



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 24, 2015

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

OR2015-20026

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# 579456 (PIR # 15-3076).

The Texas Department of Public Safety (the "department") received a request for specified categories of information pertaining to all department employees. You state the department will release some of the requested information. 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 representative sample of information.¹

Initially, we note you have only submitted information pertaining to members of the department's Criminal Investigations and Intelligence and Counter Terrorism Divisions (the "divisions") and Executive Protection Bureau (the "bureau"). To the extent any responsive information pertaining to the remaining department employees existed on the date the department received the request, we assume the department has released it. If the department has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

concludes no exceptions apply to requested information, it must release information as soon as possible).

We note the employees' names, salaries, positions, and dates of hire are subject to section 552.022 of the Government Code. Section 552.022(a)(2) provides the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body are expressly public under section 552.022 of the Government Code and may not be withheld unless it is made confidential under the Act or other law. Gov't Code § 552.022(a)(2). Although you assert this information is excepted from disclosure under section 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 information subject to section 552.022 under section 552.108. However, because sections 552.101 and 552.152 of the Government Code can make information confidential under the Act, we will address your arguments under these exceptions for the information subject to section 552.022. Further, we will address your argument under section 552.108 for the remaining information.

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.² 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 pertaining to the undercover officers in Tab A would subject them to a substantial threat of

²As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information

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.³ 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

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, 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) exempts 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).

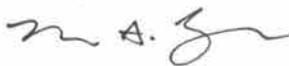
You argue release of the remaining information would interfere with law enforcement and jeopardize employee safety. However, upon review, we find you have failed to demonstrate how the release of the remaining information would interfere with law enforcement and crime prevention. Accordingly, the department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

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 section 552.152 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,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/cbz

Ref: ID# 579456

Enc. Submitted documents

c: Requestor
(w/o enclosures)