

CAUSE NO. D-1-GN-18-003124

CITY OF ARLINGTON, TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	53RD JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY	§	
GENERAL, STATE OF TEXAS	§	TRAVIS COUNTY, TEXAS

ORIGINAL PETITION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CITY OF ARLINGTON, TEXAS (“Arlington”) and files this Original Petition for Declaratory Judgment in accordance with the Texas Public Information Act (“TPIA”).¹

I.
SUMMARY

1.01 The Attorney General for the State of Texas issued a ruling forcing the City of Arlington, Texas to publicly release information on the FBI-Joint Terrorism Task Force (“JTTF”), including information on an active terrorism investigation. No reasonable interpretation of the Texas Public Information Act requires a Texas governmental entity to release this type of information. Accordingly, the City of Arlington seeks a declaratory judgment that the documents related to the JTTF are not subject to release. The specific question presented to the Court is whether there is a compelling reason to withhold the JTTF documents from public disclosure.

¹See TEX. GOV’T CODE ANN. §§ 552.324 & 552.325.

II.
DISCOVERY LEVEL

2.01 Arlington intends for discovery to be conducted under Level 2.²

2.02 In a suit filed under the TPIA, “the court may order that the information at issue may be discovered only under a protective order until a final determination is made.”³

III.
PARTIES

3.01 Arlington is a home-rule municipality in the State of Texas. Accordingly, Arlington may initiate and prosecute suits without giving security for cost.⁴ No driver’s license or social security number has been issued to Arlington.⁵

2.02 Defendant Ken Paxton, Attorney General of the State of Texas, (“Attorney General”) has his central office in Travis County, Texas. A suit for declaratory judgment against the Attorney General must be filed in Travis County.⁶ The TPIA designates the Attorney General as the statutorily mandated defendant.⁷

2.03 The Attorney General may be served by certified mail at Post Office Box 12548, Austin, Texas 78711-2548.

²See TEX. R. CIV. P. 190.1 & 190.3.

³See TEX. GOV’T CODE ANN. §§ 552.322.

⁴See TEX. CIV. PRAC. & REM. CODE ANN. § 6.002.

⁵See TEX. CIV. PRAC. & REM. CODE ANN. § 30.014.

⁶See TEX. GOV’T CODE ANN. § 552.324.

⁷See TEX. GOV’T CODE ANN. § 552.324(a).

IV.
FACTUAL BACKGROUND

4.01 Arlington expects the factual background of this lawsuit to be undisputed. Arlington further believes that this case is appropriate for resolution on a stipulation of facts to be worked out with the Attorney General.

A. The request.

4.02 On February 26, 2018, at 9:51 p.m., Isaiah X. Smith submitted a request for records under the TPIA. Mr. Smith described the documents he requested as follows:

1. All records that the Arlington Police Department has in its possession that is in regard and pertaining to the North Texas Joint Terrorism Task Force.
2. All written communication, including but not limited to emails, in which is in the possession of the Arlington Police Department that is in regard and pertaining to the North Texas Joint Terrorism Task Force.
3. All written communication, including but not limited to emails, in which were sent by and received by the Arlington Police Department from or to the Federal Bureau of Investigation, the Department of Homeland Security, the United States Attorney Office for the Northern District of Texas, and to other federal officials and other federal agencies that is in regard and pertaining to the North Texas Joint Terrorism Task Force.
4. All written communication, including but not limited to emails, in which were sent by and received by the Arlington Police Department from or to other state and local law enforcement governmental bodies regarding and pertaining to the North Texas Joint Terrorism Task Force.

A copy of Mr. Smith's request is attached as **Exhibit 1**. As can be seen, the sole focus of the request is on obtaining documents related to the prevention of terrorism. Because the

request was submitted after hours, Arlington treated the request as having been received on February 27, 2018.

B. Arlington requests a ruling from the Attorney General.

4.03 On March 13, 2018, Arlington timely requested a ruling from the Attorney General regarding Mr. Smith's request.⁸ A copy of Arlington's request is attached as **Exhibit 2**. The request identified TPIA exceptions and stated that Arlington would submit the required items for to the Attorney General for review.⁹

C. Arlington submits written comments regarding exceptions.

4.04 On April 4, 2018, Arlington submitted its written comments stating the reasons why the exceptions applied to Mr. Smith's claim.¹⁰ The written comments included a confidential memo and various exhibits. A copy of Arlington's April 4, 2018 letter (without the confidential memo and exhibits) is attached as **Exhibit 3**.

D. The Attorney General letter ruling.

4.05 On May 18, 2018, the Attorney General issued letter ruling, OR2018-11903 in response to Arlington's asserted exceptions to Mr. Smith's requests. A copy of the letter ruling is attached as **Exhibit 4**. As discussed below, the ruling is the subject of this lawsuit. Arlington received the ruling from the Attorney General's Office on May 23, 2018.

⁸See TEX. GOV'T CODE ANN. § 552.301(b) (ten business days to request AG decision).

⁹See TEX. GOV'T CODE ANN. § 552.301.

¹⁰See TEX. GOV'T CODE ANN. § 552.301(e)(1)(A).

V.
CONFUSION OVER APPLICABLE DEADLINE FOR COMMENTS

5.01 The scope of Mr. Smith’s request was very broad; in fact, the first request is for “All records that the Arlington Police Department has in its possession that is in regard and pertaining to the North Texas Joint Terrorism Task Force.”¹¹ Because this request potentially includes body camera video footage, Arlington’s written comments to the Attorney General raised the concern that portions of the requested records were excepted from disclosure pursuant to Section 1701.661 of the Texas Occupations Code.¹² The Attorney General agreed with Arlington on the body camera video footage.¹³

5.02 When addressing body camera video footage, the Legislature chose to include the statutory requirements in the Texas Occupation Code. On the other hand, the Texas Public Information Act is codified in the Texas Government Code. When a local government asserts that body camera footage should be withheld, the Texas Occupation Code allows twenty business days for the request for decision to the Attorney General and twenty-five business days for the submission to the Attorney General.¹⁴ On the other

¹¹See Exhibit 1.

¹²See Exhibit 3, p.2, ¶ 4.

¹³See Exhibit 4, pp.1-2.

¹⁴See TEX. OCC. CODE § 1701.662(a) & (c). The relevant statutory language follows:

Sec. 1701.662. Body Worn Camera Recordings; Request for Attorney General Decision.

(a) Notwithstanding Section 552.301(b), Government Code, a governmental body’s request for a decision from the attorney general about whether a requested body worn camera recording falls within an exception to public disclosures is considered timely if made not later than the 20th business day after the date of receipt of the written request.

hand, the TPIA allows ten business days for the request for decision to the Attorney General and fifteen business days for the submission to the Attorney General.¹⁵ Arlington believed that the longer period provided in the Occupation Code applied to mixed cases, which included both a request for body camera video footage and documents.¹⁶ Because Arlington's written submission was made within the time stated

(c) Notwithstanding Section 552.301(e), Government Code, a governmental body's submission to the attorney general of the information required by that subsection regarding a requested body worn camera recording is considered timely if made not later than the 25th business day after the date of receipt of the written request.

¹⁵See TEX. GOV'T CODE § 552.301(b) & (e). The relevant statutory language follows:

Sec. 552.301. Request for Attorney General Decision.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

(e) A governmental body that requests an attorney general decision under Subsection (a) must within a reasonable time but not alter than the 15th business day after the date of receiving the written request:

(1) Submit to the attorney general:

(A) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld;

(B) a copy of the written request for information;

(C) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and

(D) a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested; and

(2) label that copy of the specific information requested, or of the representative samples, to indicate which exceptions apply to which parts of the copy.

¹⁶See Exhibit 3, p.1, ¶ 1.

by the Occupation Code but outside of the time stated by the TPIA, the Attorney General's Office ruled Arlington's written submission was untimely.¹⁷

5.03 After determining Arlington's written submission was untimely, the Attorney General's Office stated: "a governmental bodies 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."¹⁸ Accordingly, the Attorney General's Office reviewed Arlington's request under a "compelling reason" standard rather than the ordinary standard.¹⁹ The Attorney General's Office agreed that the limited information it marked should be withheld as it related to "staffing requirements or a tactical plan of an emergency response provider."²⁰ The Attorney General's Office also stated that birth dates, driver's license information, vehicle title information, and vehicle registration information should be withheld.²¹ However, the Attorney General's Office determined Arlington did not present a compelling reason for withholding the remainder of the JTTF information ("remaining JTTF information").²²

¹⁷See Exhibit 4, pp.2-3.

¹⁸See *id.* (citing TEX. GOV'T CODE § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ).

¹⁹See Exhibit 4, pp.2-3.

²⁰See Exhibit 4, p.4 (citing TEX. GOV'T CODE § 418.176).

²¹See Exhibit 4, pp.5-6.

²²See *id.* at pp.4-6.

VI.
COMPELLING REASONS

6.01 The Attorney General's Office erroneously found that the remaining JTTF information should be released. The compelling reason standard is identified in Section 552.302 of the Texas Government Code, which provides:

Sec. 552.302. Failure to Make Timely Request for Attorney General Decision; Presumption That Information Is Public.

If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Sections 552.301(d) and (e-1), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

TEX. GOV'T CODE § 552.302 (underlining added).

6.02 In the case at hand, the documents – as clearly indicated in the request (see Exhibit 1) – are solely related to the Joint Terrorism Task Force. The requested documents include investigations, including at least one ongoing investigation. The Texas Supreme Court has clearly established a common-law exception to the TPIA for the type of information at issue in this case. *See Texas Dep't of Public Safety v. Cox Texas Newspapers, L.P.*, 343 S.W.3d 112, 113-22 (Tex. 2011) (“[O]ur decision recognizes, for the first time, a common law physical safety exception to the PIA.”) The Texas Supreme Court's holding was in response to a public information request for information related to former Governor Perry's “security detail.” *Id.* at 113. Accordingly, Arlington seeks a declaratory judgment that there is a compelling reason to withhold the requested information from public release.

6.03 In addition to the *Cox* case, Section 552.108 excepts information from public release if the release would interfere with the detection, investigation, or prosecution of criminal offenses. *See* TEX. GOV'T CODE § 552.108. As was previously explained to the Attorney General's Office (including a four page confidential memo), the requested information "consist of intelligence documents, communications, and other information which relate to terrorism investigations."²³ The Attorney General's Office is attempting to force the release of the JTTF information because of Arlington's interpretation of the relatively new statutory provision governing request for body cameras and the conflicting deadlines, as discussed above. The position of the Attorney General's Office disregards the safety of Texans. This position is in no way required or justified by the TPIA. Consistent with the policy of excepting law enforcement activities, as codified in Section 552.108, Arlington has shown a compelling reason to withhold the JTTF information. Accordingly, Arlington seeks a declaratory judgment that there is a compelling reason to withhold the requested information from public release.

6.04 In addition to the *Cox* case and Section 552.108, Section 552.101 of the TPIA in conjunction with Section 418.180 of the Texas Homeland Security Act except information from public release if the release would disclose reports of information to the U.S. Government (FBI) related to investigations into terrorist activity. *See* TEX. GOV'T CODE §§ 418.180 & 552.101. Moreover, the FBI also has a legitimate claim to withhold these records, which has not been waived. Compliance with the terms of Section 418.180 and the policies established by this provision provide an additional compelling reason to

²³*See* Exhibit 3, p.1.

withhold the JTTF information. Accordingly, Arlington seeks a declaratory judgment that there is a compelling reason to withhold the requested information from public release.

6.05 In addition to the above reasons, Arlington contends that portions of the JTTF information is protected by the informer's privilege. The release of such information would remove the anonymity of the reporting person(s) and discourage the exchange of information useful in detecting terrorism threats. The identity of informers should be withheld to protect their physical safety as well as encouraging them to report suspected terrorism activities. The common law right of privacy has been interpreted to include information which if made public would jeopardize the safety of individuals. For these reasons, the informer's privilege is falls within the protection of Section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See* TEX. GOV'T CODE § 552.101. Accordingly, Arlington seeks a declaratory judgment that there is a compelling reason to withhold the requested information from public release.

VII. **NOTICE TO REQUESTOR**

7.01 The undersigned attorney for Arlington certifies that a copy of this petition will be sent to Isaiah X. Smith by certified mail/return receipt requested on the day the petition is filed at the following address:

Isaiah X. Smith
Isaiah Smith Campaign
P.O. Box 163411
Fort Worth, Texas 76161

In addition, a courtesy copy of the petition will be emailed to Mr. Smith at iscampaign@usa.com. The address and email address were provided by Mr. Smith provided in his request (Exhibit 1). The statutorily required notification is included in this petition, as follows:

NOTICE TO REQUESTER MR. ISAIAH X. SMITH

The City of Arlington hereby notifies requester Isaiah X. Smith of the following:

- (1) the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;
- (2) the requestor's right to intervene in the suit or to choose to not participate in the suit;
- (3) the fact that the suit is against the attorney general in Travis County district court; and
- (4) the address and phone number of the office of the attorney general,²⁴ as follows:

Mr. Ken Paxton
Attorney General of Texas

Mailing address: P.O. Box 12548
Austin, Texas 78711-2548

Physical address: 300 W. 15th Street
Austin, Texas 78701

Telephone: (512) 463-2100

²⁴See TEX. GOV'T CODE ANN. § 552.325(b).

VIII.
CONCLUSION & PRAYER

8.01 The forced disclosure of FBI-Joint Terrorism Task Force investigations and documents is not an appropriate response to a governmental entity that made a mistake in interpreting a conflict between statutory deadlines found in different statutes. Rather, this ruling by the Attorney General's Office endangers the public at large and local and national law enforcement officers. The ruling at issue in this case demonstrates an attitude of indifference to the real-world effects of releasing information related to terrorism investigations. In this case, there is clearly a compelling reason for withholding the information.

8.02 THEREFORE, Plaintiff, City of Arlington, requests that Defendant Attorney General be cited to appear and answer, and that on final trial, Arlington have the following relief:

1. Declaratory judgment that the information requested by Isaiah X. Smith in Exhibit 1 is not subject to disclosure under the Texas Public Information Act;
2. Such other relief to which Arlington may be entitled.

Respectfully submitted,

By: /s/ Robert Fugate

Robert Fugate
Texas Bar No. 00793099
Deputy City Attorney
robert.fugate@arlingontx.gov
City of Arlington City Attorney's Office
Physical Address:
101 South Mesquite Street, 3rd Floor

Arlington, Texas 76010

Mailing Address:

Mail Stop #63-0300

Post Office Box 90231

Arlington, Texas 76004-3231

(817) 459-6878

(817) 459-6897 (fax)

ATTORNEY FOR PLAINTIFF
CITY OF ARLINGTON, TEXAS

CAUSE NO. _____

CITY OF ARLINGTON, TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	____ JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY	§	
GENERAL, STATE OF TEXAS	§	TRAVIS COUNTY, TEXAS

ORIGINAL PETITION FOR DECLARATORY JUDGMENT

EXHIBIT 1

Request from Isaiah X. Smith
Dated 02-26-18

Ms. Mary Supino

ID: SPIR-2018-0011

City Secretary

Office of the City Secretary

MS 01-0110

P.O. Box 90231

Arlington, TX 76004

mary.supino@arlingtontx.gov

Sent via: Electronic mail

February 26th, 2018

Re: Open Records Request

Ms. Supino,

Under the Texas Public Information Act, §6252-17a et seq., I am requesting an opportunity to obtain copies of records that the Arlington Police Department has in its possession. I hereby request the following records:

1. All records that the Arlington Police Department has in its possession that is in regard and pertaining to the North Texas Joint Terrorism Task Force.
2. All written communication, including but not limited to emails, in which is in the possession of the Arlington Police Department that is in regard and pertaining to the North Texas Joint Terrorism Task Force.
3. All written communication, including but not limited to emails, in which were sent by and received by the Arlington Police Department from or to the Federal Bureau of Investigation, the Department of Homeland Security, the United States Attorney Office for the Northern District of Texas, and to other federal officials and other federal agencies that is in regard and pertaining to the North Texas Joint Terrorism Task Force.
4. All written communication, including but not limited to emails, in which were sent by and received by the Arlington Police Department from or to other state and local law enforcement governmental bodies regarding and pertaining to the North Texas Joint Terrorism Task Force.

Please note that virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. Id. § 552.022(a)(1); see also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); see also Open Records Decision No. 462 at 4 (1987).

I would like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public understanding of the way in which the government operates, the Arlington Police Department, the Arlington Police Department's participation with and in the North Texas Joint Terrorism Task Force, the North Texas Joint Terrorism Task Force, government intrusion, the privacy rights of citizens, the way in which the government upholds the procedural and the substantive due process rights of a targeted individuals, the procedural and the substantive due process rights of a targeted individual and et cetera. The information that I have requested is in the public's interest and has educational contributable value.

The Texas Public Information Act requires that you "promptly produce" the requested records unless, within 10 days, you have sought an Attorney General's Opinion. As provided by the Texas Public Information Act, I will expect your response within ten (10) business days. Twenty (20) days if my request requires substantial programming or manipulation of data. See Tex. Gov't Code Ann. Secs. 552.221(d) and 231(c). If you expect a significant delay in responding to this request, please contact me with information about when I might expect copies or the ability to inspect the requested records. You can reach me via email at: iscampaign@usa.com.

If you deny any or all of this request, please provide a written explanation for the denial and cite each specific statutory exemption(s) you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law. If your "governmental body" wants to seek the Attorney General's Opinion regarding any of our request, I ask that you immediately notify me and then seek a formal decision from the Texas Attorney General not later than ten (10) calendar days from your receipt of this request, as required by the Texas Public Information Act. See Sec. 552.301. I would then ask your governmental body to release to me all of the items in which you have not sought the Attorney General's Opinion on. See Sec. 552.301, 302; see also Open Records Decision No. 664 (2000)(if a governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

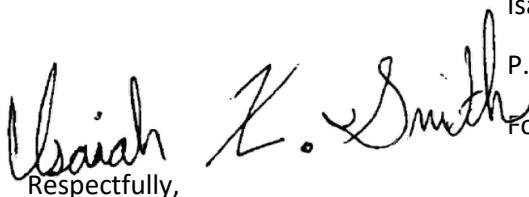
As you may already know that violation of the open records law can result in a fine of up to \$1,000, imprisonment of up to six months, or both. See Tex. Gov't Code Ann. Sec. 552.353(e). Litigation costs and reasonable attorney fees may also be assessed against you. See Sec. 552.323. I would prefer to receive all of the requested information to me by email. My email address is at: iscampaign@usa.com. You can also send me my requested records by mail at the following mailing address:

Isaiah X. Smith

Isaiah Smith Campaign

P.O Box 163411

Fort Worth, Texas, 76161



Respectfully,

Isaiah X. Smith¹

¹ www.isaiahxsmith.com

CAUSE NO. _____

CITY OF ARLINGTON, TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	___ JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY	§	
GENERAL, STATE OF TEXAS	§	TRAVIS COUNTY, TEXAS

ORIGINAL PETITION FOR DECLARATORY JUDGMENT

EXHIBIT 2

Arlington's Request for a Ruling
Dated 03-13-18



Arlington Police Department

Legal Division

Telefax 817 459 5353

CALEA Accredited Since 1989

Mail Stop 04-0200

Post Office Box 1065

Arlington, Texas 76004-1065

March 13, 2018

Office of the Attorney General
ATTN: Open Records Division
P. O. Box 12548
Austin, Texas 78711-2548

**Re: Request for a Public Information Ruling
Notice under Texas Occupations Code §1701.662(a) (PD Reference 54269)**

Dear Sir or Madam:

On February 26, 2018 at 9:51 p.m., Isaiah Smith sent an e-mail to the City of Arlington requesting records related to the North Texas Joint Terrorism Task Force. Please note the City of Arlington was closed for business at the time Mr. Smith e-mailed his request. The Arlington Police Department received a copy of his request on February 27, 2018. A copy of the request is attached as Exhibit "A". Mr. Smith has requested records which are believed to include body worn camera footage. As a result, the City believes that pursuant to Section 1701.662 of the Texas Occupations Code, it has until March 27, 2018 to request a decision from the Attorney General about whether the recording falls within an exception to public disclosure. Furthermore, because the City will be closed for business on March 29, 2018 for a city holiday, it will have until April 4, 2018 to submit written comments stating the reasons why the exceptions apply. This is the City's timely request for a ruling as required by law. Today is only the tenth business day following the City's receipt of the request.

The City requests a ruling from the Attorney General on to the required public disclosure of portions of the requested records. The City objects to disclosure of certain responsive records based on one or more of the following exceptions: Government Code Sections 552.101, 552.102, 552.103, 552.106, 552.107, 552.108, 552.1085, 552.109, 552.110, 552.111, 552.115, 552.117, 552.1175, 552.122, 552.131, 552.141, 552.151, 552.152, and 552.153.

The City will submit written comments explaining the reasons why the stated exceptions apply by the deadline required by law.

Please contact me if you have any questions about this request.

Sincerely,
DeAndrea Bradford
Assistant City Attorney

cc: Isaiah Smith
P.O. Box 163411
Fort Worth, TX 76161

CAUSE NO. _____

CITY OF ARLINGTON, TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	____ JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY	§	
GENERAL, STATE OF TEXAS	§	TRAVIS COUNTY, TEXAS

ORIGINAL PETITION FOR DECLARATORY JUDGMENT

EXHIBIT 3

Arlington's Written Comments
(without confidential memo or other exhibits)

Dated 04-04-18



Arlington Police Department

Legal Division

Telefax 817 459 5353

Let DeAndrea know when ruling recd

CALEA Accredited Since 1989

Mail Stop 04-0200
Post Office Box 1065
Arlington, Texas 76004-1065

Office of the Attorney General
ATTN: Open Records Division
209 West 14th Street
Post Office Box 12548
Austin TX 78711-2548

4/4/18

Telefax 512 463 2092

Re: AG ID# N/A
Request for a Public Information Ruling
Written Comments (PD Reference 54269)

Dear Sir or Madam:

On February 26, 2018 at 9:51 p.m., Isaiah Smith sent an e-mail to the City of Arlington requesting records related to the North Texas Joint Terrorism Task Force. Please note the City of Arlington was closed for business at the time Mr. Smith e-mailed his request. The Arlington Police Department received a copy of his request on February 27, 2018. A copy of the request is attached as Exhibit "A". This City timely requested a ruling as required by §1701.662 of the Texas Occupations Code on March 13, 2014 (although the twentieth day was not until March 27, 2018) and to our knowledge, we have not yet been assigned an AG ID. Please note that the City was closed on March 30, 2018 due to a City holiday making today the 25th business day.

A representative sample of the responsive records is enclosed as Exhibits "C", "D", "E", "F", and "G".

Pursuant to the Texas Occupations Code Section 1701.662 and Chapter 552 of the Texas Government Code, we request an opinion on the following questions:

- 1. Are the records enclosed as Exhibits C, D, E, F, and G excepted from disclosure pursuant to Section 552.108 (records of a law enforcement agency)?**

Section 552.108 of the Government Code is intended to protect information which, if released, would interfere with the detection, investigation, or prosecution of criminal offenses. The records contained in Exhibits "C", "D", "E", "F", and "G" are records of a law enforcement agency, the Arlington Police Department. These records pertain to the Joint Terrorism Task Force. They consist of intelligence documents, communications, and other information which relate to terrorism investigations. These documents are used by law enforcement to aid officers in the detection, investigation, and prevention of crime. Making this information available to the public would assist those suspected of criminal activity in avoiding detection and potentially subject large segments of the population to the threat of danger posed by terrorist operations. Additional written comments stating the reasons why the stated exception allows the information to be withheld are enclosed as confidential Exhibit "B."

- 2. Is the information enclosed as Exhibits "C", "D", "E", "F" and "G" excepted from disclosure pursuant to Section 552.101 (records confidential by law – Section 418.176 and 418.180 of the Texas Government Code)?**

The Police Department contends that the responsive records in Exhibits "C", "D", "E", "F", and "G" contain information that is confidential under the Texas Homeland Security Act. The information is "collected, assembled, and maintained" by APD for the "purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity". See Gov't Code §418.176(a). The responsive records provide staffing information of APD in their capacity as an emergency response provider and insight into certain tactical plans of APD. See id.

The records also contain reports of information provided to the U.S Government (FBI) related to investigations into terrorist activity, and the release of the information is prohibited. *See Gov't Code §418.180.*

Further explanation of how the responsive records fall within the scope of these sections of the Government Code is included in Exhibit "B".

3. *Is the information enclosed as Exhibits "C", "D", "E", and "F" excepted from disclosure pursuant to Section 552.101 (records confidential by law – informer's privilege, common law privacy-safety)?*

The Police Department contends that the requested information is protected from disclosure pursuant to the informer's privilege, in that the requested record includes the identity of the person or persons who furnished information of possible law violations to law enforcement officials charged with enforcement of those laws, and the release of identity information would remove the anonymity of the reporting person(s) and discourage them from performing that obligation in the future. No informer's identity has been released to the public. We want to protect these "informers" by preserving their anonymity, encouraging them to report suspected violations of law to law enforcement. In addition, the common law right to privacy has been interpreted to include information which if made public would jeopardize the safety of individuals. *See ORD 612 at 3.* The release of the enclosed information would jeopardize the safety of individuals who have cooperated with law enforcement officers investigating alleged terrorist activity. Additional comments regarding the confidentiality of the informant identities is included a confidential memo included as Exhibit E.

4. *Are portions of the records enclosed as Exhibit "F" excepted from disclosure pursuant to Section 552.101 in conjunction with Section 1701.661 of the Occupations Code (information deemed confidential by law)?*

The records enclosed in Exhibit F consist of body worn camera. The Arlington Police Department acknowledges that the requested information includes a body worn camera recording that was required by law or policy and does not relate to an administrative or criminal investigation into the actions of an officer. The Department believes the requestor has failed to provide the information required by Section 1701.661(a) and 1701.661(f) of the Texas Occupations Code. The requestor did not provide the information required to obtain body worn camera footage. In addition, some of the responsive recordings were made in a private space. The requestor did not include any signed releases from any of the subjects of the video.

Therefore, we request a decision regarding whether the material enclosed as Exhibits "C", "D", "E", "F", and "G" is excepted from public disclosure under the above-referenced provisions of the Texas Government Code. In addition, we ask that you issue a previous determination which allows us to withhold records related to investigations conducted by the JTTF without necessity of requesting an opinion.

Sincerely,

DeAndrea Bradford
Assistant City Attorney

Enclosures: Exhibit "A" – Copy of Request
Exhibit "B" – Confidential Memo
Exhibit "C"—Copy of Requested Information
Exhibit "D"—Copy of Requested Information
Exhibit "E" —Copy of Requested Information
Exhibit "F"— Copy of Requested Information
Exhibit "G"— Copy of Requested Information

CAUSE NO. _____

CITY OF ARLINGTON, TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	____ JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY	§	
GENERAL, STATE OF TEXAS	§	TRAVIS COUNTY, TEXAS

ORIGINAL PETITION FOR DECLARATORY JUDGMENT

EXHIBIT 4

AG Ruling OR2018-11903



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 18, 2018

Ms. DeAndrea Bradford
Assistant City Attorney
Arlington Police Department
P.O. Box 1065
Arlington, Texas 760004-1065

OR2018-11903

Dear Ms. Bradford:

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# 709674 (PD Reference No. 54269).

The Arlington Police Department (the "department") received a request for four categories of information pertaining to a named entity. You claim some of the submitted information is not subject to disclosure pursuant to section 1701.661 of the Occupations Code. You also 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 representative sample of information.¹

Initially, we note the submitted information includes a city police officer's body worn camera recordings. Body worn cameras are subject to chapter 1701 of the Occupations Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. Section 1701.661(a) provides:

¹We 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 that those records contain substantially different types of information than that submitted to this office.

A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a). In this instance, the requestor does not give the requisite information under section 1701.661(a). As the requestor did not properly request the body worn camera recordings at issue pursuant to chapter 1701, our ruling does not reach this information and it need not be released. However, pursuant to section 1701.661(b), a “failure to provide all the information required by Subsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information.” *Id.* § 1701.661(b).

Next, we must address the department’s obligations under section 552.301 of the Government Code. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is exempted from public disclosure. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov’t Code § 552.301(e)(1)(A)-(D). You inform us the department received the request for information on February 27, 2018. Accordingly, the department’s fifteen-business-day deadline was March 20, 2018. However, the envelope in which the department provided the information required by section 552.301(e) was meter-marked April 4, 2018. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the department failed to comply with the requirements mandated by section 552.301 of the Government Code.

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 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of*

Ins., 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Although you claim section 552.108 of the Government Code and section 552.101 of the Government Code in conjunction with the common-law informer’s privilege, we find you have failed to establish compelling reasons to address these exceptions. However, as sections 552.101 and 552.130 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider your remaining arguments under section 552.101 and the applicability of section 552.130 for the submitted information.²

You raise section 552.101 of the Government Code in conjunction with a provision of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code for some of the remaining information. 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. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.176(a) of the Government Code provides:

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.

Id. § 418.176(a). Section 418.180 of the Government Code, 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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. The fact that information may be related to a governmental body's security concerns or emergency preparedness does not make such information per se confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You seek to withhold the submitted information under section 552.101 of the Government Code in conjunction with sections 418.176 of the Government Code. The department contends release of this information would "provide staffing information of [the department] in [its] capacity as an emergency response provider and insight into certain tactical plans of [the department]." Based on your representations and our review, we find the department has established the information we marked relates to staffing requirements or a tactical plan of an emergency response provider under section 418.176. *See id.* § 418.176(a)(1), (2). Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.³ However, we find you have not demonstrated any of the remaining information was collected, assembled, or maintained for the purposes of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and that it relates to the staffing requirements or the tactical plan of an emergency response provider or consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider. Further, we find you have failed to establish any of the remaining information relates to an act of terrorism or related criminal activity and is required to be kept confidential under section 552.101 of the Government Code because of a federal statute or regulation, to participate in a state-federal information sharing agreement, or to obtain federal funding. Consequently, the remaining information is not confidential under section

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

418.176(a) or section 418.180, and the department may not withhold it under section 552.101 of the Government Code on either of these bases.

Section 552.101 of the Government Code also encompasses 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 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, we conclude you have failed to demonstrate the applicability of the common-law physical safety exception to any of the remaining information. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Accordingly, the department must withhold the public citizen's date of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by this state or another state or country. Gov't Code § 552.130(a)(1), (2). Accordingly, the department must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

In summary, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department must withhold the public citizen's date of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the motor vehicle record information we marked under section 552.130 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,

A handwritten signature in black ink, appearing to read "Ashley Crutchfield". The signature is written in a cursive style with a large initial "A".

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/sb

Ref: ID# 709674

Enc. Submitted documents

c: Requestor
(w/o enclosures)