



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 16, 2020

Mr. Ronny H. Wall
Senior Associate General Counsel
Texas Tech University System
Box 45031
Lubbock, Texas 79409-5031

OR2020-08252

Dear Mr. Wall:

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# 814285.

The Texas Tech University (the "university") received a request for specified APHIS forms, necropsies for specified animal deaths, and correspondence with specified agencies.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.136, 552.137, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² 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

¹ You state the university sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *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 also inform us the university received the required payment on December 3, 2019. *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).

² 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.

make confidential certain information related to terrorism. You assert the submitted information is made confidential by section 418.181 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. 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 the information you marked consists of information pertaining to university buildings. You assert, and we agree, the buildings at issue 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"). You assert release of this information would "give potentially dangerous individuals precise locations to allow planning and coordination of attacks on these critical buildings." Based on your arguments and our review, we find you demonstrated release of the information we marked would identify the technical details of particular vulnerabilities of the university's critical infrastructure to an act of terrorism. Thus, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.³ However, upon review, we find you failed to demonstrate the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, the remaining information at issue is not confidential under section 418.181, and the university may not withhold it under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses information made confidential by judicial decision and the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm,

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

but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. Upon review, we find you have failed to demonstrate release of any of the remaining information would create a substantial threat of physical harm to an individual. Accordingly, the university may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 [of the Government Code] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You state release of some of the remaining information would subject university employees to a substantial threat of physical harm. Upon review, we find you have demonstrated release of some of the information at issue would subject an employee to a substantial threat of physical harm. Therefore, the university must withhold the information we marked under section 552.152 of the Government Code. However, we find you have not demonstrated the release of any of the remaining information would subject an employee of the university to a substantial threat of physical harm. Thus, the university may not withhold any of the remaining information at issue under section 552.152 of the Government Code.

Section 552.117(a)(1) 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.⁴ *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 individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the university must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the cellular telephone number may only be withheld if a governmental body does not pay for the cellular telephone service.

⁴ The 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).

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, the university must withhold the bank account numbers you marked under section 552.136 of the Government Code.

We note the remaining information contains e-mail addresses that may be subject to section 552.137 of the Government Code. 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). *Id.* § 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. *See id.* § 552.137(c). We are unable to determine if the e-mail addresses within the submitted information fall within the scope of subsection 552.137(c). Accordingly, we must rule conditionally. To the extent the e-mail addresses within the remaining information are not excluded by subsection 552.137(c) of the Government Code, the university must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent an e-mail address within the remaining information is excluded by subsection 552.137(c), that e-mail address may not be withheld under section 552.137 of the Government Code.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The university must withhold the information we marked under section 552.152 of the Government Code. If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the university must withhold the information we 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. The university must withhold the bank account numbers you marked under section 552.136 of the Government Code. To the extent the e-mail addresses within the remaining information are not excluded by subsection

552.137(c) of the Government Code, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The university must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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 <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,

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/eb

Ref: ID# 814285

Enc. Submitted documents

c: Requestor
(w/o enclosures)