



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 2, 2017

Ms. Lindsey Aston  
General Counsel  
Office of the Secretary of State  
P.O. Box 12697  
Austin, Texas 78711-2060

OR2017-22445

Dear Ms. Aston:

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# 677657.

The Office of the Secretary of State (the "secretary's office") received two requests from different requestors for communications between the secretary's office and federal agencies pertaining to the election security during specified time period.<sup>1</sup> You claim the requested information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.137,

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<sup>1</sup>We note the secretary's office asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you argue the submitted information is not “public information” subject to disclosure under the Act. Section 552.002(a) of the Government Code defines “public information” as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Gov’t Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You argue the submitted information consists of information used solely for the purpose of maintenance, manipulation, or protection of public property and has no other significance. However, upon review, we find the submitted information has significance other than its use as a tool for the maintenance, manipulation, or protection of public property. Accordingly, we conclude the submitted information is “public information” as defined by section 552.002, and it is subject

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<sup>2</sup>We 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. We also note we asked the secretary’s office 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 secretary’s office pursuant to that request.

to disclosure under the Act. We will address the arguments against disclosure of the submitted information.

Next, we must address the secretary's office's obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). The secretary's office received the first request for information on July 13, 2017. Thus, the secretary's office's ten-business-day deadline was July 27, 2017. However, the secretary's office did not request a ruling by electronic submission until July 28, 2017. Consequently, we find the secretary's office has failed to comply with the requirements of section 552.301 in requesting a decision.

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, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). You raise sections 552.101, 552.108, 552.111, 552.137, and 552.139 as exceptions to disclosure. The need of a governmental body, other than the governmental body that failed to timely seek an open records decision, to withhold information under section 552.108 of the Government Code can provide a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision No. 586 (1991). Because you inform us the United States Department of Homeland Security (the "DHS") and the United States Federal Bureau of Investigation (the "FBI") have a law enforcement interest in the information at issue, we will consider whether the secretary's office may withhold the submitted information under section 552.108 of the Government Code on behalf of the DHS or FBI. Further, because sections 552.101, 552.137, and 552.139 can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these sections for the submitted information. However, we find you have failed to establish a compelling reason to address your remaining exceptions.

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. Section 552.101 of the Government Code 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. You assert some of the submitted information is made confidential by sections 418.181 and 418.182 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. Section 418.182 provides, in relevant part,

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

*Id.* § 418.182(a). The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *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 Texas Homeland Security Act 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 state some of the submitted information is excepted under sections 418.181 and 418.182 of the Government Code. We understand you to assert the information you have indicated relates to the security of the statewide voter registration system maintained by the secretary's office and the portions of website of the secretary's office pertaining to elections, which you state are critical infrastructure for the purposes of the HSA. You contend release of the information you have indicated would reveal particular vulnerabilities of this critical infrastructure "because [the information at issue] discusses how these systems are monitored for criminal activity." You further state the information at issue contains criminal "prevention and mitigation recommendations" the release of which "could result in malicious actors developing ways to circumvent such prevention and mitigation recommendations, exacerbating any identified vulnerabilities." Upon review, we find you have demonstrated release of portions of the information at issue, which we have marked, would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Accordingly, the secretary's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. However, we find you have not demonstrated the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See 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"). Further, you have not demonstrated

the information at issue consists of access codes and passwords or reveals the location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Consequently, we find the secretary's office may not withhold the remaining information at issue under section 552.101 in conjunction with section 418.181 or section 418.182.

You assert the remaining information is subject to section 552.108 of the Government Code based on the law enforcement interests of the DHS and the FBI. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body possesses information relating to the pending case of another a law enforcement agency, the governmental body may withhold the information under section 552.108(a)(1) if it demonstrates the information relates to the pending case and this office is provided with a representation from the law enforcement agency that the law enforcement agency wishes to have the information withheld.

You state, and submit documentation demonstrating, the FBI objects to disclosure of a portion of the remaining information, which we have marked, because its release would interfere with a pending criminal investigation being conduct by the FBI. Based upon this representation, we conclude release of the information we have marked will interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, we find the secretary's office may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the FBI. However, we have not received any correspondence from the DHS or the FBI with respect to the remaining information. Further, you have not provided our office with any representation to indicate either the DHS or the FBI wishes to have any of the remaining information at issue withheld. Accordingly, we find you have failed to demonstrate section 552.108(a)(1) is applicable to the remaining information, and it may not be withheld on that basis.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically

excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental body for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine whether the personal e-mail addresses we have marked belong to government employees or officials. Thus, we rule conditionally. To the extent the personal e-mail addresses we have marked in the remaining information belong to government officials or employees, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov't Code § 552.137(a)). However, to the extent the personal e-mail addresses we have marked are not the personal e-mail addresses of government officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. However, the remaining e-mail addresses are subject to section 552.137(c), and may not be withheld under section 552.137 of the Government Code.

Section 552.139 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)–(2). Section 2059.055 of the Government Code provides:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). You generally assert the remaining information is protected from disclosure by section 552.139. Upon review, however, we find you have failed to demonstrate any portion of the information at issue relates to computer network security, to restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Further, we find you have failed to demonstrate any portion of the information at issue consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Consequently, the secretary's office may not withhold any of the remaining information under section 552.139 of the Government Code.


In summary, the secretary's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The secretary's office may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the FBI. To the extent the personal e-mail addresses we have marked are not the personal e-mail addresses of government officials or employees and subsection (c) does not apply, this information must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. 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.

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](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,

  
Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/sb

Ref: ID# 677657

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)