



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 8, 2019

The Honorable Phil King
State Representative District 61
P.O. Box 2910
Austin, Texas 78768-2910

OR2019-28269

Dear Representative King:

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# 790151.

The Office of Representative Phil King (the "representative's office") received a request for all records pertaining to specified terms during a specified time period. You state the representative's office has released some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.152 of the Government Code. Additionally, you state release of the submitted information may implicate the interests of the Texas Military Department (the "TMD") and the Texas Department of Public Safety (the "DPS"). Accordingly, you state, and provide documentation showing, the representative's office notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. We have received comments from the TMD and the DPS. We have considered the submitted arguments and reviewed the submitted information.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. Section 552.108(b)(1) 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.” *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, ORDs 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, 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 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The DPS states the submitted information, if released, “would provide wrong-doers, terrorists, and other criminals with invaluable information concerning certain protection provided for elected officials in specific instances.” The DPS further states that disclosure of the information at issue “would compromise law enforcement purposes by enabling terror or criminal suspects to anticipate weakness in law enforcement and alter their methods of operation in order to avoid detection.” Based on these representations and our review, we agree the release of some of the information at issue, which we marked, would interfere with law enforcement. Accordingly, the representative’s office may withhold the information we marked under section 552.108(b)(1) of the Government Code.¹ However, we find the DPS has not demonstrated the release of the remaining information would interfere with law enforcement. Accordingly, the representative’s office may not withhold any of the remaining information under section 552.108(b)(1) 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. Section 552.101 encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.176 of the Homeland Security Act 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:

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(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[.]

Id. § 418.176(a)(1), (2). Section 418.177 provides that information is confidential if it:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *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 exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain 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). Upon review, we find the DPS has not demonstrated any of the remaining information is confidential under section 418.176 or section 418.177 of the Government Code. Therefore, the representative's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.176 or section 418.177 of the Government Code.

The representative's office and the TMD assert the remaining information must be withheld under section 552.101 of the Government Code in conjunction with 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, LP. & Hearst Newspapers, LLC*, 343 S.W.3d 112 (Tex. 2011) (holding "freedom from physical harm is an independent interest protected under law, untethered to the right of

privacy”). 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 new 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. Upon review, we find the representative’s office and the TMD have failed to demonstrate the disclosure of the remaining information would create a substantial threat of physical harm to an individual. Therefore, the representative’s office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

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. The representative’s office and the TMD also raise section 552.152 of the Government Code for the remaining information. Upon review, we find the representative’s office and the TMD have not demonstrated the release of the remaining information would subject an employee or officer to a substantial risk of physical harm. Accordingly, the representative’s office may not withhold any of the remaining information under section 552.152 of the Government Code.

The TMD asserts portions of the remaining information are confidential under section 437.232 of the Government Code. Section 552.101 of the Government Code also encompasses section 437.232 of the Government Code, which provides as follows:

(a) In this section, “military personnel information” means a service member’s name, home address, rank, official title, pay rate or grade, state active duty orders, deployment locations, military duty addresses, awards and decorations, length of military service, and medical records.

(b) A service member’s military personnel information is confidential and not subject to disclosure under Chapter 552.

Id. § 437.232. Upon review, we find most of the information the TMD seeks to withhold, which we marked, consists of military personnel information maintained by the Texas military forces. *See id.* § 437.001(8) (providing “service member” for purposes of chapter 437 means a member or former member of the state military forces or a component of the United States armed forces, including a reserve component), (13) (providing the department

is the state agency charged with administrative activities in support of the Texas military forces), (14) (providing that “Texas military forces” for purposes of chapter 437 means the Texas National Guard, the Texas State Guard, and any other military forces under state law). Accordingly, the representative’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. However, we find the TMD failed to demonstrate section 437.232 is applicable to the remaining information at issue. Therefore, the representative’s office may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

We note some of the remaining information may be subject to section 552.1175 of the Government Code.² Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *Id.* § 552.1175. Section 552.1175 applies, in part, to “a current or former member of the United States Army, Navy, Air Force, Coast Guard, or Marine Corps, an auxiliary service of one of those branches of the armed forces, or the Texas military forces, as that term is defined by Section 437.001.” Act of May 27, 2019, 86th Leg., R.S., H.B. 1351, § 4 (to be codified at Gov’t Code § 552.1175(a)(15)). We note section 552.1175 is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 a 5-6 (1988). Accordingly, to the extent the information at issue, which we marked, consists of the personal cellular telephone number of an individual who is subject to section 552.1175(a) and who elects to restrict access to the information in accordance with section 552.1175(b), the representative’s office must withhold the information under section 552.1175 of the Government Code; however, the cellular telephone number at issue may only be withheld under section 552.1175 if a governmental body does not pay for the cellular service. Conversely, if the individual whose information is at issue is not an individual who is subject to section 552.1175(a), does not elect to restrict access to their information in accordance with section 552.1175(b), or the cellular telephone service is paid for by a governmental body, then this information may not be withheld under section 552.1175.

In summary, the representative’s office may withhold the information we marked under section 552.108(b)(1) of the Government Code. The representative’s office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. To the extent the information we marked consists of the personal cellular telephone number of an individual who is subject to section 552.1175(a) and who elects to restrict access to the information in accordance with section 552.1175(b), the representative’s office must withhold the information under section 552.1175 of the Government Code; however, the cellular telephone number at issue may

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

only be withheld under section 552.1175 if a governmental body does not pay for the cellular service. The representative's office 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/gw

Ref: ID# 790151

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 2 Third Parties
(w/o enclosures)