



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2009

Ms. Jenny Gravley
Taylor Olson Adkins Sralla Elam, L.L.P.
Attorney for City of Southlake
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2009-14513

Dear Ms. Gravley:

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# 358247.

The City of Southlake (the "city"), which you represent, received a request for the cellular telephone bills and records, to include text messages, for the chief of police and assistant city manager for specified dates and times. You state the requested text messages do not exist.¹ You claim the submitted information is not subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under sections 552.108 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have marked portions of the submitted information as not responsive to the request. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

Next, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-12454 (2009) to the city's Department of Public Safety. To the extent any portion of the submitted information was ruled upon in Open Records Letter No. 2009-12454, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the city may continue to rely on Open Records Letter No. 2009-12454 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address the submitted arguments.

You claim the submitted cellular telephone records are not public information subject to the Act because the city does not own or have any right of access to this information. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides that "public information" consists of

information 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). Moreover, section 552.001 of the Act provides that 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 id.* § 552.001(a).

We further note that the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body 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) (finding that information does not fall outside definition of "public information" in Act merely because individual official or employee of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that 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, the mere fact that the city does not possess the information at issue does not take the information outside the scope of the Act. *See id.* In Open Records

Decision No. 635, this office found that information in a public official's personal appointment calendar may be subject to the Act in certain instances. *See* ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). We note that the Act's definition of "public information" does not require that an employee or official create the information at the direction of the governmental body. *See* Gov't Code § 552.002. Accordingly, the mere fact that city officials may have generated business-related information using personal resources does not take the information outside the scope of the Act.

You state the submitted cellular telephone records pertaining to the chief of police and assistant city manager are not subject to the Act because the city does not provide cellular telephones to these two individuals. However, you further state that the city provides the chief of police and assistant city manager with a stipend for the use of the telephones for business use during normal business. You assert that even if the submitted cellular telephone records contain information related to the official business of the city, they are not subject to the Act because the records are sent to these individuals' home addresses, and the city does not own or have a right of access to these records. We reiterate that 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 id.* § 552.002(a). Thus, to the extent the submitted cellular telephone records maintained by the chief of police and assistant city manager relate to the official business of the city, they are subject to the Act, and we will address your arguments against the disclosure of this information. However, to the extent the submitted cellular telephone records do not relate to the official business of the city, they are not subject to the Act and need not be released.

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." *Id.* § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You seek to withhold the entire cellular telephone record of the chief of police arguing that revealing to whom and when calls are made "could reveal the numbers of confidential informants or witnesses in pending criminal cases interfering with both law enforcement and crime prevention." Although you make these general assertions, you do not identify the telephone numbers at issue or specifically explain how the release of the entire cellular telephone record would interfere with law enforcement or crime prevention. Therefore, you have failed to demonstrate how subsection 552.108(b)(1) is applicable to the chief's entire cellular telephone record. You also state that the telephone numbers you have highlighted in pink in Exhibits B and C belong to the director of the city's Department of Public Safety and the city manager. You assert that releasing these telephone numbers to the public would interfere with law enforcement and crime prevention because the release of this information could make it more difficult for these employees to be reached in an emergency or when needed for official law enforcement business. In Open Records Decision No. 506 (1998), this office concluded that cellular telephone numbers for individuals with specific law enforcement responsibilities may be withheld under section 552.108. ORD 506 at 2. 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.* Thus, we agree that release of the information at issue would interfere with law enforcement. Therefore, the city may withhold the information you have highlighted in pink pursuant to section 552.108(b)(1) of the Government Code.

Section 552.117(a)(1) of the Government Code 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 request that this information be kept confidential under section 552.024. *See Gov't Code* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* You inform us, and provide documentation showing that the city manager made a timely election for confidentiality of his personal information under section 552.024. Therefore, the city must withhold the information you have highlighted in green in Exhibit C under section 552.117(a)(1) of the Government Code.

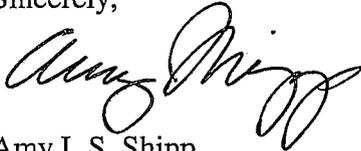
Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code. *See Gov't Code* § 552.117(a)(2). You assert that the information you have highlighted in blue and green in Exhibit B reveals the home telephone numbers and family member information of peace officers. Accordingly, the city must withhold the information you have highlighted in blue and green in Exhibit B pursuant to section 552.117(a)(2) of the Government Code.

In summary, to the extent any portion of the submitted information was ruled upon in Open Records Letter No. 2009-12454, the city may continue to rely on Open Records Letter No. 2009-12454 as a previous determination and withhold or release the identical information in accordance with that ruling. To the extent the submitted cellular telephone records do not relate to the official business of the city, they are not subject to the Act and need not be released. However, to the extent the submitted records relate to the official business of the city, the city may withhold the information you have highlighted in pink pursuant to section 552.108(b)(1) of the Government Code. The city must withhold the information you have highlighted in green in Exhibit C under section 552.117(a)(1) of the Government Code and the information you have highlighted in blue and green in Exhibit B pursuant to section 552.117(a)(2) of the Government Code. The remaining responsive information must be released to the requestor.

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 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, toll free, at (888) 672-6787.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/rl

Ref: ID# 358247

Enc. Submitted documents

cc: Requestor
(w/o enclosures)