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ATTORNEY GENERAL OF TEXAS

April 9, 2020

Mr. Frank Garza
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OR2020-10649

Dear Mr. Garza:

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# 818346.

The Port Authority of San Antonio (the "authority"), which you represent, received a request for the specified lease agreements between the authority and The Boeing Company ("Boeing"), and information pertaining to the storage of Boeing 737 MAX airplanes at the authority.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Boeing. Accordingly, you state and provide documentation showing, you have notified Boeing of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments from Boeing. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered the comments from a

¹ We note we asked the authority 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 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 authority pursuant to that request.

representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information that is made confidential by other statutes. The authority argues section 552.101 in conjunction with section 418.181 of the Homeland Security Act (the “HSA”). Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the HSA. Section 418.181 provides “[t]hose 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 measures does not make the 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 of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of 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 inform us the information at issue consists of blueprints and drawings of the authority’s airport. You assert, and we agree, the authority’s airport is a 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 state release of this information would create a vulnerability to the authority’s airport to an act of terrorism. Based on your representations and our review, we find the authority has demonstrated release of some of the information at issue would identify the technical details of particular vulnerabilities of the authority to an act of terrorism. Thus, the authority 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.² 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 under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

The authority and Boeing argue section 552.104 of the Government Code. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov't Code § 552.104(a). Therefore, we do not address Boeing's arguments under section 552.104 of the Government Code. 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." *Boeing*, 466 S.W.3d at 841. After review of the information at issue and consideration of the authority's arguments, we find the authority has failed to demonstrate the applicability of section 552.104 to the information at issue. Thus, we conclude the authority may not withhold the information at issue under section 552.104(a) of the Government Code.

The authority and Boeing also argue the remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(b)-(c). Although the authority argues the information at issue is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the authority's argument under section 552.110. Section 552.110(c) of the Government Code excepts from disclosure "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" *Id.* § 552.110(c). Boeing argues some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Boeing has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the authority must withhold the information we have marked under section 552.110(c) of the Government Code. However, we find Boeing has failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.1101 of the Government Code excepts from disclosure "information *submitted to a governmental body* by a vendor, contractor, potential vendor, or potential contractor *in response to a request for a bid, proposal, or qualification*["] *Id.* § 552.1101(a) (emphasis added). Additionally, we note section 552.1101(b) lists certain types of information to which section 552.1101(a) does not apply. *See id.* § 552.1101(b). Upon review, we find Boeing has failed to demonstrate the applicability of section 552.1101(a) to its information. Accordingly, the authority may not withhold any of the information at issue under section 552.1101 of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes. Boeing claims 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, 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).³ *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).

³ 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.”

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; (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 Boeing claims the remaining information is confidential under section 673 of the United States Code, we find the authority does not represent the information at issue was 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 Boeing 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 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 authority must withhold the information we have marked under section 552.110(c) 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 <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,

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Attorney
Open Records Division

ACB/eb

Ref: ID# 818346

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)