



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 7, 2017

Ms. Erin D. Thorn  
Assistant District Attorney  
County of Hidalgo  
100 East Cano  
Edinburg, Texas 78539

OR2017-12481

Dear Mr. Alamanza:

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# 660846 (File No. 2017-0030-DA.CO).

The County of Hidalgo (the "county") received a request for all information relating to employees who worked on Operation Stonegarden ("Stonegarden"). You state you will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code. The county has also submitted correspondence from the United States Customs and Border Protection (the "CBP") objecting to the release of the requested information. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be

released). We have considered the submitted arguments you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, 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[.]

*Id.* § 552.022(a)(3). The submitted information contains information in an account, contract, or voucher relating to the receipt or expenditure of funds by the county that is subject to section 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(3) under section 552.108 of the Government Code. However, section 552.108 is discretionary in nature and does not make information confidential under the Act. *See 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 information subject to section 552.022(a)(3), which we marked, may not be withheld under section 552.108 of the Government Code. However, because sections 552.101 and 552.102 of the Government Code make information confidential under the Act, we will consider the applicability of sections 552.101 and 552.102 for the information at issue. We will also consider your arguments for the information not subject to section 552.022.

Section 552.108(b) 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 (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section 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, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the

---

<sup>1</sup>We 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.

disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department's use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. 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 remaining information not subject to section 552.022 consists of employee activity reports. The county explains the information at issue pertains to a joint operation between the CBP, United States Border Patrol ("USBP"), and local law enforcement agencies. The CBP objects to the release of the information at issue because the records include "information concerning the administration, logistics, command, control, and communications of [Operation Stonegarden], including equipment, officer assignments, communications networks[,] as well as the methods by which state and local providers will coordinate with [federal agencies]." The CBP also asserts the records directly relate to its internal tactical procedures, reveal its operational budget, as well as USBP's execution and general concept regarding Stonegarden. The county asserts "[t]his information can be essential for criminals or suspects attempting to anticipate weakness or avoid detection from law enforcement" and argues its disclosure "could allow private citizens to become aware of specific time frames to commit crimes in order to avoid detection." Upon review, we find the county and CPB have established release of the information not subject to section 552.022 of the Government Code would interfere with law enforcement. Therefore, the county may withhold this information, which we have marked, under section 552.108(b)(1) of the Government Code.<sup>2</sup>

---

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

Section 552.101 of the Government Code exempts 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), which provides as follows:

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 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(a) must adequately explain how the responsive information falls within the scope of the provisions. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The county and CPB assert the information not subject to section 552.022 is confidential under section 418.176(a) because it “involves preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity by multiple law enforcement agencies” and includes “operational and tactical plans as it relates to the assignment of officers and the duties and limitations of the investigators and the specific divisions.” Based on these representations and our review, we find the county and CPB have established some of the information at issue relates to the staffing requirements of an emergency response provider or relates to a tactical plan of the provider under section 418.176. *See id.* § 418.176(a)(1)-(2). Therefore, the county must withhold the information we marked information under section 552.101 of the Government Code in conjunction with section 418.176(a) of the Government Code. However, we find the county and CPB have failed to demonstrate any of the remaining information is confidential under section 418.176(a) of the Government Code. Therefore none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 418.176(a) of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 of the Government Code encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find you have failed to demonstrate the applicability of section 552.102(a) to any of the remaining information, and the county may not withhold any of the remaining information on this basis.

As stated above, section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects the specific types of information the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *Indus. Found.*, 540 S.W.2d at 685. 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 found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the remaining information pertains to individuals who have been de-identified and whose privacy interests are, thus, protected, or is not highly intimate or embarrassing and of no legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

In summary, the county may withhold the information we marked under section 552.108(b)(1) of the Government Code. The county must withhold the information we marked information under section 552.101 of the Government Code in conjunction with section 418.176(a) 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,



Jahna Ward  
Assistant Attorney General  
Open Records Division

JW/som

Ref: ID# 660846

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)