



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 21, 2016

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-001

OR2016-14023

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# 615237 (PIR# 16-1886).

The Texas Department of Public Safety ("DPS") received a request for all documents related to services, technology and/or equipment acquired by DPS from named vendors during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. You also state release of this information may implicate the proprietary interests of the Federal Bureau of Investigation (the "FBI"); Harris Corporation ("Harris"); Pen-Link, Ltd. ("Pen-Link"); and Vigilant Video d/b/a Vigilant Solutions, Inc. ("Vigilant"). Accordingly, you state, and provide documentation showing, you notified these parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 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 arguments from Harris and Pen-Link. We have considered the exceptions claimed and reviewed the submitted information.

Initially, you state some of the requested information was the subject of previous requests for a ruling, as a result of which this office issued Open Records Letters No. 2012-16607 (2012), 2014-22890 (2014), 2015-01114 (2015), and 2015-06678 (2015). You state the law, facts, or circumstances on which the prior rulings were based have not changed. Thus, DPS must continue to rely on Open Records Letters No. 2012-16607, 2014-22890, 2015-01114, and 2015-06678 as previous determinations and withhold or release the information at issue 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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 the FBI or Vigilant explaining why the submitted information should not be released. Therefore, we have no basis to conclude those parties have protected proprietary interests 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, DPS may not withhold any portion of the submitted information related to those parties on the basis of any proprietary interest the FBI or Vigilant may have in the information.

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:

...

(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). Portions of the submitted information consist of invoices relating to the expenditure of public funds subject to section 552.022(a)(3) of the Government Code. This information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under section 552.108 of the Government Code. However, section 552.108 is a discretionary exception 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, DPS may not withhold the information subject to section 552.022(a)(3) under section 552.108. However, you claim section 552.101 for the submitted information. Harris and Pen-Link also assert section 552.110 for the submitted information. Because sections 552.101 and 552.110 make information confidential under the Act, we will address the applicability of these exceptions to the information subject to section 552.022(a)(3) of the Government Code. Additionally, we will consider the arguments under sections 552.101, 552.108, and 552.110 for the information not subject to section 552.022(a)(3).

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, 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 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 contend release of the submitted information “would provide wrong-doers, drug traffickers, terrorists, and other criminals with invaluable information concerning specialized equipment utilized by [DPS] in the investigation and detection of crime[.]” You further argue release of this information would “jeopardize the . . . future use of this specialized equipment . . . [thereby] compromis[ing] investigative efforts and allow[ing] criminals to employ techniques to defeat or detect this equipment, rendering it ineffective.” Upon review, we find you have failed to establish the submitted information 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, or a tactical plan of an emergency response provider, or consists of a list or compilation of pager or telephone numbers of an emergency response provider. *See id.* § 418.176(a). Therefore, the submitted information is not confidential under section 418.176, and DPS may not withhold it under section 552.101 of the Government Code on that ground.

Harris and Pen-Link state portions of their information are excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” *Id.* § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5 (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).

Harris and Pen-Link argue portions of their information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. We note the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Upon review, we find Harris and Pen-Link have not made a specific factual or evidentiary showing demonstrating the release of the remaining information would cause it substantial harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by

specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1989) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, DPS may not withhold any of the information at issue under section 552.110(b) of the Government Code.

Harris seeks to withhold some of its information under the doctrine of common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find Harris has failed to demonstrate the information at issue is highly intimate or embarrassing and not of legitimate public interest. Accordingly, DPS may not withhold the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(b)(1) 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); *see City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no writ) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See e.g.* Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the release of the information not subject to section 552.022(a)(3) of the Government Code would interfere with law enforcement or prosecution of crime. You state the release of the information at issue “would provide . . . criminals with invaluable

information concerning specialized equipment utilized by [DPS] in the investigation and detection of crime.” Upon review, we find you have failed to demonstrate the release of the information at issue would interfere with law enforcement or prosecution efforts. Accordingly, DPS may not withhold any of the information at issue under section 552.108(b)(1) of the Government Code.

We note some of the information not subject to section 552.022(a)(3) of the Government Code may be subject to section 552.117 of the Government Code.¹ Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, personal pager and cellular telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Gov’t Code § 552.117(a)(2). We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, however, it is unclear whether the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12. If the individuals at issue are currently licensed peace officers as defined by article 2.12, then DPS must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, DPS may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. Conversely, if the individuals at issue are not currently licensed police officers as defined by article 2.12, the information at issue may not be withheld under section 552.117(a)(2) of the Government Code.

If the individuals at issue are not currently licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, 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. Gov’t Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* ORD 506 at 5-6. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). DPS may only withhold the information at issue

¹The 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 No. 481 (1987), 480 (1987), 470 (1987).

under section 552.117(a)(1) if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals at issue made timely elections under section 552.024, DPS must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, DPS may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. Conversely, if the individuals at issue did not make timely elections under section 552.024, their information may not be withheld under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1)-(2). Portions of the submitted information contain license plate information and photographs of license plates. However, we are unable to determine whether this information constitutes actual motor vehicle record information for purposes of section 552.130 or whether it is fictitious motor vehicle record information created as a sample for purposes of responding to the request for proposals. Thus, to the extent the information at issue constitutes actual motor vehicle record information, DPS must withhold the license plate information and photographs of license plates under section 552.130 of the Government Code. To the extent the information at issue consists of fictitious motor vehicle record information, it may not be withheld under section 552.130 of the Government Code.

In summary, DPS must continue to rely on Open Records Letters No. 2012-16607, 2014-22890, 2015-01114, and 2015-06678 as previous determinations and withhold or release the information at issue in accordance with those rulings. If the individuals at issue are currently licensed peace officers as defined by article 2.12, then DPS must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, DPS may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. If the individuals at issue are not currently licensed peace officers and if the individuals at issue made timely elections under section 552.024, DPS must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, DPS may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. To the extent the information at issue constitutes actual motor vehicle record information, DPS must withhold the license plate information and photographs of license plates under section 552.130 of the Government Code. DPS 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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/dls

Ref: ID# 615237

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)