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ATTORNEY GENERAL OF TEXAS

July 8, 2020

Mr. Austin R. Beck
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OR2020-17028

Dear Mr. Beck:

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# 835043.

The Alliance Regional Water Authority (the "authority"), which you represent, received two requests from the same requestor for 28 categories of information pertaining to the authority's plans to acquire a permanent easement on two specified properties. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the authority has redacted information from the submitted documents that is not responsive to the instant requests for information because the redacted information does not pertain to the properties specified in the requests. This ruling does not address the public availability of any information that is not responsive to the requests and the authority is not required to release such information in response to these requests.

Next, we address the requestor's claim the authority failed to comply with the procedural obligations under section 552.301 of the Government Code in requesting a ruling from this office. *See id.* § 552.301. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated 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. *Id.* § 552.301(e). We note this office does not count the date the request was received or holidays, including skeleton crew days observed by a governmental body, for purposes of calculating a governmental body's deadlines under the Act. Upon review, we find the authority complied with the requirements of section 552.301 in requesting this decision from our office. *See id.* § 552.233 (temporary suspension of requirements for governmental body impacted by catastrophe). Thus, we will consider the arguments of the authority against disclosure of the submitted responsive information.

Next, we address the requestor's assertion the authority previously released to the public the requested information the authority seeks to withhold. The Act does not permit selective disclosure of information to the public. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that exact same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential by law. *See Gov't Code* § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). We note section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. Upon review, we have no indication the information at issue has been previously released in its exact form to any members of the public. Accordingly, we find section 552.007 is inapplicable to the responsive information and we will address the authority's arguments against its disclosure.

We note some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, as follows:

[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 submitted responsive information includes a completed report subject to section 552.022(a)(1) of the Government Code. The authority must release this information, which we marked, pursuant to section 552.022(a)(1) unless it excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999,

no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, no portion of the completed report subject to section 552.022(a)(1) may be withheld under section 552.103. However, because section 552.101 of the Government Code makes information confidential under the Act, we will address the applicability of this section to the information at issue. Additionally, we will consider your argument under section 552.103 for the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in part, as follows:

(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). A 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 (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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." See Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is "realistically contemplated." See ORD 518 at 5; see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

The authority states it reasonably anticipated litigation when it received the requests for information because the authority plans to bring eminent domain proceedings against the

landowners of the subject properties if the parties are unable to reach a voluntary settlement agreement. Based on your representations and our review, we find you have demonstrated the authority reasonably anticipated litigation on the date it received the present requests for information. Further, we find the information at issue is related to the anticipated litigation for purposes of section 552.103 of the Government Code. Accordingly, with the exception of the completed report subject to section 552.022(a)(1) of the Government Code, the authority may withhold the submitted responsive information under section 552.103(a) of the Government Code.¹

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. Section 552.101 encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with section 418.181 of the Texas 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 state the remaining information pertains to the locations and details of components of the authority’s water system. We understand the authority’s water system is critical infrastructure for purposes of section 418.181. *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 the information at issue “may facilitate an act of terrorism or other criminal activity, including sabotage, against the [water] pipeline[.]” Based upon your representations and our review, we find you have demonstrated the release of some of

¹ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

the remaining information would identify the technical details or particular vulnerabilities of the authority's critical infrastructure to an act of terrorism. Accordingly, the authority must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. However, upon review, we find none of the remaining information reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, none of the remaining responsive information may be withheld under section 552.101 in conjunction with section 418.181.

In summary, with the exception of the completed report subject to section 552.022(a)(1) of the Government Code, the authority may withhold the submitted responsive information under section 552.103(a) of the Government Code. The authority 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 authority must release the remaining responsive 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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/be

Ref: ID# 835043

Enc. Submitted documents

c: Requestor
(w/o enclosures)