



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 3, 2019

Ms. Michelle Buendia
Assistant City Attorney
City of Dallas
1400 South Lamar, 6 Floor 6W
Dallas, Texas 75215

OR2019-00097

Dear Ms. Buendia:

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# 742020 (ORR# D022901-091118).

The Dallas Police Department (the "department") received a request for photographs of all police officers logged into the identification database and their ranks, names, and years of service. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.152 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the department did not comply with the requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). Nevertheless, sections 552.101 and 552.152 of the Government Code can provide compelling reasons to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the department's claims under those exceptions.

²We 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.

Initially, we note some of the submitted information is not responsive to the instant request for information because it is information other than the requested officer photographs, ranks, names, and years of service. 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.

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 the requirements of Section 552.021 [of the Government Code] 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 assert release of the responsive information would subject the officers to a substantial threat of physical harm. We acknowledge that our standard in regard to section 552.152 is that governmental bodies must provide specific arguments explaining how the release of the information would subject the employee or officer to a substantial threat of physical harm. However, based on the broad scope of this request, we determine the department is required to compile the information in order to comply with the request. It is this compilation of photographs, we find, that will subject the officers at issue to a substantial threat of physical harm. Accordingly, we determine the department must withhold the submitted photographs under section 552.152.³

Additionally, you inform us some of the responsive information pertains to undercover or covert officers. However, you have not marked or otherwise indicated which, if any, of the officers are undercover or covert officers, nor does the submitted information give any indication of the officers' status. Thus, we must rule conditionally. To the extent the officers at issue are undercover or covert officers, the department must withhold the names of the undercover or covert officers under section 552.152. To the extent the officers at issue are not undercover or covert officers, the department may not withhold the names of the officers at issue under section 552.152.⁴ With respect to the remaining responsive information, we find you have failed to demonstrate the release of the information would subject a department

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

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employee or officer to a substantial risk of physical harm. Accordingly, the department may not withhold the remaining responsive information under section 552.152.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses 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 provides, in relevant part:

(a) 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 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).

You argue the information at issue consists of the identifying information of department officers and relates to staffing requirements of the department, a law enforcement agency. You further state appropriate staffing and deployment of officers affects the safety of the officers and the community and are utilized to prevent, detect, respond to, and investigate terrorism and related criminal activity. Upon review, however, we find you have failed to demonstrate the remaining responsive information is collected, assembled, or maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and relates to staffing requirements of an emergency responsive provider, relates to a tactical plan of the provider, or consists of a list or compilation of pager

or telephone numbers of the provider. Therefore, we conclude the department may not withhold the remaining responsive information under section 552.101 in conjunction with section 418.176.

Section 552.101 of the Government Code also encompasses information made confidential by judicial decision and the common-law physical safety exception. For many years, this office determined section 552.101, in conjunction with the common-law right to privacy, protected information from disclosure when “special circumstances” exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court has held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112 (Tex. 2011). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. 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.

You assert release of the information at issue could harm citizens and officers. Upon review, we find the department has failed to demonstrate release of the remaining responsive information would create a substantial threat of physical harm to an individual. Therefore, the department may not withhold the remaining responsive information under section 552.101 in conjunction with the common-law physical safety exception.

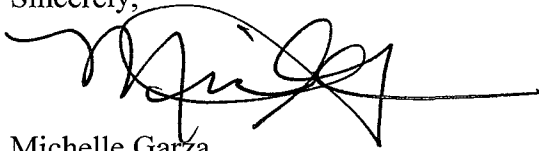
In summary, the department must withhold the responsive photographs under section 552.152 of the Government Code. To the extent the officers at issue are undercover or covert officers, the department must withhold the names of the undercover or covert officers under section 552.152 of the Government Code. The department must release the remaining responsive 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](#), 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 "Michelle Garza", with a long horizontal line extending to the right.

Michelle Garza
Assistant Attorney General
Open Records Division

MG/mo

Ref: ID# 742020

Enc. Submitted documents

c: Requestor
(w/o enclosures)