



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2007

Mr. Robert Martinez
Director Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2007-12029

Dear Mr. Martinez:

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# 289216.

The Texas Commission on Environmental Quality (the "commission") received a request for a specified application, and any supporting documentation, filed by the Lower Neches Valley Authority ("LNVA"). You claim that some of the submitted information may be excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the LNVA and by an attorney on behalf of the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We first note that the information at issue is the same information that was at issue in a previous request by the commission for a decision from this office. In our previous decision, Open Records Letter No. 2007-04723 (2007), we ruled that the commission must refer the information request to the United States Transportation Security Administration ("TSA") for its decision concerning disclosure of the information at issue. *See* 49 U.S.C. §§ 114(a), (b)(1); *see also* 49 C.F.R. §§ 1520.5(a), 1520.9(a). You explain that the commission requested an opinion from the TSA, and were ultimately directed to the United States Coast Guard, a division of the United States Department of Homeland Security. You further explain, and have submitted supporting documentation showing, that the Coast Guard has reviewed the information at issue and determined that portions of the responsive information constitute sensitive security information ("SSI"). You state that this information will be withheld from the requestor. However, you state that for five particular documents, the Coast Guard indicated that it could not make a determination. Of these five documents, we understand you to inform us that the LNVA does not object to release of the "projected demands chart" or the Certificate of Adjudication, 06-4411. We also note that neither you nor the LNVA has provided any arguments against release of the document referencing a

July 7, 2006 meeting of the Texas Water Development Board in the Stephen F. Austin building. Accordingly, the commission must release these three documents to the requestor.¹

However, you again request a ruling on whether the document entitled "Lower Neches Valley Authority Water Supply Critical Infrastructure" must be released under the Act. In addition, you inform us that the cover letter dated August 23, 2006 accompanying the "Application for Amendment to a Water Right" (the "application") is "still under dispute." You further state that the LNVA seeks to have a portion of the application redacted before it is released.² As the Coast Guard has not found that any of this information constitutes SSI, we will address whether these documents, or portions thereof, are excepted from disclosure under the Act.

With regard to the application, you state that "nothing in the application reveals any particular vulnerabilities of critical infrastructure to acts of terrorism," and that the "application does not reveal anything that is not already public knowledge." You further state that "LNVA's existing permit is a matter of public record." However, you state that the sheet entitled "Lower Neches Valley Authority Water Supply Critical Infrastructure" could fall within section 418.181 of the Government Code. We note that LNVA also argues that the information at issue is confidential under sections 418.176, 418.177, 418.180 and 418.181 of the Government Code, the Texas Homeland Security Act (the "HSA").³ Accordingly, we will address the applicability of these statutes to the information at issue.

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:

¹We also note that the Coast Guard, in its July 9, 2007 e-mail to the commission, stated that two e-mails from Robert Stroder of the LNVA, referred to as items "d" and "e" in the July 9 e-mail, are not SSI. Also in its July 9, 2007 e-mail, the Coast Guard stated that a document titled Coast Guard memorandum 5511, dated November 3, 2003, referred to as item "b", did not constitute SSI, but requested that names and phone numbers be redacted from this document before release. Since you have not submitted any of this information to this office for our further review, we assume you have also released it to the requestor, with names and phone numbers redacted from Coast Guard memorandum 5511 as constituting SSI.

²We note that in a submission to this office dated July 13, 2007, the LNVA submitted a copy of the application to this office indicating the portion of the application it seeks to have redacted, specifically, a portion of section 3.

³LNVA also argues that portions of the information at issue are confidential pursuant to federal law. However, as the Coast Guard has already reviewed this information and declined to find it confidential, we will not further address the applicability of federal law in this ruling.

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

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

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.

Section 418.180 provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

(1) is part of a report to an agency of the United States;

(2) relates to an act of terrorism or related criminal activity; and

(3) is specifically required to be kept confidential:

(A) under Section 552.101 because of a federal statute or regulation;

(B) to participate in a state-federal information sharing agreement; or

(C) to obtain federal funding.

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.

Gov't Code §§ 418.176, .177, .180, .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 provisions 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).

Upon review of the submitted information and the submitted arguments, we conclude that a portion of the document entitled "Lower Neches Valley Authority Water Supply Critical Infrastructure" is confidential under section 418.181 of the Government Code, and therefore must be withheld under section 552.101 of the Government Code. We have marked the information to be withheld. With regard to the remaining information at issue, we find that LNVA has not demonstrated how this information falls under sections 418.176, 418.177, 418.180 or 418.181. Accordingly, as the commission raises no exceptions to disclosure of the cover letter dated August 23, 2006 accompanying the application, the portion of the application that the LNVA seeks to have redacted, or the remainder of the the document entitled "Lower Neches Valley Authority Water Supply Critical Infrastructure", this information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jb

Ref: ID# 289216

Enc. Submitted documents

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