ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2009

Ms. Carol W. Ofenstein
Brewster County Treasurer
107 West Avenue E #4
Alpine, Texas 79830

OR2009-01954

Dear Ms. Ofenstein:

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# 336691.

The Brewster County Treasurer (the "treasurer") received a series of requests from the same requestor for information relating to the Brewster County Sheriff's Department (the "sheriff"), including records of the sheriff's cellular telephone usage. You take no position on the public availability of the submitted information. The sheriff claims, however, that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.[1] We have considered the exception the sheriff claims and reviewed the submitted information. We assume that the treasurer has released any other information that is responsive to these requests, to the extent that the treasurer held or had access to any other responsive information when the treasurer received the requests. If not, then any such information must be released immediately.[2] *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

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[1]*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

[2]We note that the Act does not require the treasurer to release information that did not exist when these requests were received, create responsive information, or obtain information that is not held by or on behalf of the treasurer. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

We first note that the information that the sheriff seeks to withhold has been redacted from the submitted documents. Information must be submitted to the attorney general in a manner that permits this office to determine whether the information is excepted from public disclosure. *See* Gov't Code § 552.301(e)(D). In this instance, we are able to ascertain the nature of the redacted information.[3] In the future, however, you should generally refrain from redacting any information that is submitted to this office for the purpose of requesting the attorney general's decision under the Act unless the information is the subject of a previous determination.[4] *See id.* §§ 552.301(a), .302; Open Records Decision No. 673 (2001) (previous determinations).

We also note that the treasurer did not otherwise comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes the procedures that must be followed in asking this office to determine whether information is excepted from disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) requires a governmental body to ask for the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) provides that the governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information at issue; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us that the treasurer received the instant requests for information on July 22, November 21, and December 10, 2008.[5] You submitted the treasurer's request for this decision, along with the requests for information and the information at issue, on January 7, 2009. Thus, the treasurer did not comply with section 552.301, and the submitted

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[3]In a letter dated January 13, 2009, the sheriff notified us that he would be submitting unredacted copies of his telephone bills to this office. As of the date of this decision, this office had not received those records.

[4]We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

[5]We note that the requestor also submitted a subpoena, which the treasurer did not accept as a request for information under the Act. *See* Gov't Code § 552.0055 (subpoena duces tecum or request for discovery issued in compliance with statute or rule of civil or criminal procedure not considered to be request for information under Act).

information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). The applicability of section 552.101 of the Government Code, which the sheriff claims, can provide a compelling reason for non-disclosure.

We next note that the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). In this instance, the submitted information consists of records of the sheriff's cellular telephone account. Section 552.101 of the Government Code is other law that makes information confidential for the purposes of section 552.022(a)(3). Accordingly, we will address that exception.

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. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In Open Records Decision No. 169 (1977), this office concluded that under certain "special circumstances," common-law privacy will protect information that ordinarily would be subject to public disclosure. *Id.* at 6-7. Such "special circumstances" encompass a very narrow set of situations. *Id.* at 6. They do not include a desire for privacy or "a generalized and speculative fear of harassment or retribution." *Id.* "Special circumstances" do include situations in which release of the information would likely cause someone to face "an imminent threat of physical danger." *Id.* We determine whether a request for information involves such "special circumstances" on a case-by-case basis. *Id.* at 7.

The sheriff informs us that the information redacted from the submitted cellular telephone bills is the telephone number of a confidential informant. The sheriff states that the release of the telephone number could place the informant's life in jeopardy because of the informant's location and the type of information that the informant supplies. The sheriff also states that the informant is not connected with the case that prompted the instant requests for information. Based on the sheriff's representations, we conclude that the treasurer must withhold the informant's telephone number under section 552.101 in conjunction with common-law privacy.[6]

We note that some of the remaining information falls within the scope of section 552.136 of the Government Code, which also is a confidentiality provision for the purposes of

[6]As we are able to make this determination, we do not address the sheriff's other arguments against disclosure.

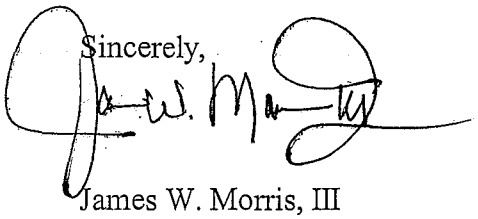
section 552.022(a)(3) of the Government Code.[7] Section 552.136 provides in part that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). The treasurer must withhold the sheriff's cellular telephone account number, which we have marked, under section 552.136.

In summary: (1) the informant's telephone number must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy; and (2) the marked cellular telephone account number must be withheld under section 552.136 of the Government Code. The rest of the submitted information must be released, unless the treasurer has already done so.

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 at (512) 475-2497.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 336691

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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[7]Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Sheriff Ronny Dodson
Brewster County Sheriff's Office
201 West Avenue E
Alpine, Texas 79830
(w/o enclosures)