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ATTORNEY GENERAL OF TEXAS

May 16, 2016

Mr. Nick Lealos  
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Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2016-11243

Dear Mr. Lealos:

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# 610582 (PIR # 16-1139).

The Department of Public Safety (the "department") received a request for eight categories of information pertaining to border security operations. You state you will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.152 of the Government Code. You also state you notified the United States Border Patrol (the "border patrol") and the Texas Parks and Wildlife Department ("TPWD") 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. We have received comments from TPWD. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup>We 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.

Initially, we note some of the submitted information may be the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-17735 (2015) and 2015-18903 (2015). In response to Open Records Letter Nos. 2015-17735 and 2015-18903, the department has filed lawsuits against our office. *See Tex. Dep't of Pub. Safety v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-15-003974 (201st Dist. Ct., Travis County, Tex.); *Tex. Dep't of Pub. Safety v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-15-004690 (53rd Dist. Ct., Travis County, Tex.). Accordingly, with regard to the information at issue in these lawsuits, we will allow the trial courts to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. However, to the extent the information in the current request is not encompassed by these lawsuits, we will consider the exceptions you raise.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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 includes information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is 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 or other law. *See id.* The department asserts the information at issue is excepted from release under section 552.108 of the Government Code. However, this section is discretionary 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), 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. However, you claim the information subject to section 552.022(a)(3), and the remaining submitted information, is excepted under sections 552.101 and 552.152 of the Government Code. Because these sections make information confidential under the Act, we will address their applicability to the information subject to section 552.022(a)(3), as well as the remaining information. We will also address the applicability of section 552.108 to the information that is not subject to section 552.022(a)(3).

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). 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.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why the 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) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 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 (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 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).

The department and TPWD argue the information not subject to section 552.022(a)(3) of the Government Code should be withheld under section 552.108(b)(1). You state “[o]verall, these records discuss ongoing operations [...] to detect, prevent, and respond to terroristic threats and other criminal activities” and release would provide wrongdoers with “invaluable information concerning the law enforcement efforts at the Texas border.” Having considered the arguments and reviewed the information at issue, we agree the release of some of the information at issue, which we have marked and indicated, would interfere with law enforcement. Accordingly, the department may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code.<sup>2</sup> However, we find you have not demonstrated how any of the remaining information at issue would interfere with law enforcement or crime prevention. Accordingly, the department may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t

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

Code § 552.101. This section encompasses information protected by other statutes, such as section 418.176 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 418.176 provides in 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;

(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 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 section 418.176 must adequately explain how the responsive information falls within the scope of the provision. *See id.* § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The department argues the remaining information is confidential under section 418.176. The department states information pertaining to travel expenses would reveal the names and number of personnel participating in the operation and would “compromise the employees’ ability to perform their duties, as well as their safety.” The department states disclosure of the hotel contracts would “unveil critical details about how [department] personnel are deployed.” The department asserts disclosure of the information pertaining to illegal alien apprehensions would reveal strategic information regarding “ongoing operations by the [d]epartment and other law enforcement agencies at the Texas border to detect, prevent, and respond to terroristic threats and other criminal activities.” Upon review, we find some of the remaining information at issue relates to the staffing requirements and tactical plan of emergency response providers, and is maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.<sup>3</sup> However,

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

we find the department has failed to demonstrate the applicability of section 418.176 to the remaining information, and the department may not withhold it under section 552.101 of the Government Code on that ground.

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 the 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.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."<sup>4</sup> Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the department must withhold the partial credit card number we have marked under section 552.136 of the Government Code.

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 [required public disclosure] 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. The department and TPWD argue the remaining information should be withheld under section 552.152. Upon review, we find the department and TPWD have failed to demonstrate 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 any of the remaining information under section 552.152 of the Government Code.

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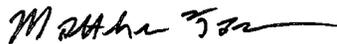
<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, we will allow the trial courts to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. The department may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department must withhold the partial credit card number we have marked under section 552.136 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](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,



Matthew Taylor  
Assistant Attorney General  
Open Records Division

MHT/dls

Ref: ID# 610582

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)