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ATTORNEY GENERAL OF TEXAS

September 16, 2015

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

OR2015-19323

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# 578014 (PIR Nos. 15-2833, 15-3645, and 15-3851).

The Texas Department of Public Safety (the "department") received three requests from two different requestors for the department's current roster of employees. You state the department will release some responsive information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.139, and 552.152 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestors do not seek the employees' dates of birth, which are contained in the submitted information. Accordingly, the employees' dates of birth in the submitted information are not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the department is not required to release such information in response to this request.²

¹ Although you do not raise sections 552.102 or 552.139 in your brief, we understand you to raise these sections based on your markings in the submitted information.

² As we are able to reach this conclusion, we do not address your other arguments to withhold this information.

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:

(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:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(2). The submitted information contains the name, sex, ethnicity, salary, title, and dates of employment of public employees, which are subject to section 552.022(a)(2). This information must be released unless it is made confidential under the Act or other law. *See id.* Although the department seeks to withhold this information under section 552.108 of the Government Code, section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential under the Act. *See* 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 information at issue may not be withheld under section 552.108. However, you also raise sections 552.101, 552.139, and 552.152 of the Government Code. Because these sections can make information confidential under the Act, we will consider their applicability to the information at issue. We will also address your argument under section 552.108 for the information not subject to section 552.022.

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 section encompasses information protected by other statutes, including section 418.176 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.176(a) reads as follows:

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;
- (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.

Id. § 418.176(a). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under section 418.176. *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 confidentiality provision, a governmental body asserting section 418.176 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the information in Tab C, which pertains to employees in the department's Executive Protection Bureau, relates to employees whose job is to protect elected officials and their families "from acts of terrorism and other criminal activity." You further state that "[e]ven revealing [this] information with the names and other identifying information redacted would indicate the number of agents," which would be detrimental to the department. Based on your representations and our review, we find the information in Tab C was collected, assembled, or maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and relates to the staffing requirements of an emergency response provider. *See id.* § 418.176(a)(1). Accordingly, the department must withhold Tab C under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.³ However, we find the information in Tabs A and B, which pertains to employees in the department's Criminal Investigations and Intelligence and CounterTerrorism Divisions, respectively, is not confidential under section 418.176, and the department may not withhold it under section 552.101 of the Government Code on that ground.

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.

Id. § 552.152. As noted above, you state the information in Tabs A and B relates to employees assigned to the department's Criminal Investigations and Intelligence and CounterTerrorism Divisions, respectively. You claim employees in the Criminal Investigations Division "frequently work in an undercover capacity, and release of their names would . . . compromise their effectiveness as undercover officers [and] also expose them and their families to an imminent threat of physical danger." Based on your representations and our review, we find you have demonstrated the release of the information

³As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information

pertaining to the undercover officers in Tab A would subject them to a substantial threat of physical harm. Thus, the department must withhold all the information pertaining to the undercover officers listed in Tab A under section 552.152 of the Government Code.⁴ However, we find you have failed to demonstrate how release of the remaining information would subject any of the officers or other employees to a substantial risk of physical harm. Accordingly, the department may not withhold any of the remaining information under section 552.152 of the Government Code.

Section 552.101 of the Government Code also encompasses 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 (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 raise the common-law physical safety exception for the remaining information. However, upon review, we find the department has not demonstrated the release of any of the remaining information would subject any person to a substantial threat of physical harm. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

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 (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section 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.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department’s use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules,

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.

and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You argue release of the remaining information would interfere with law enforcement and jeopardize employee safety. However, upon review, we find you have failed to demonstrate how the release of the remaining information would interfere with law enforcement and crime prevention. Accordingly, the department may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

Gov't Code § 552.139(a). Section 2059.055 of the Government Code provides in part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). We understand employees' web identification numbers can be used as unique user codes to access the secure Employee Information System. Based on our review of the submitted information, we find the web identification numbers relate to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of the computer network as contemplated in section 552.139(a). Accordingly, the department must withhold the web identification numbers in the remaining information under section 552.139(a) of the Government Code.

We note the remaining information contains employees' social security numbers. Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁵ *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, we are unable to determine whether the employees are currently licensed peace officers as defined by article 2.12. Thus, we must rule conditionally. To the extent the employees are currently licensed peace officers as defined by article 2.12, the department must withhold their social security numbers in the remaining information under section 552.117(a)(2) of the Government Code. However, to the extent the employees are not licensed peace officers as defined by article 2.12, the department may not withhold their social security numbers under section 552.117(a)(2).

If the employees are not licensed peace officers, then their social security numbers may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the employees timely requested confidentiality under section 552.024 of the Government Code, the department must withhold their social security numbers in the remaining information under section 552.117(a)(1) of the Government Code. Conversely, if the employees did not timely request confidentiality under section 552.024, then the department may not withhold their social security numbers under section 552.117(a)(1).⁶

In summary, the department must withhold Tab C under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department must withhold all the information pertaining to the undercover officers listed in Tab A under

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release with out the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

section 552.152 of the Government Code. The department must withhold the employees' web identification numbers in the remaining information under section 552.139(a) of the Government Code. To the extent the employees are currently licensed peace officers as defined by article 2.12, the department must withhold their social security numbers in the remaining information under section 552.117(a)(2) of the Government Code. If the employees are not licensed peace officers, then, to the extent the employees timely requested confidentiality under section 552.024 of the Government Code, the department must withhold their social security numbers in the remaining information under section 552.117(a)(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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 578014

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)