



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 1, 2011

Mr. Ross Fischer  
Denton, Navarro, Rocha & Bernal, P.C.  
For Karnes County  
2517 North Main Avenue  
San Antonio, Texas 78212

OR2011-04498

Dear Mr. Fischer:

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# 411594.

Karnes County (the "county"), which you represent, received a request for multiple categories of information related to the proposed building of a detention center in the county, including documents, contracts, and communications in the Commissioner's Court minutes from January 1, 2008 to the date of the request.<sup>1</sup> We understand the county will release some of the responsive information to the requestor. You state the county does not maintain the requested documents, contracts, and communications in the Commissioner's Court minutes.<sup>2</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.136, 552.137, 552.139, and 552.150 of the Government

---

<sup>1</sup>You note that the county sought and received a clarification 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).

<sup>2</sup>In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time the request was received. *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).

Code. In addition, you state release of this information may implicate the proprietary interests of the GEO Group, Inc. ("GEO"). Thus, you state the county notified GEO of the county's receipt 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) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). You further indicate release of this information may implicate the interests of the United States Immigration and Customs Enforcement Office of Acquisition Management Division and Detention Management ("ICE"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from GEO. As of this date, we have not received comments from ICE explaining why the submitted information should not be released. We have considered the submitted arguments and reviewed the submitted information.

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 that is made confidential by other statutes. The county raises section 552.101 in conjunction with provisions of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.181 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 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, and functions vital to the state or the nation"). Section 418.182 provides in part:

(a) [I]nformation, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

*Id.* § 418.182(a). The fact information may be related to a governmental body's security concerns does not make such 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 county asserts the proposed detention center constitutes critical infrastructure for purposes of section 418.181. You state release of the information in Exhibit F would reveal particular vulnerabilities of the facility's infrastructure, including information regarding the type of security to be provided to the proposed facility. Upon review, we find the county has established that portions of the information at issue would identify the technical details of particular vulnerabilities of the facility to an act of terrorism or related criminal activity. Accordingly, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. We note the submitted Performance Work Statement is part of an Intergovernmental Services Agreement ("IGSA") between the county and ICE. The stated purpose of the submitted Performance Work Statement is to facilitate the provision of the necessary physical structure, equipment, facilities, personnel, and services to meet ICE's minimum operating standards for a civil detention facility. We further note the submitted Performance Work Statement states the county may, at its discretion, communicate the substance of the IGSA when requested and specifically provides the IGSA "will become a public document when presented to the Service Provider's governing body for approval." Upon review, we find the county has failed to demonstrate how any of the remaining information at issue identifies the technical details of particular vulnerabilities of the facility to an act of terrorism or related criminal activity. Accordingly, none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. Additionally, we find the county has failed to establish how any of the remaining information, including the submitted Performance Work Statement, relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Consequently, the county may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code.

Section 552.101 also encompasses section 236.6 of title 8 of the Code of Federal Regulations,<sup>3</sup> which protects information regarding detainees held on behalf of the Immigration and Naturalization Service (the "INS").<sup>4</sup> This section provides as follows:

No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the [INS] (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the [INS] and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

8 C.F.R. § 236.6. You assert a portion of the information at issue pertains to INS detainees. Based on your arguments and our review, we agree the county is required to abide by rules promulgated by the INS with regard to INS detainees. *See* 8 C.F.R. § 2.1 (providing that Secretary of Homeland Security may issue regulations to administer and enforce laws relating to immigration and naturalization of aliens); *see also* *ACLU of N.J., Inc. v. County of Hudson*, 799 A.2d 629 (N.J. 2002) (stating that while state possesses sovereign authority over operation of its jails, it may not operate them, in respect to INS detainees, in any way that derogates federal government's exclusive and expressed interest in regulating aliens). You do not provide our office with any applicable federal law, regulation, or executive order that provides the requestor with a right of access to the information at issue. We therefore conclude the information at issue, which we have marked, pertains to INS detainees and is made confidential by section 236.6 of title 8 of the Code of Federal Regulations and must be withheld from the requestor under section 552.101 of the Government Code.<sup>5</sup> *See*

---

<sup>3</sup>Section 552.101 encompasses information that other statutes make confidential. A federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

<sup>4</sup>We note that the functions of the INS were transferred to the Department of Homeland Security on March 1, 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). However, as section 236.6 still refers to the agency at issue as "the INS," we will also do so in this ruling.

<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

*ACLU*, 799 A.2d at 655 (concluding that because INS had authority to promulgate 8 C.F.R. § 236.6, provision preempts state law requiring disclosure of requested information); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation).

You raise section 552.111 of the Government Code for the information in Exhibit H. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 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, no writ); 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 (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 that are severable from advice, opinions, and recommendations. *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).

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* ORD 561 at 9. We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You contend Exhibit H is protected under section 552.111 of the Government Code. You explain the information at issue relates to the selection process and contract negotiations for the proposed detention center. You state the information at issue “reflects negotiation strategy and terms that were proposed by the [c]ounty judge” and contains the recommendations and opinions of the county judge “as he sought to secure the best contract terms for the [c]ounty.” Upon review, we conclude the portions of Exhibit H we have marked constitute the advice, opinion, and recommendations related to policymaking matters. Therefore, the county may withhold the information we have marked under section 552.111 of the Government Code. However, we find some of the remaining information in Exhibit H is factual in nature. Further, we note that some of the remaining information has been communicated to a third party who has no privity of interest with the county. Therefore, the county may not withhold the remaining information in Exhibit H under section 552.111 of the Government Code.

Section 552.136(b) of the Government Code states that “[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.” Gov’t Code § 552.136(b). This office has determined that bank account and routing numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Therefore, the county must withhold the bank account and routing numbers we have marked pursuant to section 552.136 of the Government Code. However, although you assert the computer login and security passwords you have marked constitute access devices, we find you have failed to demonstrate how this information constitutes access device numbers for purposes of section 552.136. Accordingly, the county may not withhold the computer login and security passwords you have marked under section 552.136 of the Government Code.

The remaining information contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 of the Government Code provides in relevant part:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract;

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public; or

(5) provided to a governmental body for the purpose of providing public comment on or receiving notices related to an application for a license as defined by Section 2001.003(2) of this code, or receiving orders or decisions from a governmental body.

*Id.* § 552.137(a)-(c). Thus, unless an exception under subsection (c) of the statute applies, an e-mail address of a member of the public provided for the purpose of communicating electronically with a governmental body is confidential. *Id.* § 552.137(a). Upon review, we agree that portions of the submitted information contain personal e-mail addresses that must be withheld under section 552.137. Accordingly, the county must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of these e-mail addresses have affirmatively consented to their release.

The county raises section 552.139 of the Government Code for the marked computer login and security information. Section 552.139 provides in part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security, . . . , or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

...

(2) any other assessment of the extent to which data processing operations, a computer, or 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.

*Id.* § 552.139(a), (b)(2). The county states the computer login and security information at issue pertains to the county's existing correctional facility and that disclosure of this information would subject the county to "potential electronic security breach, which could ultimately compromise physical security at the detention facilities." Based on this argument, we agree the computer login and security information, including the submitted user security question, pertains to computer network security or the design, operation, or defense of a computer network for purposes of section 552.139(a). Therefore, the county must withhold the information we have marked under section 552.139(a) of the Government Code.

The county generally asserts section 552.150 for portions of the remaining information, including the submitted Performance Work Statement. Section 552.150 of the Government Code provides that information held by a hospital district relating to a hospital district employee or officer is excepted from public disclosure provided (1) it is information that, if disclosed under the specific circumstances pertaining to the individual, could reasonably be expected to compromise the safety of the individual; and (2) the employee or officer makes a written application in accordance with section 552.150(a)(2) to the hospital district's officer for public information to have the information withheld from public disclosure under this section. *Id.* § 552.150. You have not demonstrated, however, and it is not otherwise clear to this office, how or why any information held by the county would be subject to section 552.150. Therefore, the county may not withhold any of the remaining information under section 552.150 of the Government Code.

Next, we consider GEO's arguments under section 552.110(b) of the Government Code for portions of its submitted information. Section 552.110(b) protects "[c]ommercial 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(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Upon review, we find GEO has made only conclusory allegations that release of the information at issue would cause the company substantial competitive injury. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue); *see also* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note pricing information of a winning bidder, as GEO is in this case, is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a company contracting with a governmental body is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the county may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Finally, we note that some of the remaining information at issue 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 county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The county may withhold the information we have marked under section 552.111 of the Government Code. The county must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The

county must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have consented to their release. The county must withhold the computer login and security information we have marked under section 552.139 of the Government Code. The remaining information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.<sup>6</sup>

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 [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 411594

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

---

<sup>6</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Mr. J. Greg Hudson  
Hudson & O'Leary, L.L.P.  
For The GEO Group, Inc.  
1010 MoPac Circle, Suite 201  
Austin, Texas 78746  
(Third Party w/o enclosures)

Mr. Gary Mead  
Deputy Assistant Director  
Detention Management  
Room 8057  
500 12<sup>th</sup> Street S.W.  
Washington, D.C. 20536  
(Third Party w/o enclosures)

Mr. Jerald Neveleff  
Deputy Assistant Director  
Office of Acquisition Management Division  
Immigration and Customs Enforcement  
500 12<sup>th</sup> Street S.W.  
Washington, D.C. 20536  
(Third Party w/o enclosures)