



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 25, 2022

Mr. Adam Bitter
General Counsel
Office of the Texas Secretary of State
P.O. Box 12887
Austin, Texas 78711-2887

OR2022-15060

Dear Mr. Bitter:

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# 950038 (PIR# 22-0126).

The Office of the Texas Secretary of State (the "secretary's office") received a request for technical information pertaining to electronic voting, including specifications for vDrives and CFast cards. The secretary's office states it will release some information to the requestor. You state you will redact personal e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Hart InterCivic, Inc. ("Hart"). Accordingly, you state, and provide documentation showing, you notified Hart of the request for information and of its 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 received comments from Hart. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

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

² 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

The secretary's office asserts some of the submitted information is not subject to the Act. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;
or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. The secretary's office indicates the file names, links, usernames, and passwords have no significance other than their use as tools for the maintenance, manipulation, or protection of public information. Based on these representations and our review, we find this information does not constitute public information under section 552.002 of the Government Code. Therefore, we conclude the information the secretary's office marked is not subject to the Act and need not be released to the requestor.³

Next, Hart argues the requestor has asked the secretary's office to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the secretary's office has made a good faith effort to do so.

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.

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

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).

The secretary’s office and Hart assert some of the remaining information is protected under section 418.181 of the Government Code. The secretary’s office states the information at issue relates to the state’s election system. The secretary’s office argues, and we agree, the state’s election 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”). The secretary’s office states release of this information would reveal technical details of the election system and allow unauthorized use of the election system. Based on your representations and our review, we find the secretary’s office has demonstrated release of the information at issue would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the secretary’s office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.⁴

Section 552.103 of the Government Code provides as follows:

(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.

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

...

(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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You contend the information at issue is related to pending litigation to which the secretary's office is a party. You inform us, and have provided documentation demonstrating, litigation styled *Strongin v. Scott*, Cause No. D-1-GN-22-000536, was pending in the 459th District Court of Travis County, Texas on the date the secretary's office received the request. You further explain the information at issue is related to the pending lawsuit because it pertains to the certifications of electronic voting systems, which is the issue of the pending litigation. Based on your representations, the documentation at issue, and our review of the remaining information, we find litigation was pending when the secretary's office received this request for information, and we find the information at issue is related to the pending litigation for purposes of section 552.103. Therefore, the secretary's office may withhold the information it marked under section 552.103 of the Government Code.⁵

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the information the secretary's office marked is not subject to the Act and need not be released to the requestor pursuant to section 552.002 of the Government Code. The secretary's office must withhold the information it marked under section 552.101 of

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

the Government Code in conjunction with section 418.181 of the Government Code. The secretary's office may withhold the information it marked under section 552.103 of the Government Code. The secretary's office 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,

Kelly McWethy
Assistant Attorney General
Open Records Division

KM/jxd

Ref: ID# 950038

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)