

TEXAS DEPARTMENT OF PUBLIC SAFETY

5805 N LAMAR BLVD • BOX 4087 • AUSTIN, TEXAS 78773-0001

512/424-2000

www.dps.texas.gov



STEVEN C. McCRAW
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JASON K. PULLIAM
RANDY WATSON

March 7, 2019

Via Email

Ty Clevenger
tyclevenger@yahoo.com

RE: Public Information Request for records related to DPS troopers assisting various cities in high-crime areas. (PIR # 19-0716)

Mr. Clevenger:

The Department received your above-referenced request on February 13, 2019. The Department has located records responsive to your request; however, we believe the records may be excepted from required public disclosure at this time. We are seeking a ruling from the attorney general's office with respect to disclosure of these records, and a copy of our request letter is enclosed. You will be notified directly by the attorney general's office when a ruling is issued.

Regarding the portion of your request asking for costs related to these operations, additional information is needed from you in order to properly process your request. There is no formal agreement in relation to any operation that you reference in your request which outlines or tracks costs or which defines the number of personnel which may be required. The number of personnel assigned vary on the scope of the operation and the number of resources that can be allocated from personnel already scheduled to work that day. In order to provide costs, the field would need to determine which personnel were a part of each operation and the dates that the operations ran. Each time sheet would then need to be examined to determine how many hours worked could be attributed to the operation. Given the length of time some of these operations were in effect and the number of personnel that could be involved, this process would be labor intensive and would likely result in a fairly high cost estimate to you. Please reply in writing if you would still like the Department to proceed with costs related to these operations, and a cost estimate will be prepared for you.

Please clarify what information you are seeking and we will proceed with your request accordingly. **In accordance with Government Code section 552.222(d), if we do not receive a written response from you by the 61st day after the date of this letter, your request will be considered to have been withdrawn.** You may submit the response in writing via facsimile to (512) 424-5716, via email to OGC.Webmaster@dps.texas.gov, via mail to the address in the letterhead, or in person at our offices at 5805 N. Lamar Blvd. in Austin.

If you have any questions regarding this request, please contact the Media and Communications office at media@dps.texas.gov. Thank you.

Cordially,

A handwritten signature in black ink, appearing to read "B. Sears".

Brian Sears
Assistant General Counsel

cc:

Attorney General of Texas
Open Records Division
209 West 14th Street, 6th Floor
Austin, Texas 78701

From: Ty Clevenger <tyclevenger@yahoo.com>
Sent: Wednesday, February 13, 2019 5:22 PM
To: OGC Webmaster
Subject: Re: Public information request

CAUTION: This email was received from an EXTERNAL source, use caution when clicking links or opening attachments.
If you believe this to be a malicious and/or phishing email, please send this email as an attachment to SPAM@dps.texas.gov.

I have one additional request. I was informed that the Dallas Police Department was approached about receiving patrol assistance from DPS, but Dallas PD declined the offer. I request the opportunity to view all communications and documents reflecting such a proposal or offer, as well as all communications and documents rejecting the offer or proposal.

On Wednesday, February 13, 2019, 6:19:01 PM EST, Ty Clevenger <tyclevenger@yahoo.com> wrote:

After sending the request below, I was informed by a trooper that DPS has a similar arrangement with the San Antonio Police Department. I request the opportunity to view all communications and records (e.g., memoranda of understanding) discussing or outlining such a program or activity with San Antonio or any other city in Texas. I also request records reflecting the cost of any such program or activity.

On Wednesday, February 13, 2019, 4:27:14 PM EST, Ty Clevenger <tyclevenger@yahoo.com> wrote:

To Whom It May Concern:

I was informed that DPS troopers soon will be (or perhaps already are) assisting the Fort Worth Police Department in high-crime areas. I request the opportunity to view all communications and records (e.g., memoranda of understanding) discussing or outlining this program or activity.

Thank you in advance for your consideration.

Ty

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March 7, 2019

Via Hand Delivery

Attorney General of Texas
Open Records Division
209 West 14th Street, 6th Floor
Austin, Texas 78701

RE: Public Information Request for records related to DPS troopers assisting various cities in high-crime areas. (PIR # 19-0716)

DATE REQUEST FOR INFORMATION RECEIVED:	2/13/2019
DATE REQUEST FOR RULING SUBMITTED TO ATTORNEY GENERAL:	2/28/2019
DATE RESPONSIVE RECORDS SUBMITTED TO ATTORNEY GENERAL:	3/7/2019

Dear Open Records Division:

The Department of Public Safety received the above-referenced request for information from Ty Clevenger on February 13, 2019. As previously noted, we believe the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.108 and 552.152 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." Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For many years, your 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.

Section 552.101 of the Government Code also 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 and related criminal activity.

Section 552.101 encompasses section 418.176 of the Government Code, which states, 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 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; or
 - (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Section 552.101 encompasses section 418.177 of the Government Code, which states:

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.

Critical infrastructure is defined as "all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation." Gov't Code § 421.001(2).

The Department believes this information is excepted from required public disclosure pursuant to section 552.108(b)(1) of the Government Code, which states:

- (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 the requirements of Section 552.021 if:
 - (1) release of the internal record or notation would interfere with law enforcement or prosecution.

Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in [a law enforcement agency], avoid detection, jeopardize officer safety, and generally undermine [law enforcement] efforts to effectuate the laws of this State.” *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). Your office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques or procedures. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit a pattern that reveals investigative techniques, information is excepted under predecessor to section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers’ licenses), 252 (1980) (predecessor to section 552.108 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 maybe excepted).

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 [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.

These records discuss ongoing operations by the Department and other law enforcement agencies in various Texas cities to detect, prevent, and respond to terroristic threats and other criminal activities. These records include details of staffing and equipment utilized for these operations and strategies employed in these operations. The records also include information on previous operations that are used to assess ongoing and future risks to persons and property in these areas, and are maintained by the Department for this purpose. Revealing these records would provide wrong-doers, drug traffickers, terrorists, and other criminals with invaluable information concerning the law enforcement efforts, allowing these groups to identify vulnerabilities and avoid detection. Release of the requested records would reveal confidential staffing requirements and tactical plans of the Department and other law enforcement agencies during these ongoing operations, endangering the safety of both law enforcement personnel and the public in these areas. Therefore, the Department believes the requested records are confidential and excepted from required public disclosure under sections 552.101, in conjunction with section 418.176, 552.108(b)(1), and 552.152 of the Government Code.

Please find enclosed the request from Ty Clevenger, the notice of our request for a ruling sent to the requestor, and a representative sample of the records we wish to except from required disclosure. The Department has no records related to any proposed Dallas Police Department operation and is clarifying with the requestor regarding costs. Please feel free to contact me at (512) 424-2890 if you have any questions.

Sincerely,

Brian Sears
Assistant General Counsel

Enclosure(s)

cc: Ty Clevenger