



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 25, 2016

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2016-08913B

Dear Ms. Grace:

This office issued Open Records Letter No. 2016-08913A (2016) on May 27, 2016. Since the date of that letter, the Austin Police Department (the "department") informs us the United States Customs and Border Protection ("CBP") states it possesses a law enforcement interest in some of the information at issue, and the information at issue should be withheld. Thus, we must address the interests of CBP. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on May 27, 2016. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 624496 (PIR# 24384).

The department received a request for seven categories of information related to specified software. You state you will release some information to the requestor. You claim portions of the submitted information are excepted under section 552.108 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Geofeedia, Inc. ("Geofeedia"); PATHAR, Inc. ("PATHAR"); and Snaprends. Accordingly, you state you notified Geofeedia, PATHAR, and Snaprends of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released. *See id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from PATHAR. We have also received comments from CBP. *See* Gov't Code § 552.304 (interested party

may submit written comments regarding availability of requested information). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, PATHAR argues its submitted information is not responsive to the request for information. A governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). In this instance, the department has reviewed its records and determined the submitted information is responsive to the request. Accordingly, we conclude the department has made a good faith effort to relate the request to information the department holds and we will determine whether the department must release the information at issue under the Act.

Next, you state portions of the requested information were the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-19006 (2015) and 2015-26269 (2015). In Open Records Letter No. 2015-19006, we ruled, (1) the department must release any additional responsive information to the extent this information existed and was maintained by the department on the date it received the request; (2) a portion of the information is not public information and the department need not release it in response to the request for information; and (3) the department may withhold the information we marked under section 552.108(b)(1) of the Government Code. In Open Records Letter No. 2015-26269 we ruled the department must withhold the submitted information under section 552.110(b) of the Government Code. There is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the department must continue to rely on Open Records Letter Nos. 2015-19006 and 2015-26269 as previous determinations and withhold or release the identical information in accordance with those rulings. *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 information is or is not excepted from disclosure). However, we will address your arguments for the information not subject to the prior rulings.

Next, you acknowledge, and we agree, the department failed to meet the statutory deadlines imposed by section 552.301 of the Government Code with respect to PATHAR's information. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the

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

Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although the department seeks to withhold PATHAR's information under section 552.108 of the Government Code, section 552.108 is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). However, the need of a governmental body, other than the one that failed to timely seek an open records decision, to withhold information under section 552.108 can provide a compelling reason under section 552.302. Open Records Decision No. 586 (1991). You assert, and provide documentation showing, CBP has a law enforcement interest in the information at issue. Therefore, we will consider whether the department may withhold PATHAR's information on behalf of CBP under section 552.108. We will also consider PATHAR's arguments against disclosure of its information.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Geofeedia or Snaptrrends explaining why their information should not be released. Therefore, we have no basis to conclude Geofeedia or Snaptrrends has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest Geofeedia or Snaptrrends may have in the information.

Section 552.108(b)(1) of the Government Code exempts 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) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See*

Gov't Code §§ 552.108(b)(1), .301 (e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. 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 Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no pet.). 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 of the Government Code 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).

First, we address your arguments under section 552.108(b)(1) of the Government Code. You state the information you have marked “reflects details concerning specific law enforcement investigative tools and techniques the department has and will continue to utilize when conducting criminal investigations.” You further state “release of the information in question would reveal specific details about the technological tools, including strengths and limitations,” which “would interfere with the department’s ability to utilize these investigative tools.” Based on your representations and our review, we agree release of the information we have marked would interfere with law enforcement. Accordingly, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. However, we find you have failed to demonstrate release of the remaining information at issue 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).

Next, we address CBP’s arguments against disclosure of PATHAR’s information under section 552.108(b)(1). CBP states the information at issue relates to ongoing law enforcement efforts by CBP. CBP contends disclosure of this information “would reveal records compiled for law enforcement purposes, interfere with enforcement, and disclosure of investigative techniques, as well as specific intelligence regarding dangerous criminal entities and individuals.” CBP further asserts, “release of this information would permit criminals to circumvent CBP law enforcement” and would reveal specific targets of investigation. Based on these representations and our review, we agree release of the information at issue would interfere with law enforcement. Accordingly, the department may withhold PATHAR’s information on behalf of CBP under section 552.108(b)(1) of the Government Code.²

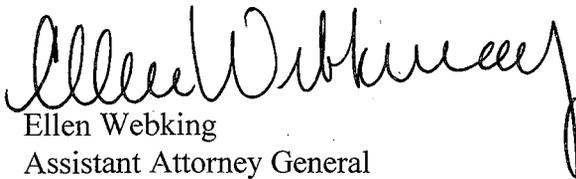
²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, the department must continue to rely on Open Records Letter Nos. 2015-19006 and 2015-26269 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The department may withhold PATHAR's information at issue on behalf of CBP under section 552.108(b)(1) of the Government Code. The department must release the remaining information.

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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 624496

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)

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