



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 26, 2020

Mr. Joseph G. Hays
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2020-26820

Dear Mr. Hays:

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# 850359 (GC No. 26862).

The Houston Airport System (the "system") received a request for correspondence received by George Bush International Airport and William P. Hobby Airport (the "airports") from airlines pertaining to specified subjects during a stated period of time. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also state you notified third parties of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released.¹ *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 exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

¹ We note, and you acknowledge, the system did not comply with the procedural requirements of section 552.301 of the Government Code in requesting a portion of this decision. *See* Gov't Code § 552.301(e). Nonetheless, because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352. You indicate the third parties include the following: American Airlines; ABX Air, Inc.; EVA Air; ANA; Spirit Airlines; Volga-Dnepr Airlines; Air France; the Turkish Ministry of Foreign Affairs; Turkish Airlines; Cal-Cargo; Emirates; UPS; China Airlines; Fed Ex; Froniter Airlines; KLM Royal Dutch Airlines; Cargolux; JetBlue Airways Corporation; Viva Aerobus; Aeromexico; Airportring; Air New Zealand Limited; British Airways; and Qatar Airways.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any third party has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the system may not withhold the submitted information on the basis of any proprietary interest the third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, 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). 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 Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). While you argue the release of the submitted information could harm third parties by giving an advantage to their competitors, such an interest in protecting the information belongs to the third parties and not the system. Therefore, we find the system may not withhold the submitted information under section 552.104(a) of the Government Code.

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 that is made confidential 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 (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 concerns 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 by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive information falls 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 explain the information at issue consists of executed ordinances and contracts that reveal the layout and key details pertaining to the airports. You assert, and we agree, the airports are 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 assert release of the information at issue could be used by a terrorist or criminal “in planning mass attacks, in order to incite panic, and enhance the likelihood of death among emergency responders and members of the public.” Based on your representations and our review, we find you have demonstrated the release of some of the information at issue, which we have marked, would identify the technical details or particular vulnerabilities of the system’s critical infrastructure to an act of terrorism. Accordingly, the system 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, upon review, we find you have failed to demonstrate the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the remaining information at issue is not confidential under section 418.181, and the system may not withhold any portion of it under section 552.101 on that basis.

We note some of the remaining information may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) of the Government Code 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. *See id.* § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the system may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024, the system may not withhold the information under section 552.117(a)(1).

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

³ 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 No. 481 (1987), 480 (1987), 470 (1987).

In summary, the system 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. If the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the system may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. The system 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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/be

Ref: ID# 850359

Enc. Submitted documents

c: Requestor
(w/o enclosures)