



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 16, 2015

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

OR2015-04989

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# 556584 (PIR No. 14-5115).

The Texas Department of Public Safety (the "department") received a request for the expenses for a specified operation during a specified time period and the operation's projected expenses for a second specified time period.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.152 of the

¹You state the department sought and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that 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 governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, 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; [and]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(3), (5). The submitted information includes information in an account, voucher, or contract relating to the expenditure of funds by a governmental body that is subject to subsection 552.022(a)(3) and information used to estimate the need for or expenditure of public funds or taxes by a governmental body that is subject to subsection 552.022(a)(5), which must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (5). Although the department raises section 552.108 of the Government Code for some of the information subject to subsections 552.022(a)(3) and (a)(5), this exception is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold any of the information subject to section 552.022 under section 552.108. However, the department raises sections 552.101 and 552.152 of the Government Code for some of this information.

²We note, and you acknowledge, the department did not comply with section 552.301 of the Government Code in requesting this decision for a portion of the submitted information. *See* Gov't Code § 552.301(e). Nonetheless, because sections 552.101 and 552.152 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider the applicability of these sections to the submitted information. *See id.* §§ 552.007, .302, .352.

Because sections 552.101 and 552.152 make information confidential for purposes of section 552.022, we will consider the applicability of these sections to the submitted information. We will also address your claim under section 552.108 of the Government Code for the information not subject to section 552.022.

You seek to withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. 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 information that is made confidential by other statutes, including the HSA. Section 418.176 of the HSA provides in relevant part:

(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 the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

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

Id. § 418.176(a)(1)-(2). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting this section must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the information at issue relates to an ongoing law enforcement operation at the Texas border. You further state the purpose of sending department personnel to this area is to investigate and prevent criminal and terroristic activity. You explain the release of this information would reveal confidential staffing requirements and tactical plans of the department and other law enforcement agencies. On matters of public safety and security, we defer to the representations of law enforcement agencies such as the department. Thus, based on your representations and our review, we find most of the information at issue relates to staffing requirements of a law enforcement agency and is 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 or relates to a tactical plan of the department. Therefore, with the exception of the information we have marked for release, the department

must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.³ However, we find no portion of the remaining information is confidential pursuant to section 418.176 of the Government Code and the department may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, 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). Pursuant to this 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 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. Upon review, we find the department has not demonstrated how disclosure of the remaining information would create a substantial threat of physical harm to an individual. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Next, we address the department's argument under section 552.108 of the Government Code for the remaining information not subject to section 552.022 of the Government Code. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989). 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." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

(Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The department states some of the remaining information discusses ongoing operations by the department and other law enforcement agencies at the Texas border to detect, prevent, and respond to criminal activities. The department explains the information at issue details equipment utilized for these operations and strategies employed in these operations. The department states revealing the information at issue would provide wrong-doers, drug traffickers, terrorists, and other criminals with invaluable information concerning the efforts of law enforcement to detect and prevent criminal activity on the border. Upon review, we find the department has demonstrated release of the information we have marked would interfere with law enforcement. Thus, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. However, the department has failed to demonstrate how release of the remaining information would interfere with law enforcement, and the department may not withhold it under section 552.108(b)(1).

Section 552.152 of the Government Code 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. Upon review, we find the department has not demonstrated the release of the remaining information would subject an employee or officer to a substantial risk of physical harm. Accordingly, the department may not withhold the remaining information under section 552.152 of the Government Code.

In summary, with the exception of the information we have marked for release, the department must withhold the information you have marked, and the additional information we have marked, under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The remaining information must be released.

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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/bhf

Ref: ID# 556584

Enc. Submitted documents

c: Requestor
(w/o enclosures)