



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 27, 2016

Ms. Jessica Vu
Public Information Coordinator
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2016-28380

Dear Ms. Vu:

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# 639369 (OOG ID No. 16-326).

The Office of the Governor (the "governor's office") received a request for a named individual's calendar during a specific date range. The governor's office states it is releasing some information to the requestor, with redactions made pursuant to section 552.024 of the Government Code and Open Records Decision No. 684 (2009).¹ The governor's office claims some of the submitted information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. We have considered the exceptions the governor's office claims and reviewed the submitted information.

¹Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117(a)(1) of the Government Code without requesting a decision from this office if the current or former employee or official timely chooses not to allow public access to the information. *See* Gov't Code §§ 552.024(c), .117. Open Records Decision No. 684 is a previous determination authorizing all governmental bodies to withhold certain categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public subject to section 552.137 of the Government Code.

Initially, the governor's office states some of the responsive information was the subject of a previous request for information in response to which this office issued Open Records Letter No. 2015-10477 (2015). As we have no indication the law, facts, and circumstances on which the prior ruling was based has changed, the governor's office may continue to rely on Open Records Letter No. 2015-10477 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.101 of the Government Code exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code 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 confidential certain information related to terrorism. The governor's office asserts the information it has marked is made confidential by section 418.181 of the Government Code. Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact that information may relate to a governmental body's security concerns does not make the 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).

We note the building at issue is critical infrastructure for the purposes of section 418.181 of the Government Code. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). Upon review, we find the information the governor's office has marked reveals the technical details of particular vulnerabilities of a governor's office building to an act of terrorism. Therefore, the governor's office must

withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.²

Section 552.104 of the Government Code excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The governor’s office argues expansion and recruitment of businesses to the State of Texas is a competitive process, and the governor’s office “works tirelessly to promote Texas, in part by providing state resources to encourage business growth within the state.” The governor’s office states “Texas devotes substantial resources to programs designed primarily to attract new businesses to the state or assist with the substantial expansion of an existing business as part of competitive recruitment.” The governor’s office explains it is currently negotiating potential approvals or contracts with the businesses at issue, and contracts with these businesses have not been executed. The governor’s office argues release of this information, before contracts are signed or final approval given, would disadvantage Texas by permitting other states to directly approach these businesses and their representatives with competing incentives. Based on these representations and our review, we find the governor’s office has demonstrated it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. We also find the governor’s office has demonstrated release of the information it has marked would give advantage to a competitor or bidder. Accordingly, the governor’s office may withhold the information it has marked under section 552.104 of the Government Code.

In summary, the governor’s office may continue to rely on Open Records Letter No. 2015-10477 as a previous determination and withhold or release the identical information in accordance with that ruling. The governor’s office must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The governor’s office may withhold the information it has marked under section 552.104 of the Government Code. The remaining information must be released.

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.

²As our ruling is dispositive, we need not address the governor’s office’s remaining argument against disclosure of this information.

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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 639369

Enc. Submitted documents

c: Requestor
(w/o enclosures)