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ATTORNEY GENERAL OF TEXAS

August 29, 2016

Mr. William S. Helfand
Counsel for the Sabine River Authority
Lewis, Brisbois, Bisgaard & Smith, L.L.P.
24 Greenway Plaza, Suite 1400
Houston, Texas 77046

OR2016-19526

Dear Mr. Helfand:

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# 624397.

The Sabine River Authority (the "authority"), which you represent, received a request for (1) information pertaining to the authority's use of eminent domain, condemnation, or buy-outs of real property, (2) information related to the condition of Toledo Bend Hydroelectric Unit #2 during a specified time period, and (3) a copy of a specified power sales agreement. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2016-13746 (2016) and 2016-13755 (2016). We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, to the extent the submitted information is identical to the information previously requested and ruled upon, the authority must continue to rely on Open Records Letter Nos. 2016-13746 and 2016-13755 as previous determinations and withhold or release the identical information at issue in accordance with those rulings. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the submitted information is not subject to the previous rulings, we will consider your arguments against disclosure of the information at issue.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Exhibit E consists of information in an account, contract, or voucher relating to the receipt or expenditure of funds by the authority that is subject to section 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). Although you seek to withhold this information under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the authority may not withhold Exhibit E under section 552.103. We note sections 552.101 and 552.117 can make information confidential under the Act. Accordingly, we will consider your arguments under sections 552.101 and 552.117 for the information in Exhibit E, as well as the remaining information. We will also consider your arguments under sections 552.103, 552.105, and 552.111 of the Government Code for the information not subject to section 552.022.

Section 552.103 of the Government Code provides 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.

...

(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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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).

You contend Exhibits C and D are related to pending litigation to which the authority is a party. You inform us, and have provided documentation demonstrating, litigation styled *Perry Bonin v. Sabine River Authority of Texas*, Cause No. B160137-C, was pending in the 163rd Judicial District Court of Orange County, Texas on the date the authority received the request. You further explain the information at issue is related to the pending lawsuit because it pertains to the Toledo Bend Reservoir, which is the subject matter of the pending litigation. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the authority received this request for information, and we find the information at issue is related to the pending litigation for purposes of section 552.103. Therefore, the authority may withhold Exhibits C and D under section 552.103 of the Government Code.¹

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 encompasses information protected by other statutes. 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. 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 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 argue the remaining information is “related to the Toledo Bend Hydroelectric Unit #2, which is a vital water source that impounds water for various purposes in the region.” You argue release of the information at issue “would reveal to a terrorist or other criminal element where the most damage could be inflicted to endanger public health and safety, and to maximize loss of life.” Upon review, we find you have failed to demonstrate any of the information at issue identifies the technical details of particular vulnerabilities of critical infrastructure. Consequently, the authority may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

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 that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the authority may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Upon review, we find none of the remaining information is

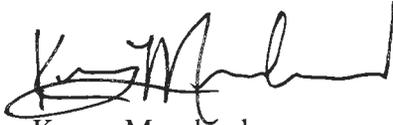
confidential under section 552.117(a)(1), and the authority may not withhold any of it on that basis.

In summary, the extent the submitted information is identical to the information previously requested and ruled upon, the authority must continue to rely on Open Records Letter Nos. 2016-13746 and 2016-13755 as previous determinations and withhold or release the identical information at issue in accordance with those rulings. The authority may withhold Exhibits C and D under section 552.103 of the Government Code. The authority 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.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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 624397

Enc. Submitted documents

c: Requestor
(w/o enclosures)