



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 1, 2016

Ms. Jessica Vu  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2016-26546

Dear Ms. Vu:

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# 636929 (OOG ID# 16-314).

The Office of the Governor (the "governor's office") received a request for all correspondence between the governor's office and the Federal Bureau of Investigation (the "FBI") regarding the FBI's review of specified cases. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of the FBI. Accordingly, you state, and provide documentation showing, you notified the FBI of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have received arguments from the FBI. We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>1</sup> *Id.* § 552.101. Section 552.101 of the Government Code encompasses information made confidential by judicial decision and the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception

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<sup>1</sup>Although the FBI does not raise section 552.101 of the Government Code in its brief, we understand the FBI to raise this exception based on the substance of its arguments.

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.

The FBI argues release of the identifying information of certain FBI employees in the submitted information would allow contact with these individuals that “could rise to the level of a threat to the physical safety[.]” However, upon review, we find the FBI has not demonstrated the release of any of the information at issue would subject anyone to a specific risk of harm. Accordingly, the governor’s office may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

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 the FBI has failed to demonstrate any of the submitted information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the governor’s office may not withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

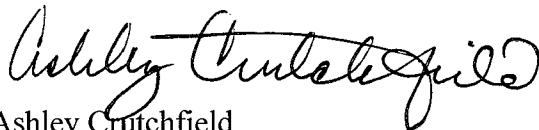
Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); see *City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (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).

The FBI seeks to withhold the identifying information of certain FBI employees in the submitted information under section 552.108(b)(1). The FBI states "FBI employees are assigned to handle tasks related to the official investigations and law enforcement activities carried out by the FBI." The FBI further states all FBI employees "have [t]op [s]ecret security clearances and thus have access to and knowledge of significant amounts of highly sensitive, classified information." Thus, the FBI argues release of the information at issue would allow criminals or adversaries to target these employees to obtain unauthorized access to sensitive information. However, we note the submitted sample letter, which contains the information at issue, is available on the FBI's website. Thus, we find the FBI has failed to demonstrate the release of the information at issue would interfere with law enforcement or prosecution efforts. Accordingly, the governor's office may not withhold any of the submitted information under section 552.108(b)(1) of the Government Code. As no further exceptions have been raised, the governor's office must release the submitted 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](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/bw

Ref: ID# 636929

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)