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ATTORNEY GENERAL OF TEXAS

March 11, 2022

Mr. Bill Cobb
Counsel for Double Horn Creek Water Supply Corporation
Cobb and Counsel
100 Congress Ave., Suite 2000
Austin, Texas 78701

OR2022-07469

Dear Mr. Cobb:

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# 932980 (DHCWSC ID # 20211222).

The Double Horn Creek Water Supply Corporation (the "corporation"), which you represent, received a request for two specified reports. We understand the corporation has released some of the requested information.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.113 of the Government Code. You also state release of the information at issue may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Donald G. Rauscher & Associates, Inc. and Wet Rock Groundwater Services, LLC of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(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.

We note 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) to submit its reasons, if any, as to

¹ A governmental body's officer for public information may comply with the requirement to promptly produce public information "by referring a requestor to an exact Internet location or uniform resource locator (URL) address on a website maintained by the governmental body and accessible to the public if the requested information is identifiable and readily available on that website." *See* Gov't Code § 552.221(b-1).

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 either of the third parties at issue explaining why their information should not be released. Therefore, we have no basis to conclude either of the third parties have 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 corporation may not withhold any of the information at issue on the basis of any proprietary interest the third parties at issue may have in it.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) [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[.]

Id. § 552.022(a)(1). The submitted information consists of completed reports made for the corporation that are subject to section 552.022(a)(1). The corporation must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* The corporation seeks to withhold the submitted information under sections 552.101, 552.111, and 552.113 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the corporation may not withhold the submitted information under section 552.111 of the Government Code. However, because sections 552.101 and 552.113 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the information at issue.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. As part of the Texas Homeland Security Act (the “HSA”), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.181 of the Government Code provides as follows:

Those 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 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).

You state information you indicated reveals “detailed information regarding the locations, specifications, and operations of [the corporation’s] water supply system[.]” You assert, and we agree, the corporation’s water supply system constitutes critical infrastructure for purposes of section 418.181 of the Government Code. *See generally id.* § 421.001(2) (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 reveal the locations and vulnerabilities of the corporation’s water supply system and expose it to possible acts of terrorism. Based on your representations and our review, we find the corporation has demonstrated release of the information we have marked would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the corporation 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 you have failed to demonstrate the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See* Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Consequently, the corporation 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.

Section 552.113 of the Government Code provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure under the Act] if it is:

...

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

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

Gov't Code § 552.113(a)(2). In Open Records Decision No. 627 (1994), this office concluded section 552.113(a)(2) protects from public disclosure only (i) geological and geophysical information regarding the exploration or development of natural resources that is (ii) commercially valuable. ORD 627 at 3-4 (overruling rationale of Open Records Decision No. 504 (1988)). The decision explained the phrase "information regarding the exploration or development of natural resources" means "information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation." *Id.* at 4 n.4. However, section 552.113(a)(2) does not except general geological information about a particular location that is unrelated to the "presence or absence of natural resources." In order to be commercially valuable for purposes of Open Records Decision No. 627 and section 552.113, information must not be publicly available. *See* Open Records Decision No. 669 (2000). Upon review, we agree the information we have marked is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the corporation must withhold the information we have marked pursuant to section 552.113 of the Government Code. However, we find the corporation has failed to demonstrate any of the remaining information is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the corporation may not withhold any of the remaining information under section 552.113 of the Government Code.

In summary, the corporation 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 corporation must withhold the information we have marked pursuant to section 552.113 of the Government Code. The corporation 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,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/ba

Mr. Bill Cobb - Page 5

Ref: ID# 932980

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: 2 Third Parties
(w/o enclosures)