



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 1, 2020

Ms. Lisa Ruiz  
Paralegal  
City of Dallas  
1500 Marilla Street, 5DS  
Dallas, Texas 75201

OR2019-08087A

Dear Ms. Ruiz:

This office issued Open Records Letter No. 2019-08087 (2019) on March 22, 2019. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on March 22, 2019. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). Your request was assigned ID# 819043 (C011306-121718).

The City of Dallas (the "city") received a request for e-mails sent between a named employee and the United States Army Corps of Engineers (the "USACE") during a specified time period. You state you will release some information to the requestor, with redactions made pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code and privileged under Texas Rule of Evidence 408. Additionally, you state release of this information may implicate the interests of the USACE; Gresham, Smith, and Partners; Jackson Walker LLP; Terracon; and HDR, Inc. Accordingly, you state, and provide documentation showing, you notified these third parties and the USACE of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code §§ 552.304, .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of

---

<sup>1</sup> Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold certain categories of information without the necessity of requesting an attorney general decision.

exception in the Act in certain circumstances). We have received comments from the USACE and Terracon. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they do not consist of e-mails sent between a named employee and the USACE during a specified time period. The city need not release non-responsive information in response to this request, and this ruling will not address that information.<sup>3</sup>

We must address the city's obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). You state the city received the request for information on December 17, 2018. You state the city requested clarification on December 31, 2018, and received clarification on December 31, 2018. *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). However, the city failed to provide written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld and a copy of the specific information requested or representative samples until January 27, 2020. Consequently, we find the city 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 (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). The city claims sections 552.101, and 552.108 of the Government Code and rule 408 of the Texas Rules of Evidence for the submitted information. Because section 552.101 and the interests of third parties can provide compelling reasons to overcome the presumption of openness, we will

---

<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.

<sup>3</sup> As we are able to make this determination, we need not address Terracon's submitted information.

address the city's arguments under section 552.101 and the third parties' arguments for the submitted information. However, we find you have failed to establish a compelling reason to address your remaining arguments.<sup>4</sup>

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. Gov't Code § 552.101. Section 154.073 of the Civil Practice and Remedies Code provides in relevant part that:

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(b). Similarly, section 2009.054 provides as follows:

(a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the impartial third party and the parties.

(b) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:

(1) a communication relevant to the dispute, and a record of the communication, made between an impartial third party and the parties to the dispute or between the parties to the dispute during the course of an alternative dispute resolution procedure are confidential and may not be disclosed unless all parties to the dispute consent to the disclosure; and

(2) the notes of an impartial third party are confidential except to the extent that the notes consist of a record of a communication with a party and all parties have consented to disclosure in accordance with Subdivision (1).

Gov't Code § 2009.054. Further, this office has found that communications during a formal settlement process were intended to be confidential. Open Records Decision No. 658 at 4 (1998); *see also* Gov't Code § 2009.054(c). Sections 154.073 and 2009.054 pertain only to communications made during an alternative dispute resolution ("ADR") procedure.

---

<sup>4</sup> We note Texas Rule of Evidence 408 governs the admissibility of information developed through compromise negotiations. *See* TEX. R. EVID. 408. However, rule 408 does not expressly make information confidential. *See generally* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987).

Although the city and the USACE asserts portions of the remaining information consists of records of an ADR hearing, we find the city and the USACE have not demonstrated, and the information at issue does not indicate, how the information at issue consists of a record from a formal ADR procedure. Therefore, the city and the USACE may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code or section 2009.054 of the Government Code.

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. The USACE represents the information it seeks to withhold pertains to a competitive bidding situation. The USACE states the information at issue consists of cost estimates for a certain infrastructure projects and “none of [the projects have] been bid out yet for the construction of the various elements of those projects.” The USACE asserts release of the information at issue “would give bidders for the construction and building the various components of the projects a distinct advantage in how to bid construction costs . . . gaining a significant advantage over other bidders . . . [and] present a clear threat to USACE’s and [the city’s] ability to obtain the lowest price and most qualified bid possible” for the projects. After review of the information at issue and consideration of the arguments, we find the USACE has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information we marked under section 552.104(a).<sup>5</sup>

Section 552.101 of the Government Code also encompasses sections 418.176 through 418.182 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.176 of the Government Code provides, in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

---

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

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers of the provider.

Gov't Code § 418.176(a). Section 418.177 of the Government Code provides that information is confidential if it:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

*Id.* § 418.177. Section 418.178 of the Government Code provides:

(a) In this section, "explosive weapon" has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

*Id.* § 418.178. Section 418.179 of the Government Code provides:

(a) Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to the details of the encryption codes or security keys for a public communications system.

(b) This section does not prohibit a governmental entity from making available, at cost, to bona fide local news media, for the purpose of monitoring emergency communications of public interest, the communications terminals used in the entity's trunked communications system that have encryption codes installed.

*Id.* § 418.179. Section 418.180 of the Government Code provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

- (1) is part of a report to an agency of the United States;
- (2) relates to an act of terrorism or related criminal activity; and
- (3) is specifically required to be kept confidential:
  - (A) under Section 552.101 because of a federal statute or regulation;
  - (B) to participate in a state-federal information sharing agreement; or
  - (C) to obtain federal funding.

*Id.* § 418.180. Section 418.181 of the Government Code 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 of the Government Code provides:

(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.

(b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under [the Act].

(c) Information in the possession of a governmental entity that relates to the location of a security camera in a private office at a state agency, including an institution of higher education, as defined by Section 61.003, Education

Code, is public information and is not excepted from required disclosure under [the Act] unless the security camera:

- (1) is located in an individual personal residence for which the state provides security; or
- (2) is in use for surveillance in an active criminal investigation.

*Id.* § 418.182. The fact that information may be related to a governmental body's security-concerns, biological toxins, or emergency preparedness does not make such 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).

The city and the USACE assert some of the remaining information is subject to the HSA. The city and the USACE explain some of the information at issue consists of a code for a security gate at a USACE facility. We understand the city and the USACE to argue the security gate at issue is part of the security system used to protect the facility at issue from acts of terrorism or related criminal activity. Based upon these representations and our review of the information at issue, we conclude the city and the USACE have demonstrated some of the information at issue, which we marked, falls within the scope of section 418.182(a). Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.182(a) of the Government Code.<sup>6</sup> However, upon review, we find the city and the USACE have not demonstrated the applicability of section 418.176, section 418.177, section 418.178, section 418.179, section 418.180, section 418.181, or section 418.182 to any of the remaining information. Thus, the city and the USACE have not established any portion of the remaining information is confidential on those bases. Therefore, the city may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with sections 418.176, 418.177, 418.178, 418.179, 418.180, 418.181, and 418.182 of the Government Code.

In summary, the city may withhold the information we marked under section 552.104 of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code. The city must release the remaining 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

---

<sup>6</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/jlbm

Ref: ID# 819043

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

5 Third Parties  
(w/o enclosures)