



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 15, 2017

Mr. Mark E. Brewton
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2017-05400

Dear Mr. Brewton:

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# 647361 (SAWS File No. 5384).

The San Antonio Water System (the "system") received a request for (1) certain information pertaining to specified items from a specified board meeting; (2) correspondence between any representative of the system and any representative of the Central Texas Regional Water Supply Corporation ("CTRWSC") during a specified time period; and (3) correspondence between any representative of the system and any representative of the United States Fish and Wildlife Services or the United States Army Corps of Engineers pertaining to specified projects during a specified time period.¹ You state you provided some information to the

¹We note the system sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). You inform us you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the system received the required deposit on December 1, 2016. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

requestor. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code.² You also state release of the remaining information may implicate the interests of Baker Botts, L.L.P.; CTRWSC; Garney P3, L.L.C. (“Garney”); Haynes and Boone; Husch Blackwell, L.L.P.; Milbank, Tweed, Hadley & McCloy, L.L.P.; Pape-Dawson Engineers, Inc.; Sumitomo Mitsui Banking Corporation; and VRRSP Consultants, Inc. (“VRRSP”). Accordingly, you notified these third parties of the request for information and of their right to submit arguments stating why their information should not be released. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from CTRWSC, Garney, and VRRSP. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why their information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the system may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Garney argues its information is not responsive to the request for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the system has submitted the information at issue for our review, we find the system

²We note we asked the system to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov’t Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the system pursuant to that request.

has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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.” *Id.* at 841. CTRWSC, Garney, and VRRSP state they have competitors. In addition, CTRWSC, Garney, and VRRSP state release of the information they indicated would give advantage to their competitors. After review of the information at issue and consideration of the arguments, we find CTRWSC, Garney, and VRRSP have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information we have indicated under section 552.104(a) of the Government Code.³

CTRWSC, Garney, and VRRSP raise section 552.113 of the Government Code for some of the remaining information. Section 552.113 provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure under the Act] if it is:

....

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

Gov’t Code § 552.113(a)(2). In Open Records Decision No. 627 (1994), this office concluded section 552.113(a)(2) protects from public disclosure only (I) geological and geophysical information regarding the exploration or development of natural resources that is (ii) commercially valuable. ORD 627 at 3-4 (overruling rationale of Open Records Decision No. 504 (1988)). The decision explained the phrase “information regarding the exploration or development of natural resources” means “information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation.” *Id.* at 4 n.4. However, section 552.113(a)(2) does not except general geological information about a particular location that is unrelated to the “presence or absence of natural resources.” In order to be commercially valuable for purposes of Open Records Decision No. 627 and section 552.113, information must not be publicly available. *See* Open Records Decision No. 669 (2000). Upon review, we agree the

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

information we have indicated is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the system must withhold the information we have indicated pursuant to section 552.113 of the Government Code.⁴

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 the Texas Homeland Security Act (the “HSA”). As part of 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 418.181 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 the 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).

The system, CTRWSC, Garney, and VRRSP assert, and we agree, the system’s water and wastewater service systems are critical infrastructure. *See generally id.* § 421.001 (defining “critical infrastructure” to include “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”). The system states some of the information at issue depicts the location and relationship of this infrastructure at the Aquifer Storage Recovery Facility. The system argues release of this information “will cause significant risk to [system] security regarding that critical infrastructure to acts of terrorism or related criminal activity.” The system further states some of the additional information at issue identifies “location and design specifications for infrastructure regarding pumps and pump stations, production wells, pump valves, and projected power usage for water infrastructure to be constructed” as part of the Vista Ridge Transmission Pipeline (the “pipeline”) project. The system informs us it “will assume ownership of the pipeline and all of the associated infrastructure at the end of the contract period.” The system asserts release of this information “would inform an effort to

⁴As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

disrupt technology and other operational aspects of [its] water supply.” Based on these representations and our review, we agree portions of the information at issue would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the system must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. However, we find the system, CTRWSC, Garney, and VRRSP have not demonstrated the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, we find the system may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.⁵ *See id.* § 552.117(a)(1). Section 552.117 is applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers may only be withheld if a governmental body does not pay for the cellular telephone service.

In summary, the system may withhold the information we have indicated under section 552.104(a) of the Government Code. The system must withhold the information we have indicated pursuant to section 552.113 of the Government Code. The system must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers

⁵The 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)*.

may only be withheld if a governmental body does not pay for the cellular telephone service. The system 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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/sdk

Ref: ID# 647361

Enc. Submitted documents

c: Requestor
(w/o enclosures)

8 Third Parties
(w/o enclosures)