



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2022

Ms. Cynthia Trevino
Counsel for the City of Schertz
Denton, Navarro, Rocha, Bernal & Zech, P.C.
2517 North Main Avenue
San Antonio, Texas 78212-4685

OR2022-34308

Dear Ms. Trevino:

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# 976340 (PIA 22-272).

The City of Schertz (the "city"), which you represent, received a request for eight different points of information. You state you will release some information. You state the city will withhold information pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.110, 552.1101, 552.111, and 552.131 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of ADB Design Services; Boomerang Interests, LLC ("Boomerang"); Civil Engineering Consultants; Fugro Consultants, Inc.; Pacheco Koch ("Westwood"); Pape Dawson Engineers, Inc.; and Phase Engineering, L.L.C. Accordingly, you state, and provide documentation showing, you notified these third parties 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 received comments from Boomerang and Westwood. We have considered the submitted arguments and reviewed the submitted information.

¹ Open Records Decision No. 684, a previous determination to all governmental bodies, authorizes the withholding of certain categories of information, including a certified agenda and tape of a closed meeting under section 552.101 in conjunction with section 551.104 of the Government Code, without the necessity of requesting an attorney general decision.

Initially, we note section 552.301(e)(1)(D) states a governmental body asking for an attorney general decision must, within fifteen business days of receiving a request, provide the attorney general with “a copy of the specific information requested, *or submit representative samples of information if a voluminous amount of information was requested[.]*” Gov’t Code § 552.301(e)(1)(D) (emphasis added). Although you state you have submitted a representative sample of the requested information, we note you have submitted a voluminous amount of information rather than a representative sample. We have identified and reviewed a representative sample of the voluminous information submitted.²

Next, we note some of the submitted information is not responsive to the present request for information because it was created after the date the city received the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the present request and the city is not required to release such information in response to this request.³

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(b)-(c). Although the city argues the submitted information is excepted under section 552.110, this exception is designed to protect the interests of third parties, not the interests of a governmental body. *See id.* §§ 552.110. In addition, although you raise section 552.1101 of the Government Code for the information at issue, this section protects only the interests of a vendor, contractor, potential vendor, or potential contractor that has provided information to a governmental body, not those of the governmental body itself. *See id.* § 552.1101(c). Thus, we do not address the city’s argument under section 552.110 or 552.1101. We note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice to submit its reasons, if any, as to why info relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from any of the remaining third parties. Thus, we have no basis to conclude any of the remaining 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 city may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

We understand Boomerang to assert the submitted information is excepted from disclosure based on a non-disclosure agreement. However, information is not confidential under the Act simply because the party that submits the information 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

² To the extent the city identifies confidential information subject to a provision not addressed in this ruling, the city should contact the Open Government Hotline.

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

provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a 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 city must release it, notwithstanding any expectations or agreement specifying otherwise.

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 section encompasses information protected by other statutes, such as 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 418.181 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; *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 station 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 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 the submitted information identifies details and locations of the city’s water, sanitary sewer, and storm sewer systems. You argue, and we agree, the city’s water, sanitary sewer, and storm sewer systems are critical infrastructure for purposes of section 418.181 of the Government Code. *See generally id.* § 421.001(2). We understand release of this information would reveal the locations and vulnerabilities of the city’s water, sanitary sewer, and storm sewer systems and expose them to possible acts of terrorism or other criminal activity. Based upon these representations and our review, we find the city has demonstrated release of some of the information at issue would identify the technical details of particular vulnerabilities of the city to an act of terrorism. Accordingly, the city must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.⁴ However, we find

⁴ As we are able to make this determination, we need not address the remaining arguments against disclosure of this information.

you have failed to demonstrate the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure for purposes of section 418.181 and the city may not withhold any portion of the remaining information under section 552.101 of the Government Code on that basis.

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 you have failed to demonstrate the applicability of section 552.104 to the remaining information. Thus, we conclude the city may not withhold the submitted information under section 552.104(a).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

As noted above, 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). Section 552.110(c) of the Government Code excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” *Id.* § 552.110(c). *Boomerang and Westwood*

argue the remaining information consists of trade secrets subject to section 552.110(b) and commercial or financial information subject to section 552.110(c). Upon review, however, we find Boomerang and Westwood have failed to provide specific factual evidence demonstrating the information at issue is a trade secret or constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the city may not withhold any of the information at issue under section 552.110(b) or 552.110(c) of the Government Code.

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

(a) . . . [I]nformation 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 [required disclosure] 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;

(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.

Id. § 552.1101(a). Boomerang and Westwood generally assert their information is protected under section 552.1101 of the Government Code. Upon review, however, we find Boomerang and Westwood have failed to provide the specific factual evidence necessary to withhold any of the information at issue under section 552.1101(a), and the city 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. 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. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). 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).

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. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); see 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).

You state the remaining information at issue consists of advice, opinions, and recommendations of city employees regarding policymaking matters of the city. However, upon review, we find the remaining information at issue is general administrative and purely factual that does not rise to the level of policymaking. Thus, we find you have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the city. Therefore, the city may not withhold any portion of the remaining information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

Westwood also raises section 552.113 of the Government Code, which protects certain geological, geophysical, and other information regarding the exploration or development of natural resources. See Gov't Code § 552.113. See generally Open Records Decision No. 627 (1994). Upon review, however, we find Westwood has not demonstrated this exception is applicable to any of its information. Accordingly, the city may not withhold any of Westwood's remaining information at issue under section 552.113 of the Government Code.

Westwood raises section 552.117(a)(1) of the Government Code for some of the remaining information. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the

Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose cellular telephone numbers are at issue timely requested confidentiality of this information under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, then the city must withhold the city employees' cellular telephone numbers under section 552.117(a)(1) of the Government Code. Conversely, if the employees at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, then the city may not withhold the information at issue under section 552.117(a)(1). In either instance, we find Westwood failed to demonstrate the applicability of section 552.117(a)(1) to the remaining information, and thus, no portion of the remaining information may be withheld under section 552.117(a)(1).

Section 552.131 of the Government Code relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(c). We note section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic

development negotiations. Because we have already disposed of Boomerang's claims under section 552.110, the city may not withhold any of Boomerang's information under section 552.131(a) of the Government Code.

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). Section 552.131(b) protects the interests of governmental bodies, not third parties. The city states the information at issue contains economic development information. However, upon review, we find the city has not demonstrated any portion of the remaining information reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude the city may not withhold any of the remaining information under section 552.131(b) of the Government Code.

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). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we find Westwood has not demonstrated any of its remaining information consists of access device numbers for purposes of section 552.136. Accordingly, the city may not withhold any of the remaining information under section 552.136 of the Government Code.

Westwood raises section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, the general e-mail address of a business, an Internet website address, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address that a governmental entity maintains for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine if some of the e-mail addresses within the remaining information fall within the scope of section 552.137(c). Accordingly, we must rule conditionally. To the extent the e-mail addresses within the remaining information are not excluded by section 552.137(c), the city must withhold them under section 552.137 of the Government Code, unless the individual to whom the e-mail address belongs affirmatively consents to its release. *See id.* § 552.137(b). However, to the extent the e-mail addresses are excluded by section 552.137(c), the e-mail address may not be withheld under section 552.137 of the Government Code.

In summary, the city must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The city must withhold the information we have marked under section 552.101 of

the Government Code in conjunction with common-law privacy. If the employees whose cellular telephone numbers are at issue timely requested confidentiality of this information under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, then the city must withhold the city employees' cellular telephone numbers under section 552.117(a)(1) of the Government Code. To the extent the e-mail addresses within the remaining information are not excluded by section 552.137(c), the city must withhold them under section 552.137 of the Government Code, unless the individual to whom the e-mail address belongs affirmatively consents to its release. The city 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,

Chase D. Young
Assistant Attorney General
Open Records Division

CDY/eb

Ref: ID# 976340

Enc. Submitted documents

c: Requestor
(w/o enclosures)

7 Third Parties
(w/o enclosures)