



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2013

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

OR2013-04719

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# 481888 (DPS PIR #12-4332).

The Texas Department of Public Safety (the "department") received a request for all e-mails sent and received by a named officer during a specified time period. You claim portions of the submitted information are not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You argue the information you marked is not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). You explain the submitted e-mails contain purely personal exchanges that have no connection with the transaction of official business of the department. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Upon review of the marked information, we agree the information does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of

official business” by or for the department. *See* Gov’t Code § 552.021. Thus, we conclude the information you marked is not subject to the Act and need not be released in response to this request.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward

filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state the requestor has sent various e-mails, met with department personnel, and indicated he is entitled to compensation for damages allegedly sustained during a department operation. However, you have not provided this office with evidence the requestor had taken any objective steps toward filing a lawsuit prior to the date the department received the request for information. *See* Gov't Code § 552.301(e); ORD 331. Upon review, we find you have not established litigation was reasonably anticipated on the date the department received the request for information. Therefore, the department may not withhold the remaining information under section 552.103 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). A government body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you have marked relates to ongoing criminal cases. Based on your representation and our review, we conclude the release of the information you have marked would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the department may withhold the information you marked under section 552.108(a)(1) of the Government Code.

Section 552.108(b)(1) 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov't Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Gov't Code § 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).

You explain revealing the records you have marked under section 552.108(b)(1) would provide criminals with invaluable information concerning operational strategies, procedures, and tactics used by department agents in the detection and investigation of criminal activity, terrorist escort plans, and equipment used in the detection and investigation of criminal activity. Upon review, we find you have demonstrated release of a portion of the information you have marked would interfere with law enforcement. However, the department has failed to demonstrate how the remaining information you have marked, which we have noted, would interfere with law enforcement. Thus, with the exception of the information we have noted, the department may withhold the information you have marked under section 552.108(b)(1) of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the 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 informer's 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. *See Open Records Decision No. 208 at 1-2 (1978)*. The informer's 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 1-2 (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 (1988)*.

You state the information you marked reveals the identity of a confidential police informant who reported violations of the Penal Code to the department. However, upon review, the information you marked does not identify an informant. Thus, the department may not withhold any portion of the information you marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.101 of the Government Code also encompasses section 418.176 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. 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 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). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection).

You state a portion of the remaining information relates to the security detail of the governor provided by the department. We understand the security detail is tasked with protecting the governor from criminal activity. Upon review, we find the information we have marked relates to staffing requirements of a law enforcement agency and is 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. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 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 the requirements of Section 552.021 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.

Id. § 552.152. You state the remaining information you marked details the alias and equipment used by undercover officers. You state release of this information would jeopardize the safety of the undercover officers and subject them to a substantial threat of physical harm. Based on your representations and our review, we find you have demonstrated the release of the information at issue would subject the officers at issue to a substantial threat of harm. Thus, the department must withhold the remaining information you have marked under section 552.152.

We note some of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code 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 id.* § 552.117(a)(2). Section 552.117 also protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone service with his or her personal funds. *See* Open Records Decision No. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) excepts from disclosure peace officer's cellular telephone or pager number if officer pays for cellular telephone or pager service). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note a portion of the information at issue pertains to an individual who retired from the department. Accordingly, to the extent the information we have marked pertains to peace officers as defined by article 2.12 of the Code of Criminal Procedure, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. Additionally, we note the remaining information contains cellular telephone numbers of department peace officers. Accordingly, if the cellular telephone service is paid for by the peace officers with their own funds, then the cellular telephone numbers in the remaining information must be withheld under section 552.117(a)(2). However, if the cellular telephone service is paid for by the department, the cellular telephone numbers may not be withheld under section 552.117(a)(2) of the Government Code.

To the extent the retired individual is not a peace officer as defined by article 2.12 of the Code of Criminal Procedure, the marked information pertaining to that individual may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the retired individual timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the retired individual did not timely request confidentiality under section 552.024, the department may not withhold the information under section 552.117(a)(1).

Some of the remaining information may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

...

(7) criminal investigators of the United States as described by Article 2.122(a), Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(7), (b). We note a cellular telephone number is excepted under section 552.1175, provided the cellular telephone service is not paid for with public funds. *See* Open Records Decision No. 506 at 5-6 (1988). The remaining information includes cellular telephone numbers of individuals who may be criminal investigators of the United States. If the information we marked pertains to individuals who are criminal investigators of the United States as described by article 2.122(a) of the Code of Criminal Procedure and who elect to restrict access to the cellular telephone numbers in accordance with section 552.1175(b), then the department must withhold the marked cellular telephone numbers under section 552.1175 if the cellular telephone service is not paid for by a government body. However, if the cellular telephone service is paid for with public funds, the individuals are not criminal investigators of the United States, or they do not properly elect to restrict access to their personal telephone numbers, the department may not withhold the cellular telephone numbers we have marked under section 552.1175 of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, the department must withhold the partial credit card number we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, or an e-mail address that a governmental entity maintains for one of its officials or employees. We also note the information at issue includes the requestor’s e-mail address, to which he has a right of access pursuant to section 552.137(b). *See id.* § 552.137(b). However, the department must withhold the remaining e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure or subsection (c) applies.

We note a portion of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the information you have marked is not subject to the Act. The department may withhold the information you have marked under section 552.108(a)(1). With the exception of the information we have noted, the department may withhold the information you have marked under section 552.108(b)(1). The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department must withhold the remaining information you have marked under section 552.152. To the extent the information we have marked pertains to peace officers as defined by article 2.12 of the Code of Criminal Procedure, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The department must also withhold cellular telephone numbers of peace officers in the remaining information under section 552.117(a)(2) if the cellular telephone service is paid for by the peace officer with their own funds. To the extent the retired individual at issue is not a peace officer and timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The department must withhold the cellular telephone numbers we have marked under section 552.1175 if the information we marked pertains to employees who are criminal investigators of the United States as described by article 2.122(a) of the Code of Criminal Procedure who elect to restrict access to the cellular telephone numbers in accordance with section 552.1175(b) and the cellular telephone service is not paid for by a government body. The department must withhold the partial credit card number we have

marked under section 552.136 of the Government Code. The department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure or subsection (c) applies. The remaining information must be released; however, any information subject to copyright may be released only in accordance with copyright law.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/dls

Ref: ID# 481888

Enc. Submitted documents

c: Requestor
(w/o enclosures)