



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 24, 2011

Ms. Stephanie Galanides  
City Secretary  
City of Heath  
200 Laurence Drive  
Heath, Texas 75032

OR2011-09069

Dear Ms. Galanides:

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# 422742.

The City of Heath (the "city") received a request for (1) information pertaining to the new water tower from October 2010 to the date of the request; (2) information pertaining to payments made in relation to the new water tower during the same time period; (3) all documents between the city and Chicago Bridge & Iron Company, Inc. ("CB&I") during the same time period; (4) documents reflecting movement of funds in relation to the new water tower and the Hillview water line improvements for the same time period; (5) documents reflecting any type of payment to a named construction company for the Hillview water line improvements; and (6) information showing any payments made to any law firm or attorney in relation to the new water tower. You state the city has released information responsive to items two through six of the request to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You provide documentation showing you notified Freeman-Millican, Inc. ("Freeman") and CB&I of the request and their right to submit arguments to this office as to why their information should not be released because release of the submitted information may implicate these companies' proprietary interests. 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). We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention the city has previously made information similar to the requested information publicly available and may not now seek to withhold the similar information. The Act does not permit selective disclosure of information to the public. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold that exact information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989), 490 at 2 (1988). *But see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to section 552.108). However, section 552.007 does not prohibit an agency from withholding similar types of information. Further, the city claims the submitted information is excepted from disclosure under section 552.101 of the Government Code and implicates the proprietary interests of third parties. Section 552.101 and third party interests can make information confidential by law for purposes of section 552.007. *See* Gov't Code § 552.101; *see also* Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). Thus, we address the city's claims against release of 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 section encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). 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. The fact that information may relate to a governmental body's security measures 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 of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of 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 state the submitted information details the construction of the city's water tower and pipelines that service the tower. You assert, and we agree, the city's water tower and water pipelines are part of the city's critical infrastructure for purposes of section 418.181. *See*

*generally 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). You provide an affidavit in which the city’s engineer and director of public works (the “engineer”) states the water tower will provide critical potable water storage required for the city to meet its demands including those necessary for firefighting. The engineer further states an individual could use the submitted information to “impede, interfere with, damage or destroy these crucial facilities making them highly vulnerable to improper or wrongful activity.” The engineer informs us damage to the proposed water tower or pipelines could severely impact the ability of the city and the City of Rockwall to provide water service. Upon review of the submitted information and the submitted arguments, we find the construction plans and construction specifications in the contract, addenda, and bid packet identify details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the city must withhold this information, which we have marked, under section 552.101 in conjunction with section 418.181 of the Government Code. However, we conclude you have failed to establish that releasing the remaining portions of the contract with Freeman and the remaining portions of the bid packet submitted by CB&I would reveal the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the city may not withhold any of the remaining information under section 552.101 in conjunction with section 418.181.

We next note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See Gov’t Code § 552.305(d)(2)(B)*. As of the date of this letter, we have not received arguments from CB&I or Freeman. Consequently, we have no basis for concluding any portion of the remaining information constitutes proprietary information of these companies. *See id.* § 552.110; Open Records Decision Nos. 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any of the remaining information based on the proprietary interests of CB&I or Freeman.

We note some of the remaining information appears to 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.

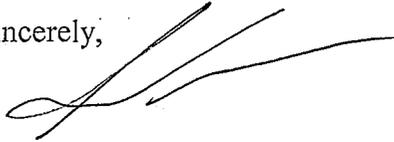
In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The

remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.

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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/bs

Ref: ID# 422742

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: CB&I, Inc.  
c/o Ms. Stephanie Galanides  
City Secretary  
City of Heath  
200 Laurence Drive  
Heath, Texas 75032  
(w/o enclosures)

Freeman-Millican, Inc.  
c/o Ms. Stephanie Galanides  
City Secretary  
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