



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 16, 2015

Ms. Kasey Feldman-Thomason
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2015-21794

Dear Ms. Feldman-Thomason:

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# 583415 (PUC ID No. 2015-06-025).

The Public Utility Commission of Texas (the "commission") received a request for information pertaining to a specified incident and information pertaining to the Pedernales Electric Cooperative ("Pedernales"). You state the commission has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.137 of the Government Code.¹ You also state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified AEP SWEPCO; AEP Texas Central Company; AEP Texas North Company; Centerpoint Energy; El Paso Electric Company; Entergy Texas, Inc.; Navigant Consulting (PI) LLC; Oncor Electric Delivery Company; Pedernales; Sharyland Utilities; Southwestern Public Service Company; Texas-New Mexico Power Company; and thirty-five named individuals of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental

¹We note that although you raise sections 552.107 and 552.136 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You also state release of the submitted information may implicate the interests of the Electric Reliability Council of Texas (“ERCOT”), which you have notified. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Pedernales and one of the named individuals.² We have considered the submitted arguments and reviewed the submitted information.

Initially, we 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we only received comments from Pedernales explaining why its information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have a protected proprietary interest in the submitted information. *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 commission may not withhold any of the information at issue on the basis of any proprietary interest any of the remaining third parties may have in it.

We also note we have not received comments from ERCOT. Accordingly, the commission may not withhold any of the submitted information on the basis of any interest ERCOT may have in it.

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 protected by other statutes. As part of the Texas Homeland Security Act (“HSA”), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. You assert some of the submitted information is confidential under section 418.181 of the Government Code, which provides “[t]hose 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

²We note the named individual at issue does not object to release of her information.

of the 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).

Both the commission and Pedernales state some of the submitted information consists of filings containing information about Pedernales' emergency operations plans. The commission and Pedernales assert, and we agree, the electricity infrastructure is critical infrastructure. *See 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 commission and Pedernales explain the information the commission marked contains specific details about Pedernales' emergency operations plans and identifies particular vulnerabilities of Pedernales' facilities and operations. The commission and Pedernales state the release of this information could be useful to terrorists in damaging Pedernales' infrastructure, disrupting power to its customers, and thwarting efforts to timely restore power to its customers. Based on these arguments and our review of the submitted information, we find you have demonstrated release of the information the commission marked would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the commission must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.³

Section 552.101 of the Government Code also encompasses section 17.004 of the Utilities Code, which provides, in part, that "[a]ll buyers of telecommunications and retail electric services are entitled to . . . privacy of customer consumption and credit information[.]" Util. Code § 17.004(a)(6). "Customer" means "any person in whose name telephone or retail electric service is billed, including individuals, governmental units at all levels of government, corporate entities, and any other entity with legal capacity to be billed for telephone or retail electric service." *Id.* § 17.002(4). Upon review, we find most of the information you have marked consist of customers' electric consumption and credit information for purposes of section 17.004. However, we find you have failed to demonstrate the information we have marked for release reveals a customer's electric consumption or credit information. Accordingly, except for the information we have marked for release, the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 17.004 of the Utilities Code. The information we have marked for release may not be withheld under section 552.101 on this basis.

³As our ruling on this information is dispositive, we need not address Pedernales' remaining arguments against disclosure.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the commission may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state the information you have marked consists of draft documents and communications between commission employees "sent for the purpose of providing recommendations regarding the final form and content" of the response to a survey from the California Public Utility Commission. Upon review, we find you have failed to establish that any portion of the information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the commission. Accordingly, the commission may not withhold the information you have marked under section 552.111 of the Government Code.

You state the commission will withhold personal e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).⁴ Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail address you have marked is an e-mail address that is maintained by a governmental entity for one of its

⁴Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

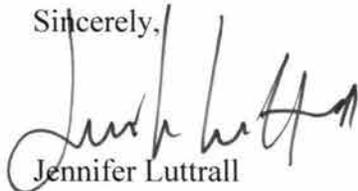
officials or employees. Thus, the commission may not withhold this e-mail address under section 552.137 of the Government Code.

In summary, the commission must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. Except for the information we have marked for release, the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 17.004 of the Utilities Code. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 583415

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)

Mr. Don Ballard
Pedernales Electric Cooperative, Inc.
P.O. Box 1
Johnson City, Texas 78636-0001
(w/o enclosures)

Mr. Mike Grable
ERCOT
7620 Metro Center Drive
Austin, Texas 78744
(w/o enclosures)

Mr. Todd Lester
Navigant Consulting LLC
98 San Jacinto, Suite 900
Austin, Texas 78701
(w/o enclosures)

Mr. Blake Gross
AEP-SWEPCO
400 West 15th Street, Suite 1500
Austin, Texas 78701
(w/o enclosures)

Ms. Cherron Rinehart
AEP Texas Central Company
400 West 15th Street, Suite 1500
Austin, Texas 78701
(w/o enclosures)

Ms. Sheri Moore
CenterPoint Energy
1005 Congress Avenue, Suite 650
Austin, Texas 78701
(w/o enclosures)

Mr. Michael Blanchard
El Paso Electric Company
P.O. Box 982
El Paso, Texas 79960
(w/o enclosures)

Mr. Vernon Pierce
Entergy Texas
350 Pine Street
Beaumont, Texas 77701
(w/o enclosures)

Mr. J. Michael Sherburne
Oncor Electric Delivery Company
1616 Woodall Rogers Freeway
Dallas, Texas 75202
(w/o enclosures)

Mr. Greg Boggs
Sharyland Utilities
1031 Andrews Highway, Suite 400
Midland, Texas 79701
(w/o enclosures)

Ms. Stacy Whitehurst
Texas-New Mexico Power Company
577 North Garden Ridge Boulevard
Lewisville, Texas 75067
(w/o enclosures)

Ms. Rhonda Sinclair
Southwestern Public Service Company
P.O. Box 1261
Amarillo, Texas 79105
(w/o enclosures)