



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 11, 2022

The Honorable Gene Wu
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

OR2022-00981

Dear Representative Wu:

Pursuant to section 552.008(b-1) of the Government Code, you seek a decision from this office as to whether certain information you received from the Texas Department of Public Safety (the "department") pursuant to section 552.008 of the Government Code is considered confidential information for purposes of that section. Your request was assigned ID# 926689.

Initially, you inform us that your office submitted a request to the department seeking information pertaining to Operation Lone Star. In response, the department stated the documents you requested were confidential and not subject to public disclosure. However, we understand the department provided those documents to you as a member of the Texas Legislature after you signed a confidentiality agreement in accordance with section 552.008(b).

Section 552.008 of the Government Code authorizes individual members, agencies, or committees of the Texas Legislature to access otherwise confidential information for official legislative purposes, but maintains the confidentiality of that information by allowing agencies to require that legislators and staff execute a confidentiality agreement. Section 552.008 provides as follows:

- (a) [The Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.
- (b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee

for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

- (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

Gov't Code § 552.008(a)-(b). Section 552.008 further provides, in relevant part, that:

(b-1) A member, committee, or agency of the legislature required by a governmental body to sign a confidentiality agreement under Subsection (b) may seek a decision as provided by Subsection (b-2) about whether the information covered by the confidentiality agreement is confidential under law. A confidentiality agreement signed under Subsection (b) is void to the extent that the agreement covers information that is finally determined under Subsection (b-2) to not be confidential under law.

(b-2) The member, committee, or agency of the legislature may seek a decision from the attorney general about the matter. The attorney general by rule shall establish procedures and deadlines for receiving information necessary to decide the matter and briefs from the requestor, the governmental body, and any other interested person[.]

Id. § 552.008(b-1), (b-2). This provision of the Act allows legislative requestors to ask this office to independently confirm whether a governmental body's assertions of confidentiality meet the requisite legal standard for withholding the requested information

from disclosure. In response to your request for a ruling from this office under section 552.008(b-1), the department submitted a letter brief to this office articulating why the department believes the information you requested meets the legal standard for confidentiality under the Act. *See* 1 T.A.C. § 63.4(a) (setting forth the submission requirements for governmental bodies notified by the attorney general pursuant to section 63.3 of the Texas Administrative Code). The department's briefing invokes sections 552.101 and 552.108 of the Government Code. We have considered the legal briefing submitted by the department and reviewed the representative sample of the information the department provided to our office as responsive to your request.¹

Initially, we address your assertion that the department previously released some of the submitted information to the public. The Act does not permit selective disclosure of information. *See* Gov't Code §§ 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 under 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). Whether the department previously released any of the information at issue is a question of fact. This office cannot resolve questions of fact through the open records ruling process but, instead, must rely on the representations of the governmental body seeking to withhold the information at issue. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Therefore, we rely on the representations of the department in this matter. Accordingly, we will consider the department's arguments against release of the submitted 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." Gov't Code § 552.101. Section 552.101 encompasses information that is made confidential by other statutes. The department raises section 552.101 in conjunction with sections 418.176 and 418.177 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 418.176 provides, in relevant part, as follows:

- (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 any:

¹ We note section 63.4(a)(1)(C) of Title 1 of the Texas Administrative Code authorizes a governmental body to submit to this office a representative sample of documents in the ruling process under section 552.008 of the Government Code. 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.

(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

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

Id. § 418.176(a)(1)-(3). Section 418.177 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. 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 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 department states the submitted information reveals staffing requirements, tactical plans of emergency response providers in relation to operations at the border, and possible vulnerabilities related to the border. Further, the department argues release of the information at issue could aid terrorists and other criminals in avoiding detection and in the commission of crimes against critical infrastructure related to the state's international border. Based upon these representations and our review, we find the submitted information relates to staffing requirements and tactical plans of emergency response providers maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. *See* Open Records Decision Nos. 542 (1990). 532 (1989). 515 (1988), 252 (1980). Accordingly, the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.²

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

Having concluded section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code apply to the submitted information, we must now determine whether section 552.101 of the Government Code makes information confidential for purposes of a confidentiality agreement signed under section 552.008(b) of the Government Code.

In *Texas Commission on Environmental Quality v. Abbott*, 311 S.W.3d 663 (Tex. App.—Austin 2010, pet. denied), the Third Court of Appeals construed the term “confidential information” as used in section 552.008(b). In that case, a legislator requested confidential information from the Texas Commission on Environmental Quality (“TCEQ”) pursuant to the special right of access afforded to legislators under section 552.008. TCEQ sought to avoid providing the information in question to the legislator. This office ruled that section 552.008 compelled TCEQ to provide the information subject to a confidentiality agreement, and TCEQ challenged our ruling in a state district court. TCEQ argued the phrase “including confidential information” in subsection 552.008(b) operated to exclude documents protected by the attorney-client privilege from legislators’ special right of access under section 552.008. The district court rejected TCEQ’s claim and agreed with this office’s determination that TCEQ was required to produce the information subject to a confidentiality agreement. On appeal, the Third Court of Appeals ruled “[t]he plain meaning of this phrase [confidential information] includes documents subject to the attorney-client or work-product privileges. Such documents would also constitute information is ‘excepted from required disclosure’ or ‘confidential under other law.’” *Id.* at 670. After dismissing TCEQ’s separation of powers argument, the court concluded section 552.008 required TCEQ to disclose the documents at issue. In so ruling, however, the court additionally stated:

[w]e further observe that subsection 552.008(b) protects the confidentiality of [TCEQ’s] documents once they are disclosed pursuant to a legislative request for information. [Citation omitted]. Subsection 552.008(b) preserves the confidentiality of [TCEQ’s] documents while in the possession of Senator Shapleigh by authorizing [TCEQ] to require Senator Shapleigh to sign a confidentiality agreement prior to receive the documents at issue. . . . These protections make clear that the legislature intended to give its members and committees a right of access even to confidential information.

Id. at 675. Thus, the Third Court of Appeals determined that information protected by the attorney-client privilege, as well as information “excepted from required disclosure” and “confidential under other law,” constituted confidential information for purposes of section 552.008 of the Government Code. The court further concluded that the execution of a confidentiality agreement by a legislative requestor preserved the confidentiality of information provided to legislators under section 552.008(b).

Therefore, in accordance with the court’s ruling in *Texas Commission on Environmental Quality v. Abbott*, the information that we conclude falls under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code, is deemed confidential for purposes of section 552.008(b) of the Government Code

as information that is excepted from required disclosure or confidential under other law. Thus, your office must maintain the confidentiality of the information at issue under the respective exceptions, in accordance with the confidentiality agreement you executed pursuant to section 552.008(b) of the Government Code. Should either you or the department disagree with our decision in this matter, section 552.008(b-2) authorizes either party to appeal this Open Records Letter Ruling to a Travis County district court. *See* Gov't Code § 552.008(b-2).

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/ba

Ref: ID# 926689

Enc. Submitted documents

c: Interested Party
(w/o enclosures)