



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 7, 2022

Mr. Stephen M. Foster
General Counsel
Texas Facilities Commission
1711 San Jacinto Boulevard
Austin, Texas 78701

OR2022-10293

Dear Mr. Foster:

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# 937703 (PIR# 2022-051).

The Texas Facilities Commission (the "commission") received a request for three categories of information pertaining to border wall construction. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted information responsive to all categories of the instant request. To the extent any information responsive to the remaining portions of the request existed on the date you received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See Gov't Code* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the procedural obligations of the commission under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See Gov't Code* § 552.301(a), (b). In this instance, you state, and submit documentation demonstrating, the commission received the request for information on

January 13, 2022. You state the commission was closed on January 17, 2022, and January 19, 2022. Accordingly, the commission's ten-business-day deadline was January 31, 2022. However, you did not request a ruling from this office until February 1, 2022. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Therefore, we conclude the commission failed to comply with the procedural requirements mandated by section 552.301(b) in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). The commission claims sections 552.101, 552.104, and 552.111 of the Government Code for the submitted information. Because section 552.101 can provide a compelling reason to overcome the presumption of openness, we will address your argument under this section for the submitted information. However, we find you have failed to establish a compelling reason to address your remaining exceptions.

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 exception encompasses information made confidential 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 418.177 of the Government Code provides as follows:

Information is confidential if the information:

- (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. Section 418.181 provides:

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 measures does not make the information *per se* confidential under the HSA. *See Open*

Records Decision No. 649 (1996). 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 explain the submitted information consists of information assembled to prevent an act of terrorism or related criminal activity and that the information contains technical details of vulnerabilities of critical infrastructure. You argue release of the submitted information would allow terrorists and other criminals to exploit perceived vulnerabilities and devise plans to thwart construction or completion of the border wall. Upon review, we find you have demonstrated the applicability of sections 418.177 and 418.181 to portions of the information at issue, which we have marked. Therefore, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with sections 418.177 and 418.181 of the Government Code. However, we find you have failed to demonstrate the applicability of sections 418.177 and 418.181 of the Government Code to the remaining information. Accordingly, the commission may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with sections 418.177 and 418.181 of the Government Code. As you raise no other exceptions to disclosure, the remaining information must be released.

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,

Colin Henry
Attorney
Open Records Division

CEH/mo

Ref: ID# 937703

Enc. Submitted documents

c: Requestor
(w/o enclosures)