



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 10, 2014

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

OR2014-18194

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# 539108 (PIR# 14-3058).

The Texas Department of Public Safety (the "department") received a request for four categories of information referenced in a specified letter. You state you have no information responsive to a portion of the request.¹ You state the department will release some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have

¹The 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).

considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the information you seek to withhold in the Agency Estimated Expense Totals is subject to section 552.022 of the Government Code. Section 552.022(a)(5) of the Government Code provides for the required public disclosure of “all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate,” unless the information is confidential under the Act or other law. Gov’t Code § 552.022(a)(5). You seek to withhold the information at issue under section 552.108 of the Government Code. However, 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), 177 at 3 (1977) (statutory predecessor to Gov’t Code § 552.108 subject to waiver). Thus, the department may not withhold the information at issue under section 552.108 of the Government Code. However, because section 552.101 of the Government Code can make information confidential under the Act, we will consider your arguments under section 552.101 for the information at issue. Further, we will address your argument under section 552.108 for the remaining information.

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 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). 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 subsection 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). You state the submitted records contain information concerning “ongoing operations by the [d]epartment and other law enforcement agencies at the Texas border to detect, prevent, and respond to terroristic threats and other criminal activities.” You further state the information at issue includes “details of staffing and equipment utilized for these operations and strategies employed in these operations.” You assert release of the information at issue “would provide wrong-doers, drug traffickers,

²We 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.

terrorists, and other criminals with invaluable information concerning the law enforcement efforts at the Texas border, allowing these groups to identify vulnerabilities and avoid detection.” Based upon your representations and our review, we conclude release of the information at issue would interfere with law enforcement. Accordingly, the department may withhold the information you have marked that is not subject to section 552.022 of the Government Code under section 552.108(b)(1) of the Government Code.³

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 protected by other statutes. As part of the Texas Homeland Security Act (the “HSA”), 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 418.176 of the Government Code 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 a law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

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

Id. § 418.176(a)(1)-(2). Section 418.177 provides as follows:

Information is confidential if the information

(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.

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

Id. § 418.177. 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). As with any confidentiality statute, a governmental body asserting this section must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

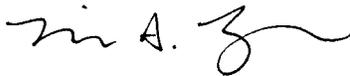
As noted above, you state the information at issue relates to “ongoing operations by the [d]epartment and other law enforcement agencies at the Texas border to detect, prevent, and respond to terroristic threats and other criminal activities.” You inform us the information at issue includes “details of staffing and equipment utilized for these operations and strategies employed in these operations.” You assert release of the information at issue “would provide wrong-doers, drug traffickers, terrorists, and other criminals with invaluable information concerning the law enforcement efforts at the Texas border, allowing these groups to identify vulnerabilities and avoid detection.” Upon review, we conclude the information we have marked relates to staffing requirements of emergency response providers maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Accordingly, the department must withhold the information we have marked in the Agency Estimated Expense Totals under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. However, we find you have not demonstrated how any of the remaining information at issue relates to staffing requirements or a tactical plan of an emergency response provider for purposes of section 418.176, or relates to an assessment of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity for purposes of section 418.177. Thus, you have not demonstrated the applicability of section 418.176 or section 418.177 to any of the remaining information you have marked. Accordingly, the department 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.

In summary, the department may withhold the information you have marked that is not subject to section 552.022 of the Government Code under section 552.108(b)(1) of the Government Code. 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 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, 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,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/bhf

Ref: ID# 539108

Enc. Submitted documents

c: Requestor
(w/o enclosures)