



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 10, 2015

Ms. Evelyn W. Kimeu
Staff Attorney
Houston Police Department
1200 Travis
Houston, Texas 77002-6000

OR2015-14071

Dear Ms. Kimeu:

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# 571039 (ORU No. 15-2539).

The Houston Police Department (the "department") received a request for eight categories of information pertaining to the department's use of specified equipment.¹ You state you do not have information responsive to some categories of the request.² You state you will release some information to the requestor. You claim the submitted information is excepted

¹We understand the department sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

from disclosure under sections 552.101, 552.107(2), and 552.108 of the Government Code.³ You state release of the submitted information may implicate the proprietary interests of a third party. You also state that release of the submitted information may implicate the interests of the Federal Bureau of Investigation (the “FBI”). Accordingly, you state, and provide documentation showing, you notified the third party and the FBI of the request for information and of their right to submit arguments to this office as to why the submitted information 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); *see* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴ We have also received and considered comments submitted by the requestor. *See id.* § 552.304.

Initially, you state some of the requested information was the subject of previous requests for rulings, as a result of which this office issued Open Records Letter Nos. 2006-14725 (2006), 2012-12000 (2012), and 2014-11844 (2014). You state the law, facts, or circumstances on which the prior rulings were based have not changed. Thus, the department may continue to rely on Open Records Letter Nos. 2006-14725, 2012-12000, and 2014-11844 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).

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:

³We note, and you acknowledge, the department did not comply with the requirements of section 552.301(e) of the Government Code in providing some of the information at issue. *See* Gov’t Code § 552.301(e). Nonetheless, because section 552.107(2) of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the information at issue. *See id.* §§ 552.007, .302, .352.

⁴We 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.

...

(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. Although the department seeks to withhold this information under section 552.108 of the Government Code, this section 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, the department may not withhold any of the information subject to section 552.022(a)(3) under section 552.108. However, because section 552.101 of the Government Code can make information confidential for purposes of section 552.022, we will consider the applicability of this section to the information subject to section 552.022. Further, we will address the department's argument under section 552.108 for the submitted 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 made confidential by other statutes. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.176(a) provides, in part:

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:

...

(2) relates to a tactical plan of the [emergency response] provider[.]

Id. § 418.176(a)(2). The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under one of the confidentiality provisions of the HSA must be

accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You inform us the information subject to section 552.022 relates to security equipment and technology utilized by the department in the investigation and detection of criminal activities. You explain release of this information will damage the ability of the department to investigate criminal activity and would “adversely impact criminal and national security investigations.” You state knowledge of the information at issue could enable suspects to “tailor their criminal enterprises to better hide their activities or even exploit weaknesses in the systems to confuse or mislead law enforcement” and avoid detection. Upon review, we find the information at issue relates to a tactical plan maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Thus, the department must withhold the information subject to section 552.022 of the Government Code under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.⁵

Section 552.107(2) of the Government Code provides information is excepted from disclosure if “a court by order has prohibited disclosure of the information.” *Id.* § 552.107(2). Article 18.20 of the Code of Criminal Procedure permits a court, on application by a prosecutor, to issue an order authorizing the interception of wire, oral, or electronic communications; the installation or use of a pen register, ESN reader, trap and trace device, mobile tracking device, or similar equipment; or the disclosure of a stored communication, information subject to an administrative subpoena, or information subject to access under article 18.21 of the Code of Criminal Procedure. *See* Crim. Proc. Code art. 18.20, §§ 6, 9; *see also id.* § 1 (defining terms). Section 11 of article 18.20 states “[t]he judge shall seal each application made and order granted under this article.” *Id.* § 11. Article 18.21 of the Code of Criminal Procedure permits a court, on application by a prosecutor, to issue an order authorizing the installation and use of a pen register, ESN reader, trap and trace device, or similar equipment. *See* Crim. Proc. Code art. 18.21, § 2; *see also id.* § 1 (defining terms). Article 18.21 also permits a court to issue an order authorizing the disclosure of contents, records, or other information of a wire or electronic communication. *See id.* § 5. Section 2 of article 18.21 states the court “shall seal an application and order granted under this article.” *Id.* § 2(g). In this instance, Exhibit 3 consists of court orders granted under articles 18.20 and 18.21 and a corresponding application for the orders. You state, and the orders and application likewise reflect, that all the documents at issue are filed under seal. As the documents at issue have been sealed by a court pursuant to articles 18.20 and 18.21, we conclude the department must withhold Exhibit 3 under section 552.107(2) of the Government Code.

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Section 552.108(b)(1) of the Government Code excepts 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 reasonably 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 (Tex. 1977). 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). Section 552.108(b)(1) is not applicable, however, 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 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the remaining information not subject to section 552.022, if released, would interfere with law enforcement or prosecution of crime. You state the release of the information at issue would reveal sensitive capabilities possessed by the department and allow individuals to employ countermeasures to avoid detection by the department. You further state the release of this information would potentially endanger the lives and physical safety of law enforcement officers and other individuals, as well as adversely impacting criminal and national security investigations. Based on your representations and our review, we agree the release of the information at issue would interfere with law enforcement. Accordingly, the department may withhold the remaining information not subject to section 552.022 under section 552.108(b)(1) of the Government Code.⁶

In summary, the department may continue to rely on Open Records Letter Nos. 2006-14725, 2012-12000, and 2014-11844 as previous determinations and withhold or release the information at issue in accordance with those rulings. The department must withhold the information subject to section 552.022 of the Government Code under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

department must withhold Exhibit 3 under section 552.107(2) of the Government Code. The department may withhold the remaining information not subject to section 552.022 under section 552.108(b)(1) of the Government Code.

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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 571039

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Federal Bureau of Investigation
c/o Ms. Evelyn W. Kimeu
Staff Attorney
Houston Police Department
1200 Travis
Houston, Texas 77002-6000
(w/o enclosures)