



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 29, 2016

Ms. P. Armstrong
Assistant City Attorney
Criminal Law and Police Section
City of Dallas
1400 South Lamar Street
Dallas, Texas 75215

OR2016-26355

Dear Ms. Armstrong:

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# 635964 (ORR# 2016-16682).

The Dallas Police Department (the "department") received a request for all text messages of two named employees that involve official business since July 1, 2016. The department states it is withholding some of the submitted information pursuant to sections 552.024(c)(2) and 552.1175(f) of the Government Code.¹ The department claims some of the remaining information is excepted from disclosure under sections 552.101 and 552.139 of the

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b) the Government Code, without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, date of birth, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure who properly elects to keep this information confidential. *See id.* § 552.1175(f).

Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

Initially, the department acknowledges, and we agree, it failed to comply with the procedural requirements of section 552.301(e) of the Government Code. *See* Gov't Code § 552.301(b), (e). 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 the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.107 of the Government Code is discretionary in nature and serves only to protect a governmental body's interests. As such, the department's claim under this section is not a compelling reason to overcome the presumption of openness. *See* Open Records Decision 676 at 12 (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the department may not withhold any of the submitted information under section 552.107. Sections 552.101 and 552.139 of the Government Code make information confidential and, thus, can provide compelling reasons to overcome the presumption of openness caused by a failure to comply with section 552.301. However, this office has concluded section 552.101 does not encompass discovery privileges. Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990) (predecessor statute). Accordingly, the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503. Nevertheless, we will address the department's remaining arguments to withhold the information at issue under sections 552.101 and 552.139.

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 section 418.176(a) of the Government Code, which provides, in part, as follows:

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing,

²We 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.

detecting, responding to, or investigating an act of terrorism or related criminal activity and:

...

(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)(3). 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 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* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The department asserts release of the cellular telephone number of the Director of the Federal Bureau of Investigation could interfere with critical communication and intelligence sharing and jeopardize the department's efforts to prevent, detect, investigate and respond to any reports of terrorism or other related criminal activity. Upon review, we conclude the information at issue was collected, assembled, or maintained by or for the department for the purpose of responding to an act of terrorism or related criminal activity and falls within the scope of section 418.176(a)(3). *See id.* § 418.176(a)(3). Therefore, the department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

Section 552.139 of the Government Code provides in relevant part the following:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, to restricted information under 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information

containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). The department states the information it has marked under section 552.139 relates to access codes used to access and operate mobile devices linked to the department's secure network. The department also asserts release of this information may result in a breach of the network's security. Upon review, we agree the department must withhold the information it has marked under section 552.139 of the Government Code.³

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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we agree some of the remaining information, which it has marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with common-law privacy.

To conclude, the department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code and under section 552.139 of the Government Code. The department must also withhold the information it has marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information.

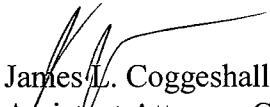
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

³As our ruling is dispositive, we do not address the other argument of the department to withhold this information.

[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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bw

Ref: ID# 635964

Enc. Submitted documents

c: Requestor
(w/o enclosures)