



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 13, 2017

Ms. Kristen N. Lee
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2017-28329

Dear Ms. Lee:

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# 687879 (C.A. File No. 17PIA0620).

The Harris County Flood Control District (the "district") received a request for information pertaining to buyouts of homes affected by flooding, including shapefiles showing homes bought out, and applications for federal and state grants for funds to buyout homes from a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.104 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2017-27682 (2017). In Open Records Letter No. 2017-27682 we determined the district must release the information subject to section 552.022(a)(15) of the Government Code and may withhold the remaining information under section 552.103 of the Government Code. As we have no

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

indication the law, facts, and circumstances on which the prior ruling was based have changed, the district may continue to rely on that ruling as a previous determination and withhold or release the submitted information in accordance with Open Records Letter Ns. 2017-27682. *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). To the extent the submitted information was not previously ruled on, we will address your submitted arguments.

Next, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *Id.* § 552.301(e)(1). You state the district received the request for information on September 14, 2017. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. You do not state the district was closed any of the days at issue; thus, the district's ten-business-day deadline was September 28, 2017. The envelope in which the district provided the information required by section 552.301(b) was meter-marked October 5, 2017. *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). You acknowledge the district's request for a ruling did not comply with the procedural requirements of the Act; however, you explain Harris County has "experienced an unprecedented surge in requests for information" in the aftermath of Hurricane Harvey. Further, you state, although you are "working diligently to ensure timely responses, . . . in some cases, staff continue to be displaced from flooded out buildings making it extremely difficult to accommodate the vast increase in requests." Although this office understands the difficulties caused by the effects of Hurricane Harvey, we note the ten-business-day deadline is statutorily imposed on the district by section 552.301(b), and this office is required to adhere to this provision when determining the timeliness of the submissions made by the district for purposes of requesting a ruling under the Act. *See id.* §§ 552.301, .302, .306. Additionally, we note a governmental body may not decline to comply with the requirements of the Act on the ground of administrative inconvenience. *See*

Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 687 (Tex. 1976). Therefore, we have no choice but to find the district failed to request a decision from this office within the ten-business-day period prescribed by section 552.301(b). Further, we note you have submitted some of the information in a format we are unable to review. The district must submit information in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. As this office cannot review the information at issue, we conclude the district has failed to comply with the requirements of section 552.301(e) of the Government Code with respect to this information. See Gov't Code § 552.301(e)(1)(D).

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). You claim sections 552.101, 552.103, and 552.104 of the Government Code for the submitted information. Because sections 552.101 and 552.137 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these exceptions to the submitted information.² You raise section 552.103 of the Government Code on behalf of both the district and on behalf of your own office, the Harris County Attorney's Office (the "county attorney's office"). 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 552.103 can provide a compelling reason sufficient to overcome the presumption of openness. See Open Records Decision No. 469 (1987) (university may withhold information under Gov't Code § 552.103 predecessor to protect district attorney's interest in anticipated criminal litigation). However, we find you have failed to demonstrate the county attorney's office is a party to the pending case at issue. Thus you have not explained the county attorney's office has a litigation interest for purposes of section 552.103. See Gov't Code § 552.103(a) (excepting from disclosure "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party"); Open Records Decision No. 575 at 2 (1990) (statutory predecessor to section 552.103 only applies when governmental body is party to litigation). Upon review, 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. This section encompasses information other statutes make confidential.

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).

You claim the information at issue is protected by the Privacy Act of 1974, section 552a of title 5 of the United States Code (“Federal Privacy Act”). Section 552a(b) of the Federal Privacy Act provides, “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]” 5 U.S.C. § 552a(b). However, our office and the courts have stated the Federal Privacy Act applies only to federal agencies, and not to state or local agencies. *See St. Michael’s Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); Attorney General Opinion MW-95 at 2 (1979) (neither federal Freedom of Information Act nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). The courts have also opined that neither the receipt of federal funds nor limited oversight by a federal entity convert state or local governmental bodies into agencies covered by the Privacy Act. *See St. Michael’s Convalescent Hosp.*, 643 F.2d at 1373-74; *see also United States v. Orleans*, 425 U.S. 807, 816 (1976) (federal regulations and contract provisions do not convert acts of local and state governmental bodies into federal governmental acts.). Upon review of your arguments, we find you have failed to demonstrate the Federal Privacy Act applies to the submitted information, and the district may not withhold any of the submitted information under section 552.101 of the Government Code on that basis.

We note Exhibit B contains e-mail addresses of members of the public that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website 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, or an e-mail address maintained by a governmental entity for one of its officials or employees. Accordingly, the district must withhold all personal e-mail addresses not excluded by section (c) under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the district may continue to rely on Open Records Letter No. 2017-27682 as a previous determination and withhold or release the submitted information in accordance with that ruling. The district must withhold all personal e-mail addresses not excluded by section (c) under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The district 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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/tdw

Ref: ID# 687879

Enc. Submitted documents

c: Requestor
(w/o enclosures)