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ATTORNEY GENERAL OF TEXAS

December 12, 2022

Ms. Desiree Duarte
Counsel for El Paso County Community College District
Scott Hulse P.C.
201 East Main Drive, Suite 1100
El Paso, Texas 79901

OR2022-38369

Dear Ms. Duarte:

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# 989343 (ORR No. 22-24).

The El Paso Community College (the "college"), which you represent, received a request for eight categories of information pertaining to a specified contract.¹ You state the college does not have information responsive to some of the request.² You also state the college has released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.³ Additionally, you state release of this information may implicate the proprietary interests of Harrington Construction d/b/a HB Construction ("HB"). Accordingly, you state, and provide

¹ You state the college sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615.

² The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³ Although you raise sections 552.102, 552.104, 552.105, 552.117, and 552.136 of the Government Code, you have not provided any arguments to support these exceptions. Therefore, we assume the college has withdrawn its claim these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302. Additionally, although you failed to timely raise section 552.101 of the Government Code, this provision constitutes a compelling reason to withhold information, and we will consider your argument under this exception. *See id.* Finally, although you also raise section 552.021 of the Government Code, we note this section is not an exception to disclosure. Rather, this provision provides that public information is available during normal business hours. *See id.* § 552.021.

documentation showing, you notified the interested third party of the request for information and of its right to submit arguments to this office as to why the information at issue 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 considered the exception you claim and reviewed the submitted information.

Initially, you inform this office you sought clarification from the requestor for portions of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state the requestor has not responded to the college's request for clarification. Thus, for the portion of the request for which the college sought but not received clarification, we find the college is not required to release information in response to this portion of the request. However, if the requestor clarifies this portion of the request for information, the college must seek a ruling from this office before withholding any responsive information from the requestor. *See* Gov't Code 552.222; *City of Dallas*, 304 S.W.3d at 387. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990).

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from HB explaining why the submitted information should not be released. Therefore, we have no basis to conclude HB has protected proprietary interests 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 college may not withhold any portion of the submitted information on the basis of any proprietary interest HB may have in the information.

Next, you assert some of the submitted information is not subject to disclosure because it is in "active use." Section 552.221 of the Government Code provides in relevant part the following:

- (a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, "promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.

...

(c) If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

Id. § 552.221(a), (c). This office has interpreted section 552.221 to require prompt disclosure of information unless it is in “immediate active use.” See Open Records Decision No. 225 at 3 (1979) (under former section 552.221, shorthand notes are in active use while typist is in the process of typing them out, but are not in active use “if there is no prospect that they will be immediately typed or further processed”), 57 at 4 (1974) (student directory information not in active use under former section 552.221 if copies of same information are provided to various college departments). Section 552.221 is a narrow exception to the rule of prompt production of information under the Act - it permits an agency to avoid only unreasonable disruption of its immediate business. Open Records Decision No. 121 at 3 (1976). Section 552.221, however, cannot be used to deny a requestor access to records. JM-757 at 4 (1987).

You assert some of the requested information is in active use as it is being used by the college. However, we disagree with the college’s position that the information at issue is in active use for purposes of section 552.221(c). See, e.g., Open Records Decision Nos. 148 at 1 (1976) (recommendations and employment evaluations not in active use under former section 552.221 during entire time when faculty member’s promotion is under consideration), 121 at 3 (university’s financial records in custody of district attorney during criminal investigation not in active use under former section 552.221). The college also has not adequately explained release of the information at issue would disrupt the college’s immediate business. Therefore, we find you have not established the information at issue is in active use for purposes of section 552.221 of the Government Code, and the college may not withhold it on that basis.

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. As part of the Texas Homeland Security Act (“HSA”), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential.

Section 418.181 of the Government Code provides “[t]hose 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 the 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 information at issue contains blueprints, schematics, and drawings of a college building. You assert the college's building is critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001 (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"). You state release of the information "could lead to a breach of security, which would compromise the physical security of the [college's] building, along with [the college's] students and employees." Based on your representations and our review, we find you have demonstrated release of some of the information at issue would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the college must withhold the information at issue, a representative sample of which we marked, under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. However, we find you have failed to demonstrate any of the remaining information at issue is confidential under section 418.181 of the Government Code. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Thus, the college must withhold the submitted date of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the college must withhold the information at issue, a representative sample of which we marked, under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The college must withhold the submitted date of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The college must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

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,

Sarah E. Reese
Attorney
Open Records Division

SER/jxd

Ref: ID# 989343

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)