



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 2, 2009

Mr. Ronald D. Stutes  
Potter Minton PC  
P.O. Box 359  
Tyler, Texas 75710

OR2009-15569

Dear Ms. Stutes:

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# 360233.

The Frankston Police Department (the "department") received two requests seeking (1) all landline telephone records for department employees from March 9, 2009 to August 9, 2009, and (2) all cellular telephone records for department employees from March 1, 2009 to May 30, 2009. You claim the submitted telephone records are excepted from disclosure under sections 552.103, 552.108, 552.117, and 552.136 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted records.

Initially, you state the information highlighted in green does not pertain to the department. Upon review, we agree the information you highlighted in green in the landline telephone records pertains to telephone lines of employees of the City of Frankston (the "city") who are not part of the department. Because the requestor only seeks landline telephone records that relate to department employees, we agree this information is not responsive. This ruling does not address the public availability of information that is not responsive to the request, and

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.136 of the Government Code, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, although you raise section 552.1175 of the Government Code for some of the submitted information, section 552.117(a)(2) is the applicable exception for the type of information you marked.

the department is not required to release this information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed). However, we find all the submitted cellular telephone records relate to department cellular telephone lines. Accordingly, the information you highlighted in green in the cellular telephone records is responsive to the request seeking departmental cellular telephone records. We will consider the availability of this information along with the other responsive information.

We next note the department did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.” Gov’t Code § 552.301(b). While the department raised sections 552.108 and 552.117 within the ten-business-day time period as required by subsection 552.301(b), the department did not raise section 552.103 or section 552.136 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See Gov’t Code § 552.352*; Open Records Decision No. 574 at n.4 (2001) (mandatory exceptions). Section 552.103 is a discretionary exception that protects a governmental body’s interests and may be waived by a governmental body’s failure to comply with the procedural requirements of the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas, no pet.) (governmental body may waive section 552.103). In failing to timely raise section 552.103 for the requested telephone records the department waived its claim under that section. Accordingly, none of the responsive telephone records may be withheld due to pending or anticipated litigation. Because section 552.136 is a mandatory exception, we will consider the department’s argument under section 552.136 notwithstanding its violation of section 552.301(b) in raising that exception.

The responsive information, which consists of billing records for landline and cellular telephone accounts paid for by the city or the department, falls within the scope of section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides for required disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[,]” unless the information is expressly confidential under “other law.” Gov’t Code § 552.022(a)(3). Thus, the department must release the records under section 552.022(a)(3), unless information in the records is expressly confidential under “other law.” Although you seek to withhold portions of the records at issue under section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See Open Records Decision Nos. 665 at n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108).* As such,

section 552.108 is not “other law” that makes information confidential for the purposes of section 552.022(a)(3) and none of the responsive records may be withheld under section 552.108. However, because sections 552.117 and 552.136 of the Government Code are “other law” for purposes of section 552.022, we will consider the applicability of those exceptions to the records at issue.

Section 552.117(a)(2) 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.<sup>2</sup> Gov’t Code § 552.117(a)(2). You represent the information you highlighted in pink in the responsive telephone records contains the home telephone numbers of department officers. Based on your representation and our review, we agree the department must withhold the officers’ home telephone numbers you marked in the telephone records under section 552.117(a)(2). However, some of the information you highlighted in pink does not consist of the home telephone number of a peace officer. This other information, which includes, among other things, the call date, location, and duration, must be released.

You next claim the information highlighted in yellow is excepted by section 552.136 of the Government Code, which 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.” *Id.* § 552.136(b). Section 552.136(a) defines “access device” as “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 ... obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we conclude the telephone account numbers in the responsive records are access device numbers for purposes of section 552.136. Thus, the department must withhold the account numbers we marked in the responsive records under section 552.136.

In summary, the officers’ home telephone numbers you marked must be withheld under section 552.117(a)(2) of the Government Code. The account numbers we marked must be withheld under section 552.136 of the Government Code. The remaining responsive information must be released.

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.

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<sup>2</sup>“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

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](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,

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 360233

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)