THE ATTORNEY GENERAL OF TEXAS

September 14, 1988

JIM MATTOX
ATTORNEY GENERAL

Honorable Mike Driscoll
Harris County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Open Records Decision No. 506

Re: Whether cellular mobile telephone numbers of county officials and employees are excepted from required disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1331)

Dear Mr. Driscoll:

You ask whether the Texas Open Records Act, article 6252-17a, V.T.C.S., requires disclosure of the cellular mobile telephone numbers of county officials and employees. You indicate that the Harris County Commissioners Court assigned mobile phones to 55 county officials and employees and a state appellate court justice. Many of these phones are portable or are installed in the officials' and employees' private vehicles so that they can be "on call" 24 hours. Other phones are installed in public vehicles assigned to county officials and employees.

You have several concerns about releasing these phone numbers to the public. Because of the nature of cellular mobile phones, the county must pay for all incoming and outgoing calls on these phones. For this reason, you are concerned about the cost to the county of uncontrolled calls made to these officials and employees. In addition, you are concerned that release of the numbers of law enforcement agencies and prosecutors would unduly interfere with law enforcement efforts. You also contend that release of other (non-law enforcement) officials' and employees' numbers could interfere with the officials' and employees' performance of their official duties, particularly during emergencies. Finally, you assert that release of these numbers is the equivalent of releasing the officials' and employees' home telephone numbers.

Under the Open Records Act all information held by governmental bodies is public unless the information falls

within at least one of the act's specific exceptions to disclosure. Attorney General Opinion JM-672 (1987). You claim that sections 3(a)(1), 3(a)(2), 3(a)(9), and 3(a)(17) protect these numbers from disclosure. In addition, by reference to an informal open records letter issued by this office in 1986, you claim that section 3(a)(8) protects the numbers of law enforcement officials and employees.

In an informal open records letter issued on October 23, 1986, this office stated:

> Section 3(a) of the act defines 'public information' as 'information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business.' You claim that the requested information is not within this definition. Harris County, however, has 'collected' and now 'maintains' these numbers, and we do not believe that it can be reasonably argued that the numbers do not relate to official county business. These numbers, therefore, are within the scope of the definition of 'public information.'
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> Section 3(a)(8) of the act, one of the exceptions on which you rely, excepts information which, if released, would 'unduly interfere' with law enforcement or prosecution. Open Records Decision Nos. 434 (1986), 287 (1981). You have advanced arguments for withholding these numbers under this exception. Based on these arguments, as well as our belief that the facts you have provided make it readily apparent that the release of these numbers could seriously impair law enforcement efforts, we conclude that section 3(a)(8) authorizes the county to withhold these numbers. Were the public to have access to the numbers, the purpose of these telephones, which is to insure immediate access to designated county officials and employees, most of whom have specific law enforcement responsibilities, could easily be defeated.

We now confirm that section 3(a)(8) protects the cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.

You claim that sections 3(a)(1), 3(a)(2),[1] 3(a)(9), and 3(a)(17) protect the cellular mobile phone numbers of employees who do not have specific law enforcement responsibilities.

Although sections 3(a)(1), 3(a)(2), and 3(a)(9) focus on different affected groups of persons, the relevant test applicable under each is the common-law privacy test. Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." No statute makes counties' cellular phone numbers confidential. Section 3(a)(2) protects personnel file information the release of which would cause "a clearly unwarranted invasion of personal privacy." In Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin, 1983, writ ref'd n.r.e.), the court held that this section protects personnel file information only if its release would cause an invasion of privacy under the test applicable under section 3(a)(1) of the act. Section 3(a)(9) protects correspondence and communications of elected office-holders when release of the information "would constitute an invasion of privacy." Decisions under section 3(a)(9) rely on the same tests applicable under section 3(a)(1). See Open Records Decision Nos. 241 (1980); 212 (1978); see also Open Records Decision No. 40 (1974) (providing that section 3(a)(9) protects content of information, not fact of communication).

Section 3(a)(1) includes protection for common-law privacy interests. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Texas courts recognize four categories of common-law privacy: (1) appropriation (commercial exploitation of the property value of one's name or likeness), (2) intrusion (invasion of one's physical solitude or seclusion), (3) public disclosure of private facts, and (4) false light in the public eye (a theory analogous to defamation). In the context of open records questions the last two of these arise most frequently. In the context of this case only the third

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1. Your Memorandum Brief actually refers to section 3(a)(3) rather than to section 3(a)(2). Because section 3(a)(3) is the litigation exception and because you do not discuss litigation, however, we assume you intended to refer to section 3(a)(2).

category is relevant.[2] In Industrial Foundation of the South v. Texas Industrial Accident Board, supra, the Texas Supreme Court set forth the primary test for "the public disclosure of private facts" privacy protection applicable under section 3(a)(1). 540 S.W.2d 668, at 685. Information may be withheld under section 3(a)(1) only if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See Id. at 683-85.

In Open Records Decision Nos. 169 (1977) and 123 (1976), this office determined that, as a general rule, home addresses and telephone numbers of public employees are not protected on privacy grounds. See also Open Records Decision Nos. 489, 488 (1988). These two decisions left open the possibility that public employees could show "special circumstances," such as having an unlisted number, to justify withholding their home phone numbers. Such "special circumstances," however, must amount to more than a desire for privacy or a generalized fear of harassment. Open Records Decision No. 169. Public officials and employees have a minimal expectation of privacy with regard to their work phone number.

Moreover, there is a greater public interest in public officials' and employees' work numbers than in their home phone numbers. The county pays for the installation of these phones and is billed for calls made to and from the phones. Presumably, these phones are used by county officials and employees only for conducting official county business. The public has a legitimate interest in public officials' and employees' performance of their duties. Although the Open Records Act does not guarantee access to persons, it does guarantee access to public information. The public certainly has a legitimate interest in information that constitutes the means of obtaining access to public officials and employees while they are at work. Consequently, sections 3(a)(1), 3(a)(2), and 3(a)(9) do not protect the cellular mobile phone numbers of public officials and employees.

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2. Although category 2, physical intrusion, may be implicated by phone calls, see Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973), the actual phone call rather than the release of the number would trigger these concerns.

You also assert that providing the cellular phone numbers of public officials and employees is the equivalent of providing their home phone numbers, and you contend that section 3(a)(17), therefore, protects these numbers. Section 3(a)(17) protects:

> the home addresses and home telephone numbers of each official and employee of a governmental body except as otherwise provided by Section 3A of this Act, and of peace officers as defined by Article 2.12, Code of Criminal Procedure, 1965, as amended, or by Section 51.212, Texas Education Code. . . .

Section 3A provides that public officials and employees may elect to close public access to their home addresses and telephone numbers. The legislature added sections 3A and 3(a)(17) in 1985 in response to decisions from the attorney general that privacy law does not, as a general rule, protect public employees' and officials' home addresses and telephone numbers. See Open Records Decision Nos. 169 (1977); 123 (1976).

The purpose of sections 3A and 3(a)(17) is to protect public officials and employees from being harassed while at home. Arguably, similar considerations apply to cellular mobile phones installed by the county in public officials' and employees' private vehicles. These phones, however, are intended for official county business, not for private use.

The exceptions to public disclosure under the Open Records Act are to be interpreted narrowly, in favor of public disclosure. Art. 6252-17a, § 14(d); see Open Records Decision No. 488 (1988). In two previous decisions, this office refused to extend the scope of sections 3(a)(17) and 3A. In Open Records Decision No. 455 (1987), this office determined that sections 3A and 3(a)(17) do not cover the home addresses and telephone numbers of applicants for public employment or of other persons such as probationers. In Open Records Decision No. 488 (1988), this office determined that sections 3A and 3(a)(17) do not apply to the home addresses and telephone numbers of non-law enforcement public employees who retired prior to the effective date of section 3A. Both decisions focused on the fact that sections 3A and 3(a)(17) expressly applied to "employees" and "officials," not to other groups of people. Similarly, sections 3A and 3(a)(17) apply to home addresses and telephone numbers, not to cellular mobile phone numbers paid for by the county and intended for use at work for county business.

Different considerations apply if the individual official or employee pays for the purchase and installation of and calls to and from a mobile phone in his private vehicle and simply seeks reimbursement for calls made on county business.

Your Memorandum Brief advances valid policy arguments for withholding these numbers:

> While such an exemption is not expressly stated in the Open Records Act, as a matter of public policy, the costs of such telephone calls, the interference with the performance of an official's or employee's duties and the undermining of legitimate interests relating to the preservation of property, public health and safety and unfettered communication between county officials and their employees during emergency situations should be considered when determining whether such information is subject to disclosure.

This office is not, however, at liberty to create new exceptions or to expand existing exceptions absent clear evidence that the legislature intended such expansion. Open Records Decision No. 488. Your policy concerns should be addressed to the legislature.

S U M M A R Y

> Section 3(a)(8) of the Texas Open Records Act, article 6252-17a, V.T.C.S., protects from required public disclosure the cellular mobile phone numbers assigned to public and private vehicles used by county officials and employees with specific law enforcement responsibilities.
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> Sections 3(a)(1), 3(a)(2), 3(a)(9), and 3(a)(17) do not protect the cellular mobile phone numbers installed by and billed to the county for public and private vehicles used by non-law enforcement county officials and employees. Section 3(a)(17) protects the cellular mobile phone numbers of county officials and employees who pay directly for

the purchase of, installation of, and billing to phones installed in their private vehicles if the officials and employees request that the numbers be maintained as confidential pursuant to section 3a of the act.

Very truly yours,

Jim Mattox

JIM MATTOX
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Jennifer S. Riggs
Assistant Attorney General