



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2013

Ms. Donna L. Johnson
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2013-08598

Dear Ms. Johnson:

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# 488154 (City Reference No. COH13-001).

The City of Hempstead (the "city"), which you represent, received a request for cellular telephone bills, including the names of the users, paid for by the city during a specified time period. You state the city is redacting information under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including access device numbers under section 552.136 of the Government Code. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in subsection 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(e). Thus, the statutory amendments to section 552.136 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to section 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Section 552.108(b)(1) of the Government Code excepts from required public disclosure an internal record of a law enforcement agency 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[.]” Gov’t Code § 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). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 508 (1988) (release of dates of prison transfer could impair security), 413 (1984) (release of sketch showing security measures to be used during execution would unduly interfere with law enforcement). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” 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.*

You inform us the submitted records contain information, which you have marked, regarding the cellular telephone records and numbers of peace officers. You state public disclosure of this information would hinder criminal investigations and interfere in communications with potential suspects, informers, and witnesses. You further state the release of this information would allow criminals and others to screen calls and avoid contact and allow the public to detect patterns and contacts of investigations and investigators. You assert this would compromise the operations in which the officers are currently working. Based on your representations and our review, we find the city may withhold the cellular telephone numbers

²Although you do not explicitly reference section 552.101 of the Government Code in your brief, we understand you to assert this exception based on your arguments.

³We assume the “representative sample” of information 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 those submitted to this office.

you and we have marked that belong to city police officers under section 552.108(b)(1) of the Government Code. However, we are unable to determine if any of the other marked cellular telephone numbers are assigned to city police officers. Accordingly, we must rule conditionally for this information. Therefore, to the extent the remaining marked cellular telephone numbers are assigned to city police officers, they may be withheld under section 552.108(b)(1) of the Government Code. However, to the extent the marked cellular telephone numbers at issue do not belong to city police officers, they may not be withheld under section 552.108(b)(1) of the Government Code. Additionally, we find you have failed to demonstrate how release of any of the remaining information you have marked would interfere with law enforcement and crime prevention. Accordingly, the city may not withhold any of the remaining marked information under section 552.108(b)(1) of the Government Code.

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. We understand you to claim the remaining marked information is excepted from required disclosure under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. For many years, this office determined section 552.101, in conjunction with the common-law right to privacy, protected information from disclosure when “special circumstances” exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court has held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112 (Tex. 2011) (holding “freedom from physical harm is an independent interest protected under law, untethered to the right of privacy”). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. You argue the disclosure of the remaining marked information “could potentially compromise the safety of the officers.” Upon review, we conclude you have made only vague assertions of risk of harm that could result from the disclosure of this information. Accordingly, the city may not withhold any of the remaining marked information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Lastly, although you state that the submitted information may be protected under federal copyright laws, upon careful review of the submitted information, we find no evidence of copyright protection.

In summary, the city may withhold the cellular telephone numbers you and we have marked that belong to city police officers under section 552.108(b)(1) of the Government Code. To the extent the remaining marked cellular telephone numbers are assigned to city police officers, they may be withheld under section 552.108(b)(1) of the Government Code. The city must release the remaining information.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/tch

Ref: ID# 488154

Enc. Submitted documents

c: Requestor
(w/o enclosures)