(2). Section 552.117(a)(1) protects the current and former home addresses and telephone numbers, social security number, and family member information of a current or former employee of a governmental body who requests that the information be kept confidential under section 552.024. *Id.* § 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 only be withheld under section 552.117(a)(1) on behalf of a current or former employee 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.

To the extent that the home phone numbers in the submitted information pertain to employees who are licensed peace officers, the county must withhold such information under section 552.117(a)(2). Pursuant to section 552.117(a)(1), the county must withhold all other personal phone numbers of county employees in the submitted information, if the employees made timely elections to keep such information confidential under section 552.024.

You claim that a portion of the remaining submitted information is subject to section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding 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

²Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

Code § 552.136. Accordingly, the county must withhold the types of information we have marked pursuant to section 552.136 of the Government Code.

In summary, the county may withhold the cellular telephone numbers pertaining to the sheriff under section 552.108(b)(1) of the Government Code. The county must withhold home phone numbers under section 552.117 of the Government Code in the submitted information to the extent (1) they pertain to licensed peace officers and (2) they pertain to county employees who made timely elections to keep such information confidential under section 552.024 of the Government Code. The county must withhold the types of account numbers we have marked under section 552.136 of the Government Code. The remaining information must be released to the requestor.

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); *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 Office of the Attorney General 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. 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,



Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/dh

Ref: ID# 261156

Enc. Submitted documents

c: Ms. Aimee Norton
c/o Ann Marie Lee
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(w/o enclosures)