



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 22, 2012

Ms. Molly Shortall
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2012-07757

Dear Ms. Shortall:

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# 454347.

The City of Arlington (the “city”) received a request for thirty-two categories of information pertaining to the city’s Gas Drilling and Production Ordinance, the Fire Prevention Chapter of the city code, the Natural Gas Well Preparedness and Response presentation, emergency responders to oil and gas wells, city fire department personnel, specialized training and emergency preparedness, royalty and bonus payments received by the city for oil and gas leases, the assessment of operational permit fees under the city’s Gas Fire Code, cost reimbursement funds, funds pertaining to the city’s dive team, and funds pertaining to the city’s hazmat response team. You state you have made some information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov’t Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we must address the city’s obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body that receives a request for information must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). You state the city received the request for information on March 1, 2012. Accordingly, we find the city’s

ten-business-day deadline was March 15, 2012. However, you did not request a ruling from this office and state exceptions that apply until March 16, 2012. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the city failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

Although you raise sections 552.103, 552.107, and 552.111 of the Government Code, these exceptions are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 663 at 5 (1999) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). In failing to comply with section 552.301, the city has waived its claims under sections 552.103, 552.107, and 552.111 of the Government Code. Therefore, none of the submitted information may be withheld under these exceptions. However, you raise section 552.101 for portions of the submitted information. Furthermore, we note some of the submitted information is subject to sections 552.117 and 552.137 of the Government Code.¹ Because sections 552.101, 552.117, and 552.137 can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to 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 made confidential by other statutes. Section 552.101 encompasses sections 418.176, 418.177, and 418.181 of the

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code. These sections were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”). Section 418.176 provides, in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

...

(2) relates to a tactical plan of the provider[.]

Id. § 418.176(a)(2). Section 418.177 provides as follows:

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 provides:

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, economy, or morale of the state or the nation”). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection).

You assert portions of the submitted information consist of tactical plans of emergency response providers related to the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Upon review, we find you have demonstrated some of the information at issue is confidential under section 418.176(a)(2) of the Government Code. Accordingly, the city must withhold this information, which we have marked, under section 552.101 in conjunction with section 418.176(a)(2) of the

Government Code. We find the city has failed to demonstrate how the remaining information at issue relates to tactical plans of emergency response providers maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism. Accordingly, it may not be withheld on that basis.

We note portions of the remaining information at issue pertain to reports prepared by the city, the United States Department of Homeland Security, the Federal Bureau of Investigation, the Texas Department of Public Safety, and other intelligence and law enforcement resources analyzing and assessing various security threats, concerns, and vulnerabilities. Upon review, we find the information we have marked was 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 relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See* Gov't Code § 418.177. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. However, we find none of the remaining information was collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism. Accordingly, this information may not be withheld on that basis.

You assert, and we agree, the city's natural gas wells and related infrastructure are critical infrastructure. You state portions of the remaining information pertain to natural gas infrastructure, potential hazards, and the presence or lack thereof of specific features at the well sites. You explain that the information at issue, including a survey of natural gas well sites within the city, reveals technical details of particular vulnerabilities of critical infrastructure, release of which would compromise public safety. Based on these arguments and our review, we agree portions of the remaining information, which we have marked, identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with section 418.181 of the Government Code. However, the requestor notes, and we agree, that the locations of the natural gas well sites you seek to withhold, as well as pipe line locations, are available to the public on the Texas Railroad Commission's internet website. You do not explain how the release of such publicly available information would expose the natural gas wells and related infrastructure to an act of terrorism. *See id.* § 418.181; Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Additionally, you have not provided arguments explaining how the physical locations of the natural gas well sites constitute "technical details of particular vulnerabilities" in the natural gas wells and related infrastructure system. Moreover, we find the city has not demonstrated how the remaining information would reveal the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Accordingly, the remaining information is not subject to section 418.181 of the Government Code and may not be withheld under section 552.101 on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). We note section 552.117(a)(1) encompasses an official's or employee's personal cellular telephone or pager number if the cellular telephone or pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024. Thus, the information we have marked under section 552.117 must be withheld on the basis of section 552.117(a)(1) to the extent it pertains to a current or former city official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including cellular telephone numbers if the cellular telephone service is not paid for by a governmental body.

Section 552.137 of the Government Code provides, "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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. *Id.* § 552.137(c). The city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.²

In summary, pursuant to section 552.101 of the Government Code, the city must withhold the information we have marked under sections 418.176, 418.177, and 418.181 of the Government Code. To the extent it pertains to a current or former city official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including cellular telephone numbers if the

²We 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 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 opinion.

cellular telephone service is not paid for by a governmental body. Unless the owners affirmatively consent to release, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. 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 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,

A handwritten signature in black ink that reads "Cynthia G. Tynan". The signature is written in a cursive, flowing style.

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 454347

Enc. Submitted documents

c: Requestor
(w/o enclosures)