



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 22, 2019

Ms. Nneka Kanu
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2019-08095

Dear Ms. Kanu:

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# 753437 (GC# 25662).

The City of Houston (the "city") received a request for information pertaining to travel and security expenses by the mayor during a certain time period. You state the city will release some of the requested information. 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.¹

¹We 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 the requestor has excluded the names of all officers serving as security from the scope of the present request for information. Thus, this information is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release such information in response to this request.²

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(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 submitted information includes information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3). The city must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act or other law. *See id.* Although the city raises section 552.108 of the Government Code for this information, 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 city may not withhold any of the information subject to section 552.022(a)(3), which we marked, under section 552.108. However, because sections 552.101 and 552.152 of the Government Code can make information confidential for purposes of section 552.022, we will consider the applicability of these exceptions to the information subject to section 552.022. Further, we will address the city's arguments against disclosure of the remaining 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." Gov't Code § 552.101. This section encompasses information that is made confidential by other statutes. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the HSA. These provisions make confidential information related to terrorism. Section 418.176 provides in relevant part:

²As we are able to make this determination, we need not address your arguments against disclosure of this information.

(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 the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency [or]

(2) relates to a tactical plan of the provider[.]

Gov't Code § 418.176(a)(1), (a)(2). The fact that information may relate to a governmental body's security measures does not make the information per se confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.176 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the responsive information reveals the staffing requirements of a law enforcement agency, the Mayor's Protective Detail (the "detail") of the Houston Police Department (the "department"). You explain the submitted information "reveals the number of officers traveling with the [m]ayor, and it is collected, assembled, and maintained for purposes of preventing, detecting, responding to, or investigating and act of terrorism or related criminal activity." You further explain, the department does not publicly identify the number of individuals protecting the mayor on a permanent basis or at any particular time. Upon review, we find you have demonstrated some of the submitted information relates to the staffing requirements maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating and act of terrorism or related criminal activity. Therefore, the city must withhold the information we marked under section 552.101 in conjunction with section 418.176 of the Government Code.³ However, we find the remaining information does not relate to staffing requirements of a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with section 418.176 of the Government Code.

Section 552.108(b)(1) 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

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

law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” *Id.* § 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).

Although you seek to withhold the remaining information under section 552.108(b)(1), we find you have failed to demonstrate the release of the remaining responsive information would interfere with law enforcement or prosecution efforts. Accordingly, the city may not withhold any of the remaining responsive information under section 552.108(b)(1) of the Government Code.

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 raise section 552.152 of the Government Code for the remaining responsive information. Upon review, we find you have failed to demonstrate the release of the remaining responsive information would subject an employee or officer to a substantial risk of physical harm. Accordingly, the city may not withhold any of the remaining responsive information under section 552.152 of the Government Code.

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 that “vague assertions of risk will

not carry the day.” *Id.* at 119. The city argues the remaining responsive information should be excepted under the common-law physical safety exception. Upon review, however, we find you failed to demonstrate disclosure of the remaining responsive information would create a substantial threat of physical harm to an individual. Therefore, the city may not withhold the remaining responsive information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

We note some of the remaining information may be subject to section 552.117(a)(2) of the Government Code.⁴ Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov’t Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Upon review, we find the city must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body.

In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The city must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the city may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. The city 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

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 that reads "Emily Kunst". The signature is written in a cursive style with a large, looped "E" and a long, sweeping "K".

Emily Kunst
Assistant Attorney General
Open Records Division

EK/gw

Ref: ID# 753437

Enc. Submitted documents

c: Requestor
(w/o enclosures)