



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 5, 2022

Ms. Clara H. Saafir
Assistant District Attorney
Dallas County
411 Elm Street, Suite 6300
Dallas, Texas 75202

OR2022-12919

Dear Ms. Saafir:

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# 942687 (Reference No. D003766).

The County of Dallas (the "county") received a request for all e-mails between a named county official and a named company for a specified time period. We understand the county will redact certain information pursuant to Open Records Decision No. 684 (2009).¹ The county claims some of the submitted information is excepted from disclosure under sections 552.111 and 552.136 of the Government Code.² Additionally, the county states release of the submitted information may implicate the proprietary interests of Election Systems & Software, LLC ("ES&S"). Accordingly, the county states, and provides documentation showing, it notified ES&S of the request for information and of its right to submit arguments to this office. *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 received comments from ES&S. We have considered the submitted arguments and reviewed the submitted information.

¹ Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information, including personal e-mail addresses subject to section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. ORD 684.

² Although the county does not raise section 552.136 of the Government Code in its brief, we understand the county to raise these exceptions based on its markings.

Initially, we note some of the submitted information is not responsive to the request because it does not consist of records within the specified time period. This ruling does not address the public availability of any information that is not responsive to the request, and the county is not required to release such information in response to this request.³

Next, we note some of the responsive information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2022-11287 (2022). In that ruling, we determined the county must withhold certain information pertaining to ES&S under section 552.110 of the Government Code and must release the remaining information. The county seeks to withhold some of the responsive information, in part, under section 552.111 of the Government Code. We note the Act does not permit the selective disclosure of information. *See Gov't Code* § 552.007. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.*; Open Records Decision No. 518 at 3 (1989); *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). Thus, pursuant to section 552.007, the county may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although the county raises section 552.111 for some of the responsive information, this section 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), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the county may not now withhold information that was previously ordered released in Open Records Letter No. 2022-11287 under section 552.111. There is no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, to the extent the responsive information was at issue in the previous ruling, the county must continue to rely on Open Records Letter No. 2022-11287 as a previous determination and withhold or release that information in accordance with that ruling. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the responsive information was not at issue in that ruling, we will address the public availability of this information.

We understand ES&S to assert the responsive information at issue is confidential because it is subject to confidentiality agreements. We note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a

³ As we are able to make this determination, we need not address the arguments against disclosure of this information.

governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, the county must release it, notwithstanding any expectations or agreement specifying otherwise.

ES&S raises section 552.104 of the Government Code. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information 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.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code § 552.104(a). Therefore, we do not address ES&S’s arguments under section 552.104.

Section 552.139 of the Government Code provides, in relevant part, the following:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following is confidential:

(1) a computer network vulnerability report;

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use; [and]

(4) information directly arising from a governmental body’s routine efforts to prevent, detect, investigate, or mitigate a computer security incident, including information contained in or derived from an information security log.

Id. § 552.139(a), (b)(1)-(2), (4). Section 2059.055 of the Government Code provides, in relevant part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a governmental entity;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). The information at issue includes security assessments of the county's computer voting system. ES&S explains this information contains "sensitive or critical information [that] is vulnerable to alteration, damage, erasure, or inappropriate use." ES&S asserts disclosure of this information "could compromise the [c]ounty's data and internal information relating to its voting system." Based upon these representations and our review, we find the information we marked relates to computer network security, or to the design, operation, or defense of a computer network. Accordingly, the county must withhold the information we marked under section 552.139.⁴ However, we find ES&S has failed to demonstrate the applicability of section 552.139 to the remaining responsive information, and the county may not withhold it on that basis.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" *Id.* § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*,

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

37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, a governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *See Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.* We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties’ interests are adverse. *See id.* (Section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

The county states some of the remaining responsive information, which it marked, consists of communications containing advice, opinions, and recommendations of a county official, county employees, and a third party with whom the county shares a privity of interest or common deliberative process. Based upon the county’s representations and our review of the information at issue, we find the county has demonstrated some of the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the county. Accordingly, the county may withhold the information we marked under section 552.111.⁵ However, we find some of the remaining information at issue pertains to contract negotiations between the county and ES&S; thus, their interests were adverse as to the negotiations and there is no privity of interest between the parties with respect to this information. Additionally, we find the remaining information at issue is either general administrative information that does not relate to policymaking or is information that is

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

purely factual in nature. Thus, the county has failed to demonstrate the remaining information at issue pertains to policymaking matters of the county for the purposes of section 552.111. Therefore, the county may not withhold the remaining responsive information under section 552.111.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See* Gov’t Code § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). ES&S argues some of the remaining responsive information consists of trade secrets subject to section 552.110(b). Upon review, we find ES&S has demonstrated portions of the information at issue constitute trade secrets. Accordingly, the county must withhold the information we marked under section 552.110(b) of the Government Code; however, to the extent the client information pertaining to ES&S is made available to the public, including but not limited to on the company’s website or social media accounts, it may not be withheld under section 552.110(b).⁶ Nonetheless, we find ES&S has failed to provide specific factual evidence demonstrating any portion of the remaining responsive information at issue is a trade secret. Therefore, the county may not withhold any of the remaining responsive information at issue under section 552.110(b).

Section 552.1101 of the Government Code provides, in relevant part:

- (a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

- (1) reveal an individual approach to:
 - (A) work;
 - (B) organizational structure;

⁶ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

(b) The exception to disclosure provided by Subsection (a) does not apply to:

(1) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; or

(2) communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

Id. § 552.1101(a), (b). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.1101(a) does not apply. *See id.* § 552.0222(b). ES&S asserts the remaining responsive information at issue is subject to section 552.1101(a). Upon review, we find the remaining information at issue is subject to section 552.0222(b) or section 552.1101(b) and may not be withheld on the basis of section 552.1101(a). *See id.* Therefore, the county may not withhold the remaining responsive information under section 552.1101(a).

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses information protected by chapter 418 of the Government Code. 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 the following:

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 of the Government Code provides the following:

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; *see also id.* § 421.001(2) (defining “critical infrastructure” to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). 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). ES&S contends some of the remaining responsive information is confidential under sections 418.177 and 418.181.⁷ However, upon review of the arguments and the remaining responsive information at issue, we find ES&S has failed to demonstrate the applicability of section 418.177 or section 418.181. Therefore, the county may not withhold the remaining responsive information under section 552.101 on either of those bases.

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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the county must withhold the bank account and routing numbers we marked and the information it marked under section 552.136.

In summary, to the extent the responsive information was at issue in Open Records Letter No. 2022-11287, the county must continue to rely on that ruling as a previous determination and withhold or release that information in accordance with that ruling. The county must withhold the information we marked under section 552.139 of the Government Code. The county may withhold the information we marked under section 552.111 of the Government Code. The county must withhold the information we marked under section 552.110(b) of the Government Code; however, to the extent the client information pertaining to ES&S is

⁷ Although ES&S does not cite to sections 418.177 and 418.181 of the government Code in its comments to our office, we understand it to raise section 552.101 of the Government Code in conjunction with sections 418.177 and 418.181 based on the substance of its arguments.

made available to the public, including but not limited to on the company's website or social media accounts, it may not be withheld under section 552.110(b). The county must withhold the bank account and routing numbers we marked under section 552.136 of the Government Code. The county must release the remaining responsive 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,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/jxd

Ref: ID# 942687

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Third Party
(w/o enclosures)