



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

March 13, 2019

Mr. Vic Ramirez  
Associate General Counsel  
Lower Colorado River Authority  
P.O. Box 220  
Austin, Texas 78767-0220

OR2019-07011

Dear Mr. Ramirez:

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# 754653.

The Lower Colorado River Authority (the "authority") received six requests from two requestors for information pertaining to flood management and response and a specified flood. You state you do not have information responsive to some of the requests.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>2</sup> We have also received and considered comments submitted by the second requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, you note, and we agree, the second requestor asks the authority to answer a question. The Act does not require a governmental body to answer factual questions,

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We assume that the "representative samples" 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.

conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision Nos. 561 at 8-9 (1990), 555 at 102. We assume the authority has made a good-faith effort to do so.

Next, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2017-23793 (2017). In that ruling, we determined the authority must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. We understand the law, facts, or circumstances on which the prior ruling was based have not changed. Thus, the authority must continue to rely on Open Records Letter No. 2017-23793 as a previous determination and withhold the information at issue in accordance with that ruling.<sup>3</sup> *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).

Next, we note the remaining information in Exhibits C-8, C-9, C-10, and C-11 is subject to section 552.022 of the Government Code, which provides in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The remaining information in Exhibits C-8, C-9, C-10, and C-11 consists of completed reports that are subject to section 552.022(a)(1). The authority must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* You raise sections 552.103 and 552.111 of the Government Code for the information at issue. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 479, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). Accordingly, the authority may not withhold any

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

portion of the information subject to section 552.022(a)(1) under section 552.103 or section 552.111 of the Government Code. However, because section 552.101 of the Government Code makes information confidential under the Act, we will consider the applicability of section 552.101 to the remaining information. We will also consider your arguments against disclosure of the remaining information not subject to section 552.022(a)(1).

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but

does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state, and provide supporting documentation showing, prior to the authority's receipt of the instant requests, the authority received two letters from attorneys stating they represent separate clients, one of whom represents the requestor. In the letters, the attorneys state they are notifying the authority of possible claims against the authority regarding injuries and damages sustained as a result of flooding. Further, the documentation demonstrates prior to the receipt of the instant request, one attorney threatened to file suit on a specified time frame if the authority did not comply with the demands at issue. Thus, you state on the date the authority received the requests for information, the authority reasonably anticipated litigation to which the authority would be a party. Based on your representations and our review, we find the authority reasonably anticipated litigation on the dates the requests were received. You also represent, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, the authority may withhold the remaining information not subject to section 552.022(a)(1) under section 552.103 of the Government Code.<sup>4</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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 protected by other statutes, such as section 418.181 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. 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 information may generally be related to a governmental body's security concerns or to a security system does not make the information *per se* confidential under section 418.181. *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

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting section 418.181 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You argue, and we agree, the authority's dams are critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001(2) (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"). You state release of the remaining information "would provide a potential terrorist with information that depicts vulnerabilities, potential vulnerabilities, data related to the potential impacts, and fatalities that could occur as a result of an act of terror on [the authority's] dams." Based on your representations and our review of the information at issue, we find the authority has demonstrated the release of some of the information at issue would identify the technical details of particular vulnerabilities of dams to an act of terrorism. Thus, the authority must withhold the remaining information in Exhibits C-10 and C-11 under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.<sup>5</sup> However, we find the authority has not demonstrated the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, the authority may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes. We understand the authority to claim the remaining information is confidential under section 673 of the Critical Infrastructure Information Act ("CIIA"), title 6, sections 671 through 674 of the United States Code. 6 U.S.C. §§ 671 - 674. Section 673 pertains to the protection of certain voluntarily shared critical infrastructure information. Subsections (a)(1)(A) through (D) of section 673 apply to a "covered [f]ederal agency," defined in the CIIA to mean the Department of Homeland Security, and provide in relevant part the following:

(a) Protection

(1) In general

Notwithstanding any other provision of law, critical infrastructure information (including the identity of the submitting person or entity) that is voluntarily submitted to a covered federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study,

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

recovery, reconstitution, or other informational purpose, when accompanied by an express statement specified in paragraph (2)—

(A) shall be exempt from disclosure under section 552 of Title 5 (commonly referred to as the Freedom of Information Act);

...

(D) shall not, without the written consent of the person or entity submitting such information, be used or disclosed by any officer or employee of the United States for purposes other than the purposes of this part, except [in certain specified circumstances.]

6 U.S.C. § 673(a)(1)(A), (D). Thus, these provisions restrict the disclosure of critical infrastructure information voluntarily submitted to a covered federal agency for certain agency uses when the submission includes an express statement specified in section 673(a)(2).<sup>6</sup> *See id.* § 673(a)(1), (a)(2) (defining “express statement”); *see also id.* § 671 (defining “covered [f]ederal agency,” “critical infrastructure information,” and “voluntary”). Therefore, these provisions apply when a covered federal agency receives a request for the information; they do not apply when a state or local governmental body receives a request for the information. *See id.* § 673(a)(1); *see also* Attorney General Opinion MW-95 (1979) (neither Freedom of Information Act (“FOIA”) nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas governmental body).

In contrast, subsection (E) of section 673(a)(1) applies when a state or local government agency receives a request for the information. *See* 6 U.S.C. § 673(a)(1)(E). Under subsection (E), the information

shall not, *if provided to a State or local government or government agency—*

(i) be made available pursuant to any State or local law requiring disclosure of information or records;

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<sup>6</sup>In this analysis of the CIIA, we will refer to critical infrastructure information voluntarily submitted to a covered federal agency for the specified agency uses and with the accompanying express statement as “information.”

(ii) otherwise be disclosed or distributed to any party by said State or local government or government agency without the written consent of the person or entity submitting such information; or

(iii) be used other than for the purpose of protecting critical infrastructure or protected systems, or in furtherance of an investigation or the prosecution of a criminal act[.]

*Id.* § 673(a)(1)(E) (emphasis added). Thus, while subsection (E) applies to information maintained by any state or local government or government agency, the prohibitions on release apply only if a covered federal agency “provided [the information] to [the] local or state government or agency.” *See id.*

Although the authority claims the remaining information is confidential under section 673 of the United States Code, we find the authority does not represent the reports at issue were provided to the authority by a covered federal agency as contemplated by subsection (E). *See id.* § 673(a)(1)(3). Consequently, as a covered federal agency did not provide the documents at issue to the authority, we find that the authority has failed to demonstrate the applicability of the CIIA in this instance. Therefore, because you have failed to establish that the CIIA is applicable here, we need not determine whether the information at issue is “critical infrastructure information” for purposes of section 673 or whether the information is “substantially similar” to the express statement in section 673(a)(2). *See id.* §§ 671(3)(A), 673(a)(2)(A). Thus, we conclude that the remaining information is not confidential under section 673(a)(2), and may not be withheld under section 552.101 of the Government Code on that basis.

In summary, the authority must continue to rely on Open Records Letter No. 2017-23793 as a previous determination and withhold the information at issue in accordance with that ruling. The authority may withhold the remaining information not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. The authority must withhold the remaining information in Exhibits C-10 and C-11 under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The authority 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/>

[ori\\_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 "Erin Groff". The signature is fluid and cursive, with the first name "Erin" and last name "Groff" clearly distinguishable.

Erin Groff  
Assistant Attorney General  
Open Records Division

EMG/gw

Ref: ID# 754653

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Third Party  
(w/o enclosures)