



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2004

Ms. Michele Austin
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2004-7458

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208340.

The City of Houston (the "city") received a request for information pertaining to use of city cellular telephones. You inform us that the Transportation Security Administration ("TSA") has classified the city's aviation employees' cellular telephone numbers as sensitive security information ("SSI") and that the city will therefore withhold these telephone numbers pursuant to TSA's instructions. *See* 49 CFR §§ 1520.9(a)(3) (requiring person subject to part 1520 to "[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS"); *see generally English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). You claim that other portions of the requested information are excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.136 of the Government Code as well as Rule 508 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.¹

¹We assume that the 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note and you acknowledge that the submitted information is subject to section 552.022 of the Government Code. This section provides that “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). Therefore the submitted information may only be withheld if it is confidential under other law. Section 552.108 is a discretionary exception, it does not constitute “other law” for purposes of section 552.022, and none of the submitted information may be withheld pursuant to this exception. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, because sections 552.101, 552.117, and 552.136 and Rule 508 constitute other law for purposes of section 552.022, we will address your arguments regarding them. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (holding that “Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022”).

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information protected by other statutes. Sections 418.176 through 418.182 of the Government Code, which were added by the Seventy-eighth Legislature, make certain information related to terrorism confidential. You contend that portions of the requested information are confidential under section 418.176, which provides:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Gov’t Code § 418.176.

You inform us that the information you seek to withhold consists of cellular telephone information of police officers, undercover police officers, firefighters, emergency medical service personnel, and bio-terrorism emergency responders. You state that these individuals

are “required to avert, frustrate, uncover, identify, investigate, and provide support in the event of a terrorist attack or related criminal activity.” However, you have failed to explain how billing records for all city employee cellular telephones constitutes “information [that] is collected, assembled, or maintained by or for a governmental entity *for the purpose of* preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity.” Gov’t Code § 418.176 (emphasis added). We therefore find that you have failed to demonstrate how section 418.176 applies to the information at issue, and none of it may be withheld on the basis of this provision. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

Section 552.101 also encompasses common law privacy. In Open Records Decision No. 169 (1977), this office recognized that information that would ordinarily be subject to disclosure may be withheld under section 552.101 in conjunction with common law privacy on a showing of “special circumstances.” This office considers “special circumstances” to refer to a very narrow set of situations in which the release of information would likely cause someone to face “an imminent threat of physical danger.” Open Records Decision No. 169 at 6 (1977). Such “special circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.* To the extent the requested information includes the names and cellular telephone numbers of undercover police officers, we find that the city must withhold such information under section 552.101 on the basis of “special circumstances.” *See* Open Records Decision No. 169 (1977).

We turn now to your arguments regarding Rule 508 of the Texas Rules of Evidence.² This rule provides in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Tex. R. Evid. 508(a)-(b). Thus, an informer’s identity is confidential under Rule 508 if a governmental body demonstrates that an individual has furnished information relating to or

²You claim Rule 508 in conjunction with section 552.101 of the Government Code. However, in Open Records Decision No. 676 (2002), this office reaffirmed that section 552.101 does not encompass the Texas Rules of Evidence and Civil Procedure. *See* Open Records Decision No. 676 at 2 (“We find no authority to support a conclusion that the Texas Rules of Civil Procedure or the Texas Rules of Evidence are constitutional law, statutory law, or judicial decisions so as to fall within section 552.101’s purview”).

assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation and the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 508(c).

You indicate that the submitted information contains telephone numbers of police informants. However, you have not identified, nor are we able to discern from our review, which if any of the telephone numbers pertains to an informant, *see* Gov't Code § 552.301(e)(2) (requiring governmental body to "label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy"), nor have you informed us what law or laws were possibly violated. Further, we note that, although the bill contains telephone numbers of calls sent or received using city cellular telephones, the bill does not indicate the identity of any individual associated with any particular telephone number or the nature of any of the listed calls. Therefore, we find that you have failed to demonstrate to this office that any of the information at issue pertains to "the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law," and none of the information may be withheld on the basis of Rule 508.

You also contend that some of the submitted information may be withheld under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, 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. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.³ Pursuant to section 552.117(a)(2), the city must withhold the home telephone and personal cellular telephone numbers for anyone who is a licensed peace officer and a current or former employee of the city. Pursuant to section 552.117(a)(1), the city must withhold this same information if it pertains to a current or former employee who elected, prior to the city's receipt of this request, to keep such information confidential.

Finally, you assert that some of the submitted information may be withheld under section 552.136 of the Government Code. This section provides:

- (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile

³The term peace officer is defined in article 2.12 of the Texas Code of Criminal Procedure.

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:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

Gov't Code § 552.136. We agree that the account number you seek to withhold constitutes an access device number for purposes of section 552.136 and must be withheld pursuant to this exception. We have also indicated an additional account number in Exhibit 6 that must be withheld on this basis.

In summary, names and cellular telephone numbers of undercover police officers must be withheld under section 552.101 on the basis of "special circumstances." The city must withhold home telephone and personal cellular telephone numbers protected by section 552.117 to the extent that exception applies. The marked account numbers must be withheld under section 552.136. The remaining submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

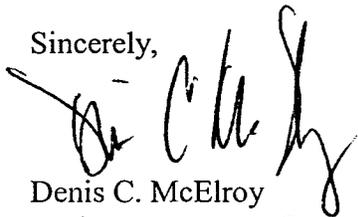
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/sdk

Ref: ID# 208340

Enc. Submitted documents

c: Mr. Ron Nissimov
Houston Chronicle
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(w/o enclosures)