



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2009

Ms. Barbara Baruch
Assistant City Attorney
City of Galveston
P.O. Box 779
Galveston, Texas 77553-0779

OR2009-07316

Dear Ms. Baruch:

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# 343039 (Galveston ID Nos. 09-085, 09-085a, 09-087, 09-123, 09-128, 09-132, 09-138, 09-143, 09-149, 09-155, 09-167, 09-170, 09-178).

The City of Galveston (the "city") received several requests from two requestors for various itemized cellular telephone bills paid for by the city in 2008. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, 552.136, and 552.145 of the Government Code, and privileged under Texas Rule of Evidence 508.¹ We have considered the arguments you make and reviewed the submitted representative sample of information.² We have also considered comments from individuals whose personal telephone numbers appear on the requested billing information. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released.)

Initially, the city represents, and has provided documentation demonstrating, that it sought clarification with regard to some of the requests for information. We note that a governmental body may communicate with a requestor for the purpose of clarifying or narrowing a request for information. *See* Gov't Code § 552.222(b); Open Records Decision

¹We note that although you also raise section 552.024 of the Government Code, this section is not an exception to disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024.

²We 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.

No. 663 at 2-5 (1999). We also note that a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted information responsive to the portions of the request for which you sought clarification and raised exceptions to disclosure for this information, we will address the applicability of the claimed exceptions to the submitted information.

We also note that section 552.022 of the Government Code is applicable to the requested information. 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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The requested telephone bills constitute information in an account relating to the expenditure of public funds by a governmental body. Thus, pursuant to section 552.022(a)(3), the city may only withhold the requested information if it is confidential under other law. You argue that the requested records are excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, 552.136, and 552.145 of the Government Code, and Texas Rule of Evidence 508. Section 552.108 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Consequently, the city may not withhold any of the requested information under section 552.108. However, because sections 552.101, 552.117, 552.1175, 552.136, and 552.145 of the Government Code and Texas Rule of Evidence 508 constitute "other law" for purposes of section 552.022, we will consider your arguments against disclosure of the requested information under those sections.

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 exception encompasses information that other statutes make confidential. Section 1039 of title 18 of the United States Code addresses fraud and related activity in connection with obtaining confidential phone records information, and provides in pertinent part:

(b) Prohibition on sale or transfer of confidential phone records information.--

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally sells or transfers, or attempts to sell or transfer, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know, such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

...

(c) Prohibition on purchase or receipt of confidential phone records information.--

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally purchases or receives, or attempts to purchase or receive, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 1039(b)(1), (c)(1). For purposes of section 1039, confidential phone records information includes information that “is contained in any bill, itemization, or account statement provided to a customer by or on behalf of a covered entity solely by virtue of the relationship between that covered entity and the customer.” *Id.* § 1039(h)(1)(C). You argue that because all of the telephone numbers in the requested information are contained in a bill, itemization, or account statement, such telephone numbers constitute “confidential phone records information” as defined in section 1039(h)(1)(C) and are therefore made confidential by section 1039. However, section 1039 applies to phone record information held by a covered entity. Section 1039(h)(2) defines covered entities as telecommunications carriers or providers of IP-enabled voice service. *Id.* § 1039(h)(2). Because the city is not a covered entity for purposes of section 1039, information it holds is not subject to section 1039 of title 18 of the United States Code and none of the requested information may be withheld on that basis.

Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager

number of employee who elects to withhold home phone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the requested information contains the home or personal cellular telephone numbers of city employees who made timely elections under section 552.024, the telephone numbers must be withheld under section 552.117(a)(1). Further, to the extent the requested information contains telephone numbers belonging to family members of city employees who made timely elections, this information must also be withheld under section 552.117(a)(1).

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone numbers, 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 and 552.1175 of the Government Code.³ Gov't Code § 552.117(a)(2). Thus, to the extent the requested information contains the home or personal cellular telephone number of a peace officer, the telephone number must be withheld pursuant to section 552.117(a)(2) of the Government Code.

The requested information may contain personal telephone numbers belonging to peace officers who are not employed by the city. These numbers are subject to section 552.1175 of the Government Code, which provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). *See, e.g.*, Open Records Decision No. 678 (2003) (ruling that confidentiality of information subject to section 552.1175 is dependent on a governmental body's receipt of an election of confidentiality from the individual whose information is at issue). Thus, to the extent any of the telephone numbers in the requested information belong to a licensed peace officer not employed by the city who elects to restrict access to this

³"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

information in accordance with section 552.1175(b), the city must withhold the telephone number under section 552.1175.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999) (summarizing information that attorney general has determined to be private).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

You raise section 552.101 in conjunction with privacy with respect to certain unlisted telephone numbers belonging to members of the public. This office has stated on several occasions that an individual's home address and telephone number generally are not protected by constitutional or common-law privacy under section 552.101. See Open Records Decision Nos. 554 at 3 (1990) (disclosure of a person's home address and telephone number is not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers do not qualify as "intimate aspects of human affairs"). Furthermore, we have frequently stated that a mere expectation of privacy on the part of the individual does not permit that information to be withheld under section 552.101. See Open Records Decision Nos. 479 at 1 (1987) (information is not confidential simply because the party that submitted the information anticipated or requested confidentiality), 169 at 6 (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution). Therefore, the city may not withhold the unlisted telephone numbers belonging to members of the public under section 552.101 of the Government Code in conjunction with either common-law or constitutional privacy.

We note that information must be withheld under section 552.101 in conjunction with common-law privacy upon a showing of "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.* We determine whether a request for information presents such "special circumstances" on a case-by-case basis. *Id.* at 7.

You inform us that some of the telephone numbers in the requested information identify officers acting as liaisons for the federal Drug Enforcement Agency ("DEA"). You state that the release of these telephone numbers would compromise the safety of these officers. Based on the city's representations and our review, we find that the city must withhold the telephone numbers belonging to officers acting as liaisons for the DEA under section 552.101 of the Government Code in conjunction with the "special circumstances" aspect of common-law privacy.

Section 552.101 also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You state that the requested information contains telephone numbers belonging to confidential informants who have reported alleged violations of criminal law to the city's police department. Based on your representations, we agree the city may withhold these telephone numbers pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege.⁴

Section 552.145 of the Government Code provides that "[t]he Texas no-call list created under Subchapter B, Chapter 304, Business & Commerce Code, and any information provided to or received from the administrator of the national do-not-call registry maintained

⁴As our ruling is dispositive, we need not address your argument against disclosure of this information under Texas Rule of Evidence 508.

by the United States government, as provided by Sections 304.051 and 304.056, Business & Commerce Code, are excepted from the requirements of Section 552.021.” Gov’t Code § 552.145. Although you argue that at least one of the telephone numbers in the requested information has been registered on the national or state “no-call list,” we note that the confidentiality of section 552.145 applies specifically to the no-call list and information provided to or received from the administrator of the do-not call registry. Accordingly, because the submitted cellular telephone bill does not consist of the Texas no-call list or of information provided to or obtained from the administrator of the national no-call registry, section 552.145 does not apply to any portion of the cellular telephone bills maintained by the city, and none of the requested information may be withheld on that basis.

Section 552.136 of the Government Code provides in relevant part:

(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(a)-(b). The city must withhold the account numbers in the requested cellular telephone records pursuant to section 552.136 of the Government Code.

In summary, to the extent the requested information contains the home or personal cellular telephone numbers of city employees who made timely elections under section 552.024 or the family members of such employees, the telephone numbers must be withheld under section 552.117(a)(1). To the extent the requested information contains the home or personal cellular telephone number of a peace officer employed by the city, the telephone number must be withheld pursuant to section 552.117(a)(2) of the Government Code. To the extent any of the telephone numbers in the requested information belong to a licensed peace officer not employed by the city who elects to restrict access to this information in accordance with section 552.1175(b), the city must withhold the telephone number under section 552.1175. The city must withhold the telephone numbers belonging to officers acting as liaisons to the DEA pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold telephone numbers belonging to confidential informants pursuant to section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The city must withhold the account numbers in the requested

information under section 552.136 of the Government Code. The remaining requested information must be released.

Finally, you ask this office to issue a previous determination allowing the city to withhold telephone numbers from cellular telephones issued by the city to its police officers, home telephone numbers of city employees who have timely requested their numbers be withheld pursuant to section 552.024 of the Government Code, and cellular telephone data on telephones supplied by the city to its police officers pursuant to section 552.108(b). *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We decline to issue such a previous determination at this time. Accordingly, 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 more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Karen E. Stack
Assistant Attorney General
Open Records Division

KES/jb

Ref: ID# 343039

Enc. Submitted documents

c: Requestor
(w/o enclosures)