



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 26, 2019

Mr. David D. Menchaca
Senior Legal Counsel
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2019-33466

Dear Mr. Menchaca:

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# 798592 (Comptroller ID Nos. 7054 and 7673).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for the name of the person who filed a specified complaint against a named entity. The comptroller's office received a second request from a different requestor for all complaints filed against the entity named in the first request. You state the comptroller's office has released some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the first requestor only seeks the name of the reporting party pertaining to the specified complaint. Thus, the remaining information you have submitted in response to the first request is not responsive to this request. This ruling does not address the public availability of the non-responsive information, and the comptroller's office need not release it in response to the first request.

Next, we note, and you acknowledge, the comptroller's office failed to comply with section 552.301 of the Government Code with respect to the first request. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons*

v. Kuzmich, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.3d 379, 381 (Tex. App.—Austin 1990, no writ). Although you claim section 552.101 of the Government Code in conjunction with the common-law informer's privilege for the information at issue, we find you have failed to establish a compelling reason to address this argument. However, because section 552.101 in conjunction with the common-law physical safety exception can provide a compelling reason to overcome the presumption of openness, we will address this argument against disclosure of the information responsive to the first request. Additionally, we will consider your timely raised arguments with respect to the second request.

Next, we note the information responsive to the second request includes a court-filed document. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is made confidential under the Act or other law. Gov't Code § 552.022(a)(17). Although you seek to withhold this information under section 552.108 of the Government Code, this section is a discretionary exception 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). As such, section 552.108 does not make information confidential for the purposes of section 552.022. Accordingly, the comptroller's office may not withhold the court-filed document, which we marked, under section 552.108. However, we note the common law informer's privilege is "other law" for the purpose of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Envtl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.). Thus, we will consider your arguments under section 552.101 of the Government Code for the information subject to section 552.022(a)(17).

Section 552.108 of the Government Code provides, in pertinent part,

(b) An 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 is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(b)(1). 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." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320,327 (Tex. App.— Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how

and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.,* Open Records Decision Nos. 531 (1989) (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.,* ORDs531 at 2-3 (Penal Code provisions, common law rule, 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). We note section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is the investigation of crimes and enforcement of criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 is generally not applicable to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). The comptroller's office is a law enforcement agency for purposes of administering the Tax Code. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-79 (Tex. 1995).

You state the information you marked consists of information maintained for internal use by the comptroller's office's Criminal Investigation Division (the "CID") for tax law enforcement purposes. You explain release of the information at issue would interfere with law enforcement investigative abilities by revealing the comptroller's office's methods of obtaining information from certain sources and enforcing the relevant tax statutes. You also state release of the information at issue would "provide tax evaders with knowledge that they could use to avoid the enforcement efforts of the CID." Based on these representations and our review, we find you have demonstrated the release of the information at issue would interfere with law enforcement. Thus, with the exception of the information subject to section 552.022(a)(17) of the Government Code, the comptroller's office may withhold the information you marked under section 552.108(b)(1) of the Government Code.¹

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by judicial decision and 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

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

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 your arguments and the information at issue, we find you have demonstrated the applicability of the common-law physical safety exception to some of the remaining information at issue. Therefore, the comptroller’s office must withhold the responsive information from the first requestor under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.² However, we find you have failed to demonstrate release of the remaining information at issue would create a substantial threat of physical harm to an individual. Accordingly, the comptroller’s office may not withhold any of the remaining information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer’s privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990). Upon review, we find you have failed to demonstrate the applicability of the informer’s privilege to any of the information subject to section 552.022(a)(17) of the Government Code, and the comptroller’s office may not withhold it under section 552.101 on that basis.

In summary, the comptroller’s office must withhold the responsive information from the first requestor under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. With the exception of the information subject to section 552.022(a)(17) of the Government Code, which must be released to the second requestor, the comptroller’s office may withhold the information you marked under section 552.108(b)(1) of the Government Code. The comptroller’s office must release the remaining information.

² As our ruling is dispositive, we need not address your remaining argument against disclosure of this 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/rm

Ref: ID# 798592

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)