



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 27, 2022

Ms. Kathryn Thiel
Counsel for the North Texas Municipal Water District
Lloyd, Gosselink, Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2022-02398

Dear Ms. Thiel:

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# 924858.

The North Texas Municipal Water District (the "district"), which you represent, received two requests from different requestors for certain information pertaining to a named employee, two specified entities, and a certain reservoir project. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note Exhibits G, H, I, J, K, L, and M are not responsive to the instant requests for information because they do not pertain to the specific information requested. Additionally, we note the second requestor excludes certain types of information from the scope of his request. Accordingly, these types of information are not responsive to the requests for information. This ruling does not address the public availability of any information that is not responsive to the requests and the district is not required to release such information in response to these requests.²

¹ 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 those records contain substantially different types of information than that submitted to this office.

² As we are able to make this determination, we need not address your argument against disclosure of this information.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The responsive information includes information in an account, contract, or voucher relating to the receipt or expenditure of funds by the district that is subject to section 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold some of the information subject to section 552.022(a)(3) under sections 552.101, 552.103, 552.104, and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary in nature and do 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 section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the district may not withhold any of the information subject to section 552.022(a)(3), which we have marked and indicated, under section 552.103 or section 552.111 of the Government Code. However, because section 552.101 of the Government Code can make information confidential under the Act, we will consider your argument under section 552.101 for the information at issue. Additionally, as information encompassed by section 552.022 may be withheld under section 552.104 of the Government Code, we will also consider your argument under this section for the information at issue. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). Further, we will also consider your arguments under sections 552.103 and 552.111 for the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in relevant part:

(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.

Id. § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You state, and provide documentation showing, prior to the district's receipt of the instant requests, a lawsuit styled *Loyd D. Johnson Family L.P. No. 1 et al v. N. Tex. Mun. Water Dist. et al*, Cause No. CV-19-44384, was filed and is currently pending against the district in the 336th District Court of Fannin County, Texas. Therefore, we agree litigation was pending on the date the district received the instant requests for information. You also state the information at issue pertains to the substance of the pending litigation. Based on these representations and our review, we find the information at issue is related to the pending litigation.

We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party to the pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the district may not withhold the information the opposing party has seen or had access to, which we have marked, under section 552.103 of the Government Code. We note 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 at 3 (1982). Accordingly, with the exception of the information subject to section 552.022 of the Government Code and the information we have marked, the district may withhold the remaining responsive information you have indicated under section 552.103 of the Government Code.³

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

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

Code § 552.101. This section encompasses information that is made confidential by other statutes. You raise 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 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 some of the remaining responsive information consists of “information relating to the design, plans, specifications, and construction plans” for the project at issue. You state the project at issue “is a critical drinking water supply source planned for the immense service area of the [d]istrict.” You assert, and we agree, the project at issue constitutes 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 “potential terrorists could use the detailed plans as a blueprint to interfere with construction or to tamper with the facilities after they are completed and providing services to the public.” Based on your arguments and our review of the information at issue, we find you have demonstrated release of some of the information at issue would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the district 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.⁴ 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. Consequently, the district may not withhold any portion of the remaining responsive information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

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.” *Id.* § 552.104(a). The “test under

⁴ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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). After review of the information at issue and consideration of the arguments, we find you have failed to demonstrate the applicability of section 552.104 to the information at issue. Thus, we conclude the district may not withhold any of the remaining responsive information at issue under section 552.104(a) of the Government Code.

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."⁵ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the district must withhold the routing and bank account numbers within the remaining responsive information under section 552.136 of the Government Code.

We note some of the materials at issue 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, with the exception of the information subject to section 552.022 of the Government Code and the information we have marked for release, the district may withhold the remaining responsive information you have indicated under section 552.103 of the Government Code. The district 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 district must withhold the routing and bank account numbers within the remaining responsive information under section 552.136 of the Government Code. The district must release the remaining responsive information; however, any information that is subject to copyright may be released only 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

⁵ 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.

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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/mo

Ref: ID# 924858

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)