



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 26, 2022

Mr. Stephen M. Foster  
General Counsel  
Texas Facilities Commission  
P.O. Box 13047  
Austin, Texas 78711-3047

OR2022-11928

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# 942604 (TFC PIR 2022-055).

The Texas Facilities Commission (the "commission") received a request for eight points of information pertaining to the border wall. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.105, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note Exhibit D was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2022-10293 (2022). In that ruling, we concluded 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. Section 552.007 of the Government Code provides information that has been voluntarily released to a member of the public 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; Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Accordingly, the commission may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you now raise sections 552.104 and 552.111 of the Government Code for the information at

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<sup>1</sup> 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.

issue, these sections do not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the commission may not withhold the information at issue under section 552.104 or section 552.111 of the Government Code. However, because section 552.101 of the Government Code protects information made confidential by law, we will address the commission's arguments under this exception for the information that was previously released. Furthermore, with respect to the information previously withheld under section 552.101 of the Government Code in conjunction with sections 418.177 and 418.181 of the Government Code in Open Records Letter No. 2022-10293, there is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, we conclude the commission must continue to rely on Open Records Letter No. 2022-10293 as a previous determination and withhold the information at issue in accordance with that ruling.<sup>2</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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

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<sup>2</sup> As our ruling is dispositive, we need not address the commission's arguments against disclosure of this information.

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 information you indicated 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 information at issue 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 some of the information at issue. Therefore, with the exception of the information we have marked for release, the commission must withhold Exhibit B and Exhibit C 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.

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 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 the commission has failed to demonstrate the applicability of section 552.104 to the information at issue. Thus, we conclude the commission may not withhold the information at issue under section 552.104(a) of the Government Code.

Section 552.105 of the Government Code excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." *Id.* § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to

particular transactions.” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state Exhibit E relates to the appraisal or purchase price of real property that the commission intends to utilize to acquire easements for construction of the border barrier. Further, you state the commission has made a good-faith determination the release of the information at issue would harm the commission’s negotiating position with respect to the acquisition of easements on the properties at issue. Based on your representations and our review, we conclude the commission may withhold Exhibit E under section 552.105 of the Government Code.

In summary, the commission must rely on Open Records Letter No. 2022-10293 as a previous determination and withhold the identical information in accordance with that ruling. With the exception of the information we have marked for release, the commission must withhold Exhibit B and Exhibit C under section 552.101 of the Government Code in conjunction with sections 418.177 and 418.181 of the Government Code. The commission may withhold Exhibit E under section 552.105 of the Government Code. The commission 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,

Joseph Hoggatt  
Assistant Attorney General  
Open Records Division

JWH/jm

Ref: ID# 942604

Enc. Submitted documents

c: Requestor  
(w/o enclosures)