



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

August 16, 2017

Ms. Molly Cost  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2017-18671

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# 672822 (PIR # 17-4159).

The Texas Department of Public Safety (the "department") received a request for all contracts, purchase orders, receipts, and communications pertaining to specified companies during a specified time period. You state the department does not have information responsive to portions of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

<sup>2</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.

Initially, you indicate some of the submitted information, which you marked, is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release such information in response to this request.

Next, we note some of the responsive 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). The responsive information contains information in an account, contract, or voucher relating to the receipt or expenditure of funds by the department 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 552.152 of the Government Code make information confidential under the Act, we will consider the applicability of sections 552.101 and 552.152 for the information at issue. We will also consider your arguments against disclosure of 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 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).

You argue release of the information not subject to section 552.022(a)(3) of the Government Code “could also allow an individual to detect patterns in travel and travel arrangements and thereby endanger the lives of the protective agents and the individuals they are assigned to protect.” Further, you assert release of this information would interfere with the department’s efforts to protect these individuals during similar operations involving travel to certain locations in the future. Upon review, we find you have demonstrated release of some of the information at issue, which we marked, would interfere with law enforcement. Thus, the department may withhold the information we marked under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated the release of any of the remaining information not subject to section 552.022 would interfere with law enforcement. Accordingly, none of the remaining information not subject to section 552.022 may be withheld under section 552.108(b).

Section 552.152 of the Government Code provides,

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov’t Code § 552.152. You state the information at issue, which pertains to employees in the department’s Executive Protection Bureau (the “EPB”), relates to employees whose job is to protect elected officials and their families “from acts of terrorism and other criminal activity.” You further assert releasing the information at issue would reveal identities of EPB agents assigned to protect certain individuals, including elected officials. You contend revealing this information would be similar to the release of undercover agents’ identities,

and “would endanger the agents both on and off duty, as well as those they are assigned to protect.” Based upon your representations and our review, we find section 552.152 is applicable to some of the information at issue, which we marked. Accordingly, the department must withhold the information we marked under section 552.152 of the Government Code.<sup>3</sup> However, we find you have failed to demonstrate the release of the remaining information would subject an employee or officer to a substantial risk of physical harm. Accordingly, the department may not withhold any of the remaining information under section 552.152 of the Government Code.

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, including section 418.176 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.176(a) reads 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 provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting section 418.176 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You state the remaining information at issue pertains to a company utilized by the department to provide security and other services to the elected officials and their families protected by the EPB while traveling. You inform us the purpose of this company is to protect these officials and their families from acts of terrorism or other criminal activity. You contend the information at issue “would be useful to those that would wish harm on these public figures.” Upon review, we find you have not demonstrated any of the remaining information at issue relates to staffing requirements or a tactical plan of an emergency response provider for purposes of section 418.176. Thus, the department has not demonstrated the applicability of section 418.176 to any of the remaining information at issue. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.176.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception 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. Upon review, we find you have not demonstrated disclosure of the remaining information at issue would create a substantial threat of physical harm to an individual. Therefore, the department may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

In summary, this ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release such information in response to this request. The department may withhold the information we marked under section 552.108(b)(1) of the Government Code. The department must withhold the information we marked under section 552.152 of the Government Code. 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/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,

A handwritten signature in black ink, appearing to read 'KH', is written over the word 'Sincerely,'.

Kieran Hillis  
Assistant Attorney General  
Open Records Division

KH/sb

Ref: ID# 672822

Enc. Submitted documents

c: Requestor  
(w/o enclosures)