



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 13, 2015

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

OR2015-04911

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# 556748 (PIR No. 14-4836).

The Texas Department of Public Safety (the "department") received two requests for communications between the department and named individuals during a specified period of time and correspondence, purchase orders, and information pertaining to a specified technology and five specified equipment names.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. You state release of the information may implicate the proprietary interests of a third party. You also indicate that release of the submitted information may implicate the interests of the Federal Bureau of Investigation (the "FBI"). Accordingly, you state, and provide documentation showing, you notified the third party and the FBI of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental

¹We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances); *see id.* § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from a third party and the FBI. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you state a portion of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter No. 2012-16607 (2012). In that ruling, we determined the department may withhold the submitted information under section 552.108(b)(1) of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the department may rely on Open Records Letter No. 2012-16607 as a previous determination and withhold the identical information in accordance with that ruling.³ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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). The submitted information contains a purchase agreement and purchase orders that are subject to section 552.022(a)(3). The department must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act

²We 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.

³As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

or other law. *See id.* Although the department raises section 552.108 of the Government Code for this information, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the department may not withhold the information subject to section 552.022(a)(3) under section 552.108. You also claim section 552.101 of the Government Code, which can make information confidential for purposes of section 552.022(a)(3). Therefore, we will determine whether any of the information subject to section 552.022(a)(3) must be withheld under section 552.101 of the Government Code. We will also consider your arguments for the information that is not subject to section 552.022.

Section 552.108(b)(1) of the Government Code 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[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Gov’t Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.,* Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.,* Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state release of the information at issue “would provide wrong-doers, drug traffickers, terrorists, and other criminals with invaluable information concerning specialized electronic surveillance equipment utilized by the [d]epartment in the investigation and detection of crime, allowing suspects to avoid detection or apprehension, and risk the safety of the public.” Upon review, we find the department may withhold the information not subject to section 552.022 under section 552.108(b)(1) of the Government Code.⁴

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

⁴As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

Code § 552.101. This section encompasses information made confidential by other statutes. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”). Section 418.176(a) provides, in part:

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:

...

(2) relates to a tactical plan of the [emergency response] provider[.]

Id. § 418.176(a)(2). The fact that information may relate to a governmental body’s security measures does not make the 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 of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under one of the confidentiality provisions of the HSA must be accompanied by an adequate explanation of 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 subject to section 552.022 relates to security equipment utilized by the department in the investigation and detection of terroristic and criminal activities. You explain release of this information “will compromise law enforcement purposes by enabling terror or criminal suspects to anticipate weakness in law enforcement and alter their methods of operation in order to avoid detection.” Upon review, we find the information at issue relates to a tactical plan maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Thus, the department must withhold the information subject to section 552.022 under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

In summary, the department may rely on Open Records Letter No. 2012-16607 as a previous determination and withhold the identical information in accordance with that ruling. The department may withhold the information not subject to section 552.022 of the Government Code under section 552.108(b)(1) of the Government Code. The department must withhold the information subject to section 552.022 of the Government Code under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

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, 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,



Megan G. Holloway
Assistant Attorney General
Open Records Division

MGH/cbz

Ref: ID# 556748

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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