



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 21, 2014

Ms. Molly Cost  
Assistant General Counsel  
Office of General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2014-21280

Dear Ms. Cost:

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# 543559 (PIR #s 14-3678, 14-3689, and 14-3838).

The Texas Department of Public Safety (the "department") received two requests from different requestors for any bulletins related to a specified topic during specified time periods and a request for all e-mail communications related to the same topic during another specified time period.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.<sup>2</sup>

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<sup>1</sup>We note we have combined these requests, which originally were assigned identification numbers 543559 and 543566, under identification number 543559.

<sup>2</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note Tab A includes court-filed documents subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record[,]” unless the information is expressly made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). Although you assert these documents are excepted from public disclosure under 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body’s interests and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the department may not withhold the court-filed documents in Tab A under section 552.108. However, because section 552.101 of the Government Code excepts from disclosure information made confidential under law, we will address your arguments under this section for the court-filed documents. Further, we will address your argument under section 552.108 for the information not subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with a provision of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.177 provides that information is confidential if it:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

*Id.* § 418.177. Section 418.180 provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

- (1) is part of a report to an agency of the United States;
- (2) relates to an act of terrorism or related criminal activity; and
- (3) is specifically required to be kept confidential:

- (A) under Section 552.101 because of a federal statute or regulation;
- (B) to participate in a state-federal information sharing agreement; or
- (C) to obtain federal funding.

*Id.* § 418.180. The fact that information may be related to a governmental body's security concerns or emergency preparedness does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the information you have marked as well as the information in Tab A, relates to "assessments produced by the [d]epartment and other law enforcement entities of the threats facing persons and property from acts of terrorism and related criminal activity" and "[t]hese assessments are created and maintained for the purpose of preventing, detecting, or investigating acts of terrorism or related criminal activity." You further state release of this information "would cause significant harm to the efforts of law enforcement entities to detect, investigate, and prevent acts of terrorism and related criminal activity." Based on your representations and our review, we find, with the exception of the information we have marked in Tab A, the department must withhold the information you have marked and indicated under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.<sup>3</sup> However, we find you have not demonstrated how any of the remaining information in Tab A relates to an assessment of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity for purposes of section 418.177. Thus, you have not demonstrated the applicability of section 418.177 to any of the remaining information at issue. Accordingly, the department may not withhold any of the remaining information in Tab A under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.

You also state some of the information at issue is subject to section 418.180 of the Government Code. However, we find you have failed to establish how any of the remaining information relates to an act of terrorism or related criminal activity and is required to be kept confidential under section 552.101 of the Government Code because of a federal statute or regulation, to participate in a state-federal information sharing agreement, or to obtain federal

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

funding. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.180 of the Government Code.

You state the remaining information in Tab A, as well as the information in Tab B, is subject to section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is 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[.]” *Id.* § 552.108(b)(1). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor).

You state the remaining information in Tab A, as well as the information in Tab B, “would reveal techniques used to identify potential threats to public safety” and these “techniques are used to detect information that is established by criminal predicate and then passed to investigators in the field as leads to ongoing crimes being committed, in the planning stage of criminal conspiracies . . . [or] that are evolving.” You assert release of the information at issue “would provide specific information that would hamper this ability currently and in the future in regard to public safety threats and criminal organization groups and individuals.” Based upon your representations and our review, we conclude release the remaining information in Tab A, as well as the information in Tab B, would interfere with law enforcement. Accordingly, the department may withhold the remaining information in Tab A, as well as the information in Tab B, under section 552.108(b)(1) of the Government Code.

You seek to withhold Tab C pursuant to section 552.152 of the Government Code. Section 552.152 provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You state Tab C reveals information about a member of the department's Executive Protection Bureau (the "EPB"), which is tasked with providing protective services to the Governor, the Governor's family, and other elected officials. You state "revealing the identities of EPB agents would endanger the agents . . . as well as those they are assigned to protect." Additionally, you state the department does not publicly reveal the identities of the agents who are assigned to protect the governor or other elected officials. Based on your representations and our review, we find you have demonstrated the release of the information we have marked would subject the officer at issue to a substantial threat of harm. Thus, the department must withhold the information we have marked under section 552.152 of the Government Code.<sup>4</sup> However, we find you have failed to demonstrate release of the remaining information at issue would subject an employee or officer to a substantial risk of physical harm. Accordingly, the department may not withhold any of the remaining information in Tab C under section 552.152 of the Government Code.

You argue the remaining information in Tab C is excepted from disclosure under the common-law physical safety exception. Section 552.101 of the Government Code also encompasses information made confidential by the common-law physical safety exception. The Texas Supreme Court has recognized a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011) (holding "freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). Pursuant to the 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 releasing the remaining information in Tab C would endanger an agent of the EPB. Upon review, we find you have not demonstrated the release of the remaining information in Tab C would subject an agent to a substantial risk of physical harm. Accordingly, the department may not withhold the remaining information in Tab C under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

In summary, with the exception of the information we have marked in Tab A, the department must withhold the information you have marked and indicated under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. The department may withhold the remaining information in Tab A, as well as the information in Tab B, under section 552.108(b)(1) of the Government Code. The department must

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

withhold the information we have marked in Tab C under section 552.152 of the Government Code. The department must release the remaining information in Tab C.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/bhf

Ref: ID# 543559

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)