



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 2, 2013

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

OR2013-20804

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# 507268 (ORR# 13-3572).

The Texas Department of Public Safety (the "department") received a request for several categories of information pertaining to the Texas Fusion Center. You state the department will release some of the requested information. You also state the department does not possess information responsive to portions of the request.<sup>1</sup> 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.<sup>2</sup>

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*

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

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 reasonably 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 writ). This office has concluded 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 (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., ORDs 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).

You argue the documents responsive to the second and third items of the request are protected by section 552.108(b)(1) of the Government Code. You explain the information responsive to the second item consists of assessments of risk and threat that are produced by the department and other law enforcement entities. You explain this information assesses the threats facing persons and property from acts of terrorism and related criminal activity. You further explain the information responsive to the third item consists of Suspicious Activity Reports, which you describe as an "official documentation of observed behavior that may be indicative of intelligence gathering or pre-operational planning related to terrorism, criminal, or other illicit intention." You state release of the information responsive to the second and third items of the request would provide wrong-doers, drug traffickers, terrorists, and other criminals with "invaluable information" concerning "facilities and infrastructure vulnerabilities and threats to persons" and "investigative techniques and procedures used in law enforcement." You argue release of the information would allow criminal and terrorist groups to "anticipate the activities of law enforcement to detect, investigate, and prevent criminal activities." Based on your representations and our review of the information at issue, we agree the information responsive to the second and third items consists of internal records of a law enforcement agency that, if released, would interfere with law enforcement and crime prevention. Accordingly, the department may withhold this information under section 552.108(b)(1) of the Government Code.<sup>3</sup>

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure of portions of the information at issue.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You argue the information responsive to item five of the request is excepted under section 552.101 in conjunction with section 418.180 of the Government Code. 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 certain information related to terrorism confidential. Section 418.180 provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

- (1) is part of a report to an agency of the United States;
- (2) relates to an act of terrorism or related criminal activity; and
- (3) is specifically required to be kept confidential:
  - (A) under Section 552.101 because of a federal statute or regulation;
  - (B) to participate in a state-federal information sharing agreement; or
  - (C) to obtain federal funding.

*Id.* § 418.180. 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 id.* § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies); Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

You argue the information responsive to item five of the request is confidential for purposes of section 418.180 of the Government Code because it is part of a report to an agency of the United States that relates to an act of terrorism or related criminal activity and is specifically required to be kept confidential to participate in a state-federal information sharing agreement. You state the information at issue is maintained as part of the department’s participation in the Protected Critical Infrastructure Information Program (the “program”) through the United States Department of Homeland Security (the “DHS”). In support of your argument, you have submitted an excerpt from the DHS Protected Critical Infrastructure Information Program Procedures Manual (the “manual”).<sup>4</sup>

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<sup>4</sup>A complete copy of the manual may be found on the DHS website at [http://www.dhs.gov/xlibrary/assets/pcii\\_program\\_procedures\\_manual.pdf](http://www.dhs.gov/xlibrary/assets/pcii_program_procedures_manual.pdf).

You inform us, and the manual indicates, the program is part of an information sharing agreement between the department and the DHS. In this instance, the information sharing agreement protects critical infrastructure information, including the identity of a person providing such information, from disclosure under the federal Freedom of Information Act and similar state and local disclosure laws when the information is voluntarily submitted to the DHS, directly or indirectly. *See* § 1, Protected Critical Infrastructure Information Program Procedures Manual (2009). We note in order to receive protection, the manual requires such information be accompanied by an express statement affirming the information was submitted in expectation of legal protections and in the absence of an exercise of legal authority by the DHS to compel access to or submission of the information. *See id.* § 3.2.

In this instance, the information at issue consists of a list of names and contact information of members of the Private Sector Advisory Council. You explain the information consists of the identities of persons who voluntarily submitted critical infrastructure information to the department. We understand such critical infrastructure information was accompanied by an express statement as required by section 3.2 of the manual. You inform us such critical infrastructure information is part of a report that was submitted to the DHS. You further inform us the information relates to an act of terrorism or related criminal activity and the department is specifically required to keep the information confidential to participate in the program. Upon review, we find the department has demonstrated the information at issue consists of the identities of individuals who provided critical infrastructure information that the department is required to keep confidential to participate in the program. Thus, based on your representations and our review, we find the information at issue is generally confidential under section 418.180 of the Government Code.

However, we note the term "critical infrastructure information" means information not customarily in the public domain and related to the security of critical infrastructure or protected systems. *See id.* App. 2; *see also id.* (defining "in the public domain"). We further note the department has published some of the information at issue on its website and thus that information is in the public domain. Therefore, we conclude the information in the public domain is not made confidential under the provisions of the manual and may not be withheld under section 552.101 of the Government Code in conjunction with section 418.180 of the Government Code on that basis. *See* App. 3, Protected Critical Infrastructure Information Program Procedures Manual. Accordingly, to the extent the information responsive to item five of the request is not in the public domain, the information is confidential pursuant to section 418.180 of the Government Code and must be withheld under section 552.101 of the Government Code.

You also argue the remaining information responsive to item five of the request is confidential for purposes of section 418.180 because it is part of a report to an agency of the United States that relates to an act of terrorism or related criminal activity and is specifically required to be kept confidential under section 552.101 because of a federal statute or regulation. *See* Gov't Code § 418.180. You argue the information is made confidential by the federal Critical Infrastructure Information Act of 2002 ("CIIA"), title 6, sections 131 through 134 of the United States Code. 6 U.S.C. §§ 131 - 134. Section 133 pertains to the

protection of certain voluntarily shared critical infrastructure information and the identities of persons or entities submitting such information. *Id.* § 133. However, we note the definition of “critical infrastructure information” articulated in the CIIA is the same as that adopted in the manual, and does not include information “customarily in the public domain.” *See id.* § 131(3). In this instance, the remaining information at issue is in the public domain, and thus is not confidential under section 133(a)(1)(E) of title 6 of the United States Code. Accordingly, the department may not withhold the remaining information under section 552.101 of the Government Code in conjunction with section 418.180 of the Government Code.

You seek to withhold the information responsive to item one of the request under section 552.152 of the Government Code. Section 552.152 provides as follows:

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.

Gov't Code § 552.152. You inform us the information at issue identifies crime analysts and intelligence analysts employed by the department. You explain these employees are responsible for “targeting transnational criminal organizations and their members and supporting criminal and terrorism investigations throughout the state.” You argue release of the information at issue could cause these individuals to be targeted by criminal and terrorist organizations, thereby creating a substantial risk of physical harm. Based on your representations and our review, we conclude you have demonstrated release of some of the information at issue would subject the department employees at issue to a substantial threat of physical harm. Therefore, the department must withhold the information we have marked under section 552.152 of the Government Code. However, we find you have not demonstrated how the release of any of the remaining information at issue would subject an employee of the department to a substantial risk of physical harm. Accordingly, the department may not withhold any of the remaining information at issue under section 552.152 of the Government Code.

You also claim the remaining information responsive to the first item of the request is excepted from required disclosure 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, L.P. & Hearst Newspapers, L.L.C.*, 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, “vague assertions of risk will not carry the day.” *Id.* at 119. You argue the disclosure of the remaining information at issue would create a substantial threat of physical harm to the individuals at issue. Upon review, we conclude you have made only vague assertions of risk of harm that could result from the disclosure of the remaining information at issue. Accordingly, the department may not withhold any of the remaining information responsive to the first item of the request under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

We note some of the remaining information is subject to sections 552.130 and 552.137 of the Government Code.<sup>5</sup> Section 552.130 provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See Gov’t Code* § 552.130. Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.<sup>6</sup>

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). The e-mail addresses at issue are not excluded by subsection (c). Therefore, to the extent the information at issue may not be withheld under section 552.101 of the Government Code in conjunction with section 418.180 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.<sup>7</sup>

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<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

<sup>6</sup>We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a)(2) without the necessity of seeking a decision from the attorney general. *See Gov’t Code* § 552.130(c). However, if a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

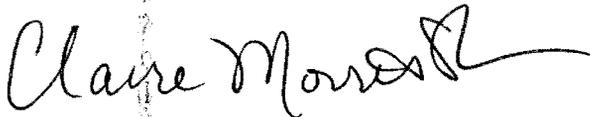
<sup>7</sup>We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the department may withhold the information responsive to the second and third items of the request under section 552.108(b)(1) of the Government Code. The department must withhold (1) the information responsive to item five of the request under section 552.101 of the Government Code in conjunction with section 418.180 of the Government Code, to the extent such information is not in the public domain; (2) the information we marked under section 552.152 of the Government Code; (3) the motor vehicle record information we marked under section 552.130 of the Government Code; and (4) to the extent the information we marked may not be withheld under section 552.101 of the Government Code in conjunction with section 418.180 of the Government Code, 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. The department 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 [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 507268

Enc. Submitted documents

c: Requestor  
(w/o enclosures)