



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2013

Ms. Mareia L. Schreiber
Legal Assistant
City of Galveston
P.O. Box 779
Galveston, Texas 77553-0779

OR2013-14637

Dear Ms. Schreiber:

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# 496982 (City ORR# 13-307).

The City of Galveston (the "city") received a request for (1) cellular telephone numbers of all city owned cellular telephones for which the city pays the service costs that are in the possession of city council members, city attorneys, assistant city attorneys, city managers, assistant city managers, and city department heads, and (2) telephone records for a specified time period associated with all city owned cellular telephones for which the city pays the service costs that are in the possession of current city council members, the city attorney, the city manager, assistant city managers, and city department heads. You inform us you have released information responsive to the request for telephone numbers. You also inform us you do not have information responsive to portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.1175,

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ diss'm'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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. Section 552.101 encompasses 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. Upon review of your arguments, we find you have not explained how release of the information at issue would lead to a substantial risk of physical harm. Thus, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 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

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.

a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. 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.

You seek to withhold some of the telephone numbers in the submitted information under the common-law informer’s privilege. However, you have not identified any law that has been violated, nor have you identified the telephone numbers you seek to withhold under this exception. Further, you have not demonstrated the information at issue identifies an individual who made the initial report of a violation of law to any entity with enforcement authority. We therefore conclude you have not demonstrated any of the submitted information is protected by the common-law informer’s privilege. Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code on this basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, 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 section 552.024 of the Government Code or section 552.1175 of the Government Code.³ Gov’t Code § 552.117(a)(2). You indicate the submitted information contains the home telephone numbers of peace officers employed by the city or their family members. Accordingly, to the extent the submitted information consists of the home telephone numbers of peace officers employed by the city or their family members, the city must withhold the telephone numbers under section 552.117(a)(2) of the Government Code.⁴ To the extent the information at issue does not pertain to licensed peace officers employed by the city or their family members, it may not be withheld under section 552.117(a)(2).

If any of the remaining telephone numbers in the submitted information consist of home or personal cellular telephone numbers belonging to current or former employees of the city who are not licensed peace officers or to the family members of these employees, then such information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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 of the Government Code.

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

⁴Open Records Decision No. 670 (2001) authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision. ORD 670 at 6.

Id. § 552.117(a)(1). 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). Therefore, the city may only withhold information under section 552.117 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. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). You inform us the submitted information contains the home and cellular telephone numbers of present and former employees who timely requested confidentiality of such information under section 552.024. Therefore, to the extent the submitted information contains the home or cellular telephone numbers of current or former employees of the city who are not licensed peace officers, or the family members of these employees, and the current or former employees timely requested confidentiality under section 552.024, the city must withhold the telephone numbers under section 552.117(a)(1) of the Government Code.⁵ However, the city may only withhold the cellular telephone numbers if the cellular service is not paid for by a governmental body. To the extent the current or former employees at issue did not make a timely election under section 552.024, or the cellular telephone numbers are paid for by a governmental body, the city may not withhold the home and cellular telephone numbers at issue under section 552.117(a)(1) of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Act of May 26, 2013, 83rd Leg., R.S., H.B. 1632, § 3 (to be codified as an amendment to Gov't Code § 552.1175). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" Gov't Code § 552.1175(a)(1). Section 552.1175 is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. You state the submitted information contains the telephone numbers of peace officers not employed by the city. Thus, to the extent the remaining information contains the home or cellular telephone numbers of licensed peace officers of other law enforcement agencies, or their family members, and the peace officers elect to restrict access to the information in accordance with section 552.1175(b), the telephone numbers must be withheld from disclosure under section 552.1175 of the Government Code; however, the city may withhold

⁵Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

the cellular telephone numbers only if the service is not paid for by a governmental body.⁶ If the individuals whose information is at issue are not currently licensed peace officers or do not elect to restrict access to the information in accordance with section 552.1175(b), the information pertaining to them or their family members may not be withheld under section 552.1175.

Section 552.136(b) of the Government Code states “[n]otwithstanding any 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.” Gov’t Code § 552.136(b). We have marked account numbers the city must withhold under section 552.136 of the Government Code.⁷

In summary, to the extent the submitted information contains the home telephone numbers of peace officers employed by the city or their family members, the city must withhold the telephone numbers under section 552.117(a)(2) of the Government Code. To the extent the submitted information contains the home or cellular telephone numbers of individuals who timely requested confidentiality under section 552.024, or their family members, the city must withhold the telephone numbers under section 552.117(a)(1) of the Government Code; however, the city may only withhold the cellular telephone numbers if the cellular service is not paid for by a governmental body. To the extent the remaining information contains the home or cellular telephone numbers of licensed peace officers of other law enforcement agencies, or their family members, and the peace officers elect to restrict access to the information in accordance with section 552.1175(b), the telephone numbers must be withheld from disclosure under section 552.1175 of the Government Code; however, the city may withhold the cellular telephone numbers only if the cellular service is not paid for by a governmental body. The city must withhold the account numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

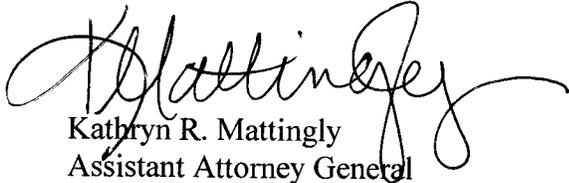
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

⁶Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, date of birth, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure who properly elects to keep this information confidential. *See* Gov’t Code § 552.1175(b), (f).

⁷Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *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(d), (e).

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read 'K. Mattingly', written in black ink.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 496982

Enc. Submitted documents

c: Requestor
(w/o enclosures)