



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 26, 2010

Ms. Jennifer C. Cohen
Assistant General Counsel
Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2010-02907

Dear Ms. Cohen:

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# 370012 (ORA# 09-2335).

The Department of Public Safety (the "department") received a request for information related to the requestor and a named officer, including recorded conversations, files, credit card statements, e-mails, and cellular telephone statements from specified time periods. You claim a portion of the submitted information is not subject to the Act. You claim portions of the remaining information are excepted from disclosure under sections 552.101, 552.108, 552.111, 552.117, 552.1175, 552.119, 552.130, 552.132, 552.136, 552.137, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it relates to information created outside the time period specified by the request or was created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to this request.

¹We note although you raise section 552.111 of the Government Code, you make no arguments to support this exception. Further, you have marked no information under section 552.111. *See* Gov't Code § 552.301(e)(2) (providing that a governmental body must label copy of information to indicate which exceptions apply to which part of the copy). Accordingly, we assume you have withdrawn your claim that this section applies to the submitted information.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act 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." *Id.* § 552.002(a). You inform us a portion of the submitted information, which you have marked, is not subject to the Act because it consists of personal e-mails that were not collected, assembled, or maintained pursuant to any law or ordinance or in connection with the transaction of any official business of the department. After reviewing the information at issue, we agree the information at issue does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the department. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, we conclude the information we have marked is not subject to the Act and need not be released in response to this request.

We note portions of the remaining information are subject to 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:

(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 remaining information includes a cellular telephone bill and credit card statements, which contain information in an account, voucher, or contract relating to the expenditure of public funds. Accordingly, section 552.022(a)(3) is applicable to this information, which we have marked. Information subject to section 552.022(a)(3) may be withheld only if it is expressly made confidential under other law. *See id.* You argue portions of the cellular telephone statement are excepted from disclosure under section 552.108 of the Government Code. However, section 552.108 is a discretionary exception and, as such, is not other law for purposes of section 552.022(a)(3). *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Accordingly, we conclude the department may not withhold any portion of the submitted cellular telephone statement under section 552.108 of the Government Code. However, sections 552.117, 552.1175, 552.132, and 552.136 of the Government Code are other laws for the purposes of section 552.022(a)(3). Therefore, we will consider your arguments under these exceptions with respect to the information that is

subject to section 552.022(a)(3). We will also consider all of your arguments for the information not subject to section 552.022.

You claim section 552.101 of the Government Code for portions of the remaining information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Part 23 of title 28 of the Code of Federal Regulations was established to regulate intelligence databases pertaining to certain criminal activities, such as drug trafficking and extortion, that involve a large number of participants over a broad geographical area. *See* 28 C.F.R. § 23.2 (providing background of part 23). The policy standards of part 23 are applicable to all criminal intelligence systems operating through support under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711, *et seq.* *Id.* § 23.3(a). For purposes of part 23, a criminal intelligence system "means the arrangements, equipment, facilities, and procedures used for the receipt, storage, interagency exchange or dissemination, and analysis of criminal intelligence information," and an intelligence project "means the organizational unit which operates an intelligence system on behalf of and for the benefit of a single agency or the organization which operates an interjurisdictional intelligence system on behalf of a group of participating agencies." *Id.* § 23.3(b)(1), (5).

The release of information within these criminal intelligence databases is governed by section 23.20 of part 23, which provides in relevant part the following:

(e) A project or authorized recipient shall disseminate criminal intelligence information only where there is a need to know and a right to know the information in the performance of a law enforcement activity.

(f)(1) Except as noted in paragraph (f)(2) of this section, a project shall disseminate criminal intelligence information only to law enforcement authorities who shall agree to follow procedures regarding information receipt, maintenance, security, and dissemination which are consistent with these principles.

(2) Paragraph (f)(1) of this section shall not limit the dissemination of an assessment of criminal intelligence information to a government official or to any other individual, when necessary, to avoid imminent danger to life or property.

Id. § 23.20(e), (f). For purposes of section 23.20, "criminal intelligence information" means "data which has been evaluated to determine that it: (i) [i]s relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity, and (ii) [m]eets criminal intelligence system submission criteria[.]" *Id.* § 23.3(b)(3). We understand you to assert the submitted intelligence reports, which we have marked, are information maintained in a multijurisdictional criminal intelligence system. Thus, we conclude the marked information is confidential under section 23.20, and may be released only in accordance with that section.

You state the requestor is not a member of a law enforcement authority. *See id.* § 23.20(f)(1). You further state the department does not believe disclosure to the requestor is necessary to avoid imminent danger to life or property. *Id.* § 23.20(f)(2). Therefore, we conclude the marked information is confidential under section 23.20 of title 28 of the Code of Federal Regulations, and must be withheld under section 552.101 of the Government Code. However, we find you have not demonstrated how the remaining information at issue constitutes data which has been evaluated and determined to be relevant to the identification of and the criminal activity engaged in by an individual or organization which is reasonably suspected of involvement in criminal activity and meets criminal intelligence submission criteria. Thus, you have not demonstrated the remaining information at issue constitutes “criminal intelligence information” for purposes of part 23 of title 28. *Id.* § 23.23(b)(3). Accordingly, we find the remainder of the information at issue is not confidential under section 23.20 of title 28 of the Code of Federal Regulations and it may not be withheld under section 552.101 of the Government Code on that basis.

You claim section 552.108 of the Government Code for a portion of the remaining information. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You represent the information at issue, which we have marked, relates to an ongoing investigation and prosecution, and release of the information would interfere with the prosecution of the pending criminal case. Based upon these representations, we conclude release of the marked information will interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, section 552.108 is applicable to the marked information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, you may withhold the marked information from disclosure under section 552.108(a)(1).³

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, social security number, and family member information of a licensed peace officer, regardless of whether the peace officer complies with

³As our ruling is dispositive with respect to this information, we do not address your remaining argument against its disclosure.

sections 552.024 and 552.1175 of the Government Code.⁴ *See* Gov't Code § 552.117(a)(2). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 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). Thus, the department must withhold the information we have marked under section 552.117(a)(2).

The submitted cellular telephone statement may contain information that is subject to section 552.1175 of the Government Code. Section 552.1175 provides, in relevant part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(7) criminal investigators of the United States as described by Article 2.122(a), Code of Criminal Procedure[.]

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, 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(a), (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). We note the submitted cellular telephone statement may contain home or cellular telephone numbers of licensed peace officers not employed by the department and a criminal

⁴"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

investigator of the United States.⁵ However, we are unable to determine whether a governmental body pays for the cellular telephone service for any of the numbers at issue. Thus, to the extent any of the telephone numbers in the requested information are the home or cellular telephone numbers of a licensed peace officer not employed by the department or a criminal investigator of the United States who elects to restrict access to this information in accordance with section 552.1175(b), the department must withhold such information under section 552.1175; however, any cellular telephone numbers may only be withheld if the licensed peace officer or criminal investigator of the United States pays for the service with his or her own funds.

You assert the submitted photographs of licensed peace officers should be withheld from disclosure under section 552.119 of the Government Code. Section 552.119 provides as follows:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find you have failed to demonstrate release of the photographs would endanger the officers' lives or physical safety. Accordingly, the photographs at issue may not be withheld under section 552.119 of the Government Code.

The submitted cellular telephone and credit card statements contain information subject to section 552.136 of the Government Code. Section 552.136 provides, "[n]otwithstanding any

⁵Criminal investigator of the United States includes special agents of the Federal Bureau of Investigation. See Crim Proc. Code art 2.122(a)(1).

other provision of [the Act], 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). The department must withhold the information we have marked under section 552.136 of the Government Code.⁶

You claim section 552.137 of the Government Code for a portion of the remaining information. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, or an e-mail address that a governmental entity maintains for one of its officials or employees. Therefore, the department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure or subsection (c) applies.

In summary, a portion of the information, which we have marked, is not subject to the Act and need not be released in response to this request. The department must withhold the marked information section 552.101 of the Government Code in conjunction with section 23.20 of title 28 of the Code of Federal Regulations. With the exception of the basic information, the department may withhold the information we have marked under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2). The department must withhold under section 552.1175 the marked home or personal cellular numbers belonging to licensed peace officers not employed by the department and criminal investigators of the United States if these individuals elect to restrict access to this information in accordance with section 552.1175(b); however, any cellular telephone numbers may only be withheld if the individual at issue paid for the service with his or her own funds. The department must withhold the information we have marked under section 552.136 of the Government Code. The department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure or subsection (c) applies. The remaining information must be released.⁷

⁶As our ruling is dispositive with respect to this information, we do not address your remaining argument under section 552.132 of the Government Code against disclosure of the submitted information.

⁷We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including credit card numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan". The signature is fluid and cursive, with a large initial "C" and "M".

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

Ref: ID# 370012

Enc. Submitted documents

c: Requestor
(w/o enclosures)