ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2013

Ms. Ellen H. Spalding
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2013-09542

Dear Ms. Spalding:

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# 490190 (ORR# 3516).

The Eanes Independent School District (the "district"), which you represent, received a request for "information requested under EANES 3398[,]" a previous request related to elevators at the district. You claim the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, you state the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-04638 (2013). In that ruling, we determined the district may withhold the information at issue under section 552.103 of the Government Code because the district was involved in pending litigation at the time it received the previous request for information. In this instance, you inform us, prior to the date the district received the instant request, the district's board of trustees had heard and concluded the administrative proceeding referenced in the prior ruling. Therefore, we find the law, facts, and circumstances on which the previous ruling is

[1]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 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.

based have changed. Consequently, you may not rely on Open Records Letter No. 2013-04638 as a previous determination with regard to the information at issue. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address the submitted arguments against release of the information.

Next, we note some of the submitted blueprints are not responsive to the instant request because they do not depict the locations of elevators. This ruling does not address the public availability of the non-responsive information, and the district need not release information that is not responsive to the request.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. You assert the submitted information is made confidential by sections 418.177, 418.181, and 418.182 of the Government Code. Section 418.177 provides,

> 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. Section 418.182 provides, in relevant part,

> (a) Except as provided by Subsections (b) and (c), information, 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 that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *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 Texas Homeland Security Act 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 information at issue consists of elevator inspection reports and blueprints depicting elevator locations. We note district buildings, including school buildings, are critical infrastructure for the purposes of section 418.181 of the Government Code. *See id.* § 421.001 (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 state or nation). Upon review, we find the responsive blueprints reveal the technical details of particular vulnerabilities of district buildings to an act of terrorism. Therefore, the district must withhold the responsive blueprints under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.[2]

You assert the remaining information, which consists of elevator inspection reports, contains the "precise locations of elevators throughout the [d]istrict that a criminal or terrorist could use to develop a strategy for a violent attack." Thus, you argue release of the remaining information "would provide . . . detailed depictions of information on the location of elevators that . . . could then [be used] to carry out a violent attack" on the district. However, the remaining information does not contain the "precise locations of elevators" in the district. Further, you do not explain how the remaining information was collected, assembled, or is maintained by or for the district 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, including critical infrastructure, to an act of terrorism or related criminal activity. Additionally, you do not explain how the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Moreover, you have not demonstrated how the remaining information consists

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[2]As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

of access codes and passwords or reveals the location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Consequently, we determine the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.177, section 418.181, or section 418.182 of the Government Code.

Section 552.103 of the Government Code provides in relevant part 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.
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> . . .
>
> (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 section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (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. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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). *See* ORD 551.

This office has long held "litigation," for purposes of section 552.103, includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You first assert litigation against the district is currently pending or is reasonably anticipated because prior to the district's receipt of the instant request for information, the requestor filed

internal grievances with the district, including a grievance against an attorney for the district. You state complaints filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You explain under the district's parent grievance policy, the grievant proceeds through a three-level process wherein hearing officers hear the complaint at level one and level two, and the district's board of trustees (the "board") hears the grievance if the grievant appeals to level three. You state the grievant is allowed to be represented by counsel, present favorable evidence to the district, and present witnesses to testify on the grievant's behalf. Based on your representations, we find you have demonstrated the district's administrative procedures for parent grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103.

You inform us the district's Board of Trustees heard some of the requestor's complaints on March 5, 2013, prior to the district's receipt of the instant request. You contend litigation is pending or reasonably anticipated in this matter because the statute of limitations for the requestor to file an appeal to the Commissioner of Education has not yet run. However, we find you have not demonstrated the requestor has taken objective steps toward filing any claim or appeal against the district since the completion of the March 5, 2013, hearing. You also inform us the district's Board of Trustees heard the requestor's complaint against the attorney for the district on December 4, 2012. Although you contend litigation is pending or reasonably anticipated in this matter, you have not demonstrated this administrative proceeding is pending. Thus, we find you have failed to demonstrate the district is involved in litigation relating to these internal grievances prior to the date the district received the request for information.

You also explain another requestor has filed complaints with the Texas Bar Association against three attorneys associated with the district. You inform us these complaints were initially dismissed but the requestor subsequently appealed them. However, we note you have not provided this office with evidence to demonstrate litigation was pending with the Texas Bar Association on the date the district received the request for information. You have further provided an e-mail dated March 7, 2013, in which the other requestor accuses the district of libel and slander. You state the district interprets this e-mail to be a threat of litigation. However, you have not provided this office with evidence the other requestor had taken any objective steps toward filing a lawsuit prior to the date the district received the request for information. *See* Gov't Code § 552.301(e); Open Records Decision No. 331 (1982). Thus, based on your representations, our review, and the totality of the circumstances, we find you have failed to demonstrate litigation to which the district, a district officer, or a district employee was a party was pending or reasonably anticipated in relation to these matters on the date the district received the request for information.

Additionally, you state that prior to the district's receipt of the instant request, the requestor filed grievances complaining the district (1) posted STAAR results on the district's website in violation of the Family Educational Rights and Privacy Act, (2) destroyed surveillance

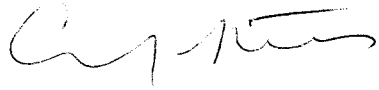
video, and (3) violated competitive bidding requirements in relation to the purchase of computer tablets. You further state these grievances remain pending. Thus, we determine the district was a party to pending litigation relating to these internal grievances at the time it received the instant request for information. However, you have failed to demonstrate how the remaining information, which consists of elevator inspection reports, relates to these pending grievances. Accordingly, the district may not withhold the remaining information under section 552.103 of the Government Code.

In summary, the district must withhold the responsive blueprints under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The district must release the remaining responsive 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 490190

Enc. Submitted documents

c: Requestor
(w/o enclosures)