



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 21, 2021

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P.O. Box 13326  
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OR2021-13431

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# 879115 (PUC ID Nos. 2021-02-017, 2021-02-019, 2021-02-020, 2021-02-021, 2021-02-024, 2021-02-025, 2021-02-026, 2021-02-031, 2021-02-032, 2021-02-033, 2021-02-034, 2021-02-038, 2021-02-048, 2021-02-051, 2021-02-052, 2021-02-055, 2021-02-056, 2021-02-057, 2021-02-058, 2021-02-061, 2021-02-066, 2021-02-067, 2021-02-070, 2021-02-071, 2021-02-072, 2021-02-074, 2021-02-076, 2021-02-079, 2021-02-081, 2021-03-004, 2021-03-010, 2021-03-011, 2021-03-012, 2021-03-017, 2021-03-021, 2021-03-024, 2021-03-030, 2021-03-031, and 2021-03-039).

The Public Utility Commission of Texas (the "commission") received multiple requests from different requestors for information related to a specified event.<sup>1</sup> We understand you will redact certain information under section 552.136(c) of the Government Code and under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You state you will release some information to the requestors. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107,

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<sup>1</sup> We note the commission sought and received clarification of some of the requests for information. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup> Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

552.111, 552.116, and 552.117 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of several third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the requests 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 §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from multiple third parties. We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.<sup>3</sup> We have also received and considered comments from a representative of some of the requestors. *See* Gov't Code § 552.304.

Initially, we address the claim made by some third parties that the present requests are not requests for information under the Act. The third parties at issue note the information at issue may relate to pending litigation. Section 552.0055 of the Government Code provides that “[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter.” *Id.* § 552.0055. However, upon review, we find these third parties have not demonstrated, and the requests do not indicate, that the information was otherwise requested pursuant to the authority of a statute or a rule of civil or criminal procedure. Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, there is nothing that prevents the requestors from also submitting requests for information under the Act. Therefore, we find the commission received requests for information under the Act, and we will address whether the commission is required to release the submitted information pursuant to chapter 552 of the Government Code.

Next, we note not all of the submitted information is responsive to every request at issue. The commission need not release to any requestor information that is not responsive to that requestor's request.

Next, we note section 552.301(e)(1)(D) of the Government Code states a governmental body asking for an attorney general decision must, within fifteen business days of receiving a request, provide the attorney general with “a copy of the specific information requested, *or submit representative samples of information if a voluminous amount of information was requested[.]*” *Id.* § 552.301(e)(1)(D) (emphasis added). In some instances, which we have indicated, we have identified and reviewed a representative sample of the voluminous information at issue.<sup>4</sup>

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<sup>3</sup> 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.

<sup>4</sup> To the extent the department identifies confidential information subject to a provision not addressed in this ruling, the department should contact the Open Government Hotline.

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information, and the department may not withhold any portion of it on that basis. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception).

Next, we note some third parties argue against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the commission has submitted to us for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the commission submitted as responsive to the requests for information.

Next, we must address the commission's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). While you raised sections 552.101, 552.111, and 552.117 of the Government Code within the ten-business-day time period as required by section 552.301(b) and raised section 552.107 for some of the information for which you argue that section within the ten-business-day time period as required by section 552.301(b), you did not raise section 552.116 of the Government Code for the information for which you argue that section and did not raise section 552.107 for some of the information for which you argue that section until after the ten-business-day deadline had passed for the first request to which that information was responsive. Accordingly, we conclude the commission failed to comply with the requirements of section 552.301 in raising sections 552.107 and 552.116 for this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumptions that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). By failing to timely raise section 552.116 of the Government Code for the information at issue, we find you have failed to establish a compelling reason to address your claim under this section. Consequently, the commission may not withhold any of the information at issue under section 552.116 of the Government Code. However, because section 552.107 of the Government Code can provide a compelling reason to overcome the presumption of openness against disclosure of the information at issue, we will consider the applicability of section 552.107 to the information at issue. *Paxton v. City of Dallas*, 509 S.W.3d 247

(Tex. 2017). Furthermore, we will consider your timely raised arguments for the responsive information.

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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

(11) each amendment, revision, or repeal of information described by Subdivisions (7)-(10); [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (10)-(11), (17). Some of the submitted information consists of completed reports subject to section 552.022(a)(1), an amendment, revision, or repeal of a substantive rule adopted by the commission that is subject to section 552.022(a)(11), and a court-filed document that is subject to section 552.022(a)(17). The commission must release the information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). The remaining information that is subject to section 552.022 must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(10)-(11), (17). Although you raise sections 552.107 and 552.111 of the Government Code for the information subject to section 552.022 of the Government Code, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver).* Therefore, none of the information subject to section 552.022 may be withheld under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information expressly confidential for the purposes of

section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege and the attorney work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively. Further, we will consider your remaining arguments for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re*

*Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You state the information you have indicated that is subject to section 552.022 of the Government Code either consists of communications or is attached to communications between attorneys for the commission, commission employees and officials, and privileged third parties that were made for the purpose of facilitating the rendition of professional legal services to the commission. You state the communications were intended to be confidential and have remained confidential. Upon review, we find the commission may withhold the information you have indicated that is subject to section 552.022 of the Government Code under Texas Rule of Evidence 503.<sup>5</sup>

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those discussed for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

As noted above, you state the information at issue consists of communications between attorneys for the commission, commission employees and officials, and privileged third parties that were made for the purpose of facilitating the rendition of professional legal services to the commission. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, with the exception of the information we have marked for release, the commission may generally withhold the remaining information you have indicated under section 552.107(1) of the Government Code.<sup>6</sup> We note, however, some of these e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Furthermore, upon review, we find the remaining information you seek to withhold has been shared with an individual you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish the remaining information at issue constitutes communications between or among commission employees and attorneys for the purposes of section 552.107(1). Thus, the commission may not withhold the remaining information at issue on that basis.

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<sup>5</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

<sup>6</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.* 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You claim the information you have indicated that is subject to section 552.022 of the Government Code consists of privileged attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state the information at issue was created by or reflects commission attorneys' mental impressions with respect to anticipated contested cases relating to enforcement actions. Based upon your representations and our review, we find you have demonstrated the applicability of the attorney work product privilege to some of the information at issue. Accordingly, the commission may withhold the information we have indicated under Texas Rule of Civil Procedure 192.5.<sup>7</sup> However, we find you have failed to demonstrate the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that was developed in anticipation of litigation or for trial. Accordingly, the commission may not withhold any portion of the remaining information at issue as attorney work product under Texas Rule of Civil Procedure 192.5.

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<sup>7</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. ORD 677 at 4-8; *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). The elements of and test for the attorney work product privilege under section 552.111 are the same as those outlined above for rule 192.5. You claim the remaining information you have indicated consists of privileged attorney work product. You state the information at issue was created by or reflects commission attorneys’ mental impressions with respect to anticipated contested cases relating to enforcement actions. Based upon your representations and our review, we find you have demonstrated the applicability of the attorney work product privilege to some of the information at issue. Accordingly, the commission may withhold the information we have indicated under section 552.111 of the Government Code as attorney work product.<sup>8</sup> However, we find you have failed to demonstrate the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney’s representative that was developed in anticipation of litigation or for trial. Accordingly, the commission may not withhold any portion of the remaining information at issue as attorney work product under section 552.111 of the Government Code.

Section 552.111 of the Government Code also 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, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, 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 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*, 22 S.W.3d 351 (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).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex.*

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<sup>8</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.



*Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 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 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.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561. We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.

You assert the information you have indicated consists of advice, recommendations, and opinions of commission employees and officials and third parties with whom the commission shares a privity of interest or common deliberative process regarding policymaking decisions. You also indicate the information at issue includes draft documents that reflect the deliberations of the commission. We understand these draft documents were intended for release in their final forms. Based on your representations and our review, we find you have demonstrated some of the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the commission. Accordingly, the commission may withhold the information we have marked and indicated under section 552.111 of the Government Code on the basis of the deliberative process privilege.<sup>9</sup> However, we find the remaining information at issue is general administrative and purely factual information that does not rise to the level of policymaking or has been shared with an individual with whom you have not demonstrated the commission shares a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of

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<sup>9</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

the commission. Therefore, the commission may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

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, such as section 418.181 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. 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 information may generally be related to a governmental body’s security concerns or to a security system does not make the information *per se* confidential under section 418.181. *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 confidentiality provision, a governmental body asserting section 418.181 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The commission and several third parties, including the Electric Reliability Council of Texas, Inc. (“ERCOT”), argue some of the remaining information is confidential under section 418.181 of the Government Code. You and the third parties at issue state the information you have indicated relates to details of the State of Texas’s electrical grid. You and the third parties at issue argue, and we agree, the electrical grid is critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001(2) (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”). You and the third parties at issue state release of the information at issue would reveal vulnerabilities of specific components of the electrical grid. Based on these representations and our review of the information at issue, we find you have demonstrated the release of some of the information at issue would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the commission must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.<sup>10</sup> However, we find neither the commission nor any third party has demonstrated the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, the commission may not withhold any of the remaining information at issue under section

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<sup>10</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Section 552.101 of the Government Code can also encompass information protected by federal law. We understand some third parties to claim the remaining information is confidential under section 673 of the Critical Infrastructure Information Act (“CIIA”), title 6, sections 671 through 674 of the United States Code. 6 U.S.C. §§ 671 - 674. Section 673 pertains to the protection of certain voluntarily shared critical infrastructure information. Subsections (a)(1)(A) through (D) of section 673 apply to a “covered [f]ederal agency,” defined in the CIIA to mean the Department of Homeland Security, and provide in relevant part the following:

(a) Protection

(1) In general

Notwithstanding any other provision of law, critical infrastructure information (including the identity of the submitting person or entity) that is voluntarily submitted to a covered federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose, when accompanied by an express statement specified in paragraph (2)—

(A) shall be exempt from disclosure under section 552 of Title 5 (commonly referred to as the Freedom of Information Act);

...

(D) shall not, without the written consent of the person or entity submitting such information, be used or disclosed by any officer or employee of the United States for purposes other than the purposes of this part, except [in certain specified circumstances.]

6 U.S.C. § 673(a)(1)(A), (D). Thus, these provisions restrict the disclosure of critical infrastructure information voluntarily submitted to a covered federal agency for certain agency uses when the submission includes an express statement specified in section 673(a)(2).<sup>11</sup> *See id.* § 673(a)(1), (a)(2) (defining “express statement”); *see also id.* § 671 (defining “covered [f]ederal agency,” “critical infrastructure information,” and “voluntary”). Therefore, these provisions apply when a covered federal agency receives a request for the information; they do not apply when a state or local governmental body

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<sup>11</sup> In this analysis of the CIIA, we will refer to critical infrastructure information voluntarily submitted to a covered federal agency for the specified agency uses and with the accompanying express statement as “information.”

receives a request for the information. *See id.* § 673(a)(1); *see also* Attorney General Opinion MW-95 (1979) (neither Freedom of Information Act (“FOIA”) nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas governmental body).

In contrast, subsection (E) of section 673(a)(1) applies when a state or local government agency receives a request for the information. *See* 6 U.S.C. § 673(a)(1)(E). Under subsection (E), the information

shall not, *if provided to a State or local government or government agency*—

- (i) be made available pursuant to any State or local law requiring disclosure of information or records;
- (ii) otherwise be disclosed or distributed to any party by said State or local government or government agency without the written consent of the person or entity submitting such information; or
- (iii) be used other than for the purpose of protecting critical infrastructure or protected systems, or in furtherance of an investigation or the prosecution of a criminal act[.]

*Id.* § 673(a)(1)(E) (emphasis added). Thus, while subsection (E) applies to information maintained by any state or local government or government agency, the prohibitions on release apply only if a covered federal agency “provided [the information] to [the] local or state government or agency.” *See id.*

Although we understand the third parties at issue to claim the remaining information at issue is confidential under section 673 of title 6 the United States Code, we find these third parties do not represent the information at issue was provided to the commission by a covered federal agency as contemplated by subsection (E). *See id.* § 673(a)(1)(3). Consequently, as a covered federal agency did not provide the information at issue to the commission, we find they have failed to demonstrate the applicability of the CIIA in this instance. Therefore, because they have failed to establish that the CIIA is applicable here, we need not determine whether the information at issue is “critical infrastructure information” for purposes of section 673 or whether the information is “substantially similar” to the express statement in section 673(a)(2). *See id.* §§ 671(3)(A), 673(a)(2)(A). Thus, we conclude that the remaining information is not confidential under section 673(a)(2) and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 17.004 of the Utilities Code, which provides, in part, that “[a]ll buyers or telecommunications and retail electric services are entitled to . . . privacy of customer consumption and credit information[.]” Util. Code § 17.004(a)(6). Upon review, we find you have failed to demonstrate the remaining information at issue reveals a customer’s electric consumption or credit information.

Therefore, the commission may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 17.004 of the Utilities Code.

Section 552.101 of the Government Code also encompasses section 437.232 of the Government Code, which provides as follows:

(a) In this section, “military personnel information” means a service member’s name, home address, rank, official title, pay rate or grade, state active duty orders, deployment locations, military duty addresses, awards and decorations, length of military service, and medical records.

(b) A service member’s military personnel information is confidential and not subject to disclosure under [the Act].

Gov’t Code § 437.232. Section 437.232 is contained in subchapter E of chapter 437 of the Government Code. Chapter 437 is titled “Texas Military” and subchapter E is titled “Texas Military Forces.” Upon review, we find section 437.232 only applies to military personnel records maintained by the Texas Military Forces. *See id.* § 437.001(14) (providing “Texas military forces” for purposes of chapter 437 mean the Texas National Guard, the Texas State Guard, and any other military forces under state law). The information you have indicated is maintained by the commission. Thus, section 437.232 is not applicable to the information at issue and the commission may not withhold it under section 552.101 of the Government Code on that ground.

Several third parties, including ERCOT, assert the remaining information is confidential under section 552.101 of the Government Code in conjunction with the ERCOT Protocols and Operating Guidelines. We note ERCOT is the independent system operator established by section 39.151 of the Public Utility Regulatory Act, Title II of the Texas Utilities Code. *See Util. Code § 39.151.* Under section 39.151, ERCOT is directly responsible and accountable to the commission. *See id.* § 39.151(d). Pursuant to section 39.151(d) of the Utilities Code, the commission has adopted Substantive Rule 25.362(e)(1)(A), which provides that “[i]nformation submitted to or collected by ERCOT pursuant to requirements of ERCOT rules shall be protected from public disclosure only if it is designated as Protected Information pursuant to ERCOT rules[.]” P.U.C. Subst. R. 25.362(e)(1)(A); *see also Util. Code § 39.151(d)* (providing that the commission shall adopt and enforce rules related to production and delivery of electricity among all market participants, and may delegate to independent organization responsibilities for establishing or enforcing such rules).

Section 552.101 of the Government Code also encompasses information protected by the ERCOT Nodal Protocols. Section 1.3.1 of the ERCOT Nodal Protocols states that ERCOT or any market participant may not disclose “Protected Information” received from the other to “any other Entity except as specifically permitted in this Section and in these Protocols.” ERCOT Nodal Protocols § 1.3.1. Among other things, “Protected Information” is defined as follows:

(c) Status of Resources, including Outages, limitations, or scheduled or metered Resource data. The Protected Information status of this information shall expire 60 days after the applicable Operating Day;

(d) Current Operating Plans (COPs). The Protected Information status of this information shall expire 60 days after the applicable Operating Day; [and]

...

(bb) Generation Resource emergency operations plans and weatherization plans[.]

ERCOT Nodal Protocols § 1.3.1.1(1)(c)-(d), (bb). For purposes of the ERCOT Nodal Protocols, “Operating Day” means the day during which energy flows. *See id.* § 2.1. Upon review, we find the remaining information at issue relates to Operating Days that were more than 60 days ago or otherwise does not consist of Protected Information as defined by the ERCOT Nodal Protocols. Therefore, we find this information does not consist of Protected Information, and the commission may not withhold any of the remaining information under section 552.101 on the basis of the ERCOT Nodal Protocols.

Multiple third parties assert portions of their remaining information are protected by section 25.272(g)(1) of title 16 of the Texas Administrative Code, which provides for the protection of proprietary customer information of a utility in certain circumstances. *See* 16 T.A.C. § 25.272(g)(1). Section 25.272(c)(5) of title 16 of the Texas Administrative Code defines “proprietary customer information” in part as

[a]ny information compiled by an electric utility on a customer in the normal course of providing electric service that makes possible the identification of any individual customer by matching such information with the customer’s name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed.

*Id.* § 25.272(c)(5). However, we note section 25.272(c)(5) further provides “[i]nformation that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.” *Id.* Upon review, we find the third parties at issue have not demonstrated their remaining information makes it possible to identify any customer to which the information relates. Therefore, the commission may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of section 25.272(g)(1) of title 16 of the Texas Administrative Code.

Texas New Mexico Power Company (“TNMP”) further asserts portions of its remaining information are protected by section 25.472(b)(1) of title 16 of the Texas Administrative Code, which provides for the protection of proprietary customer information of a utility, as

defined in section 25.272(c)(5) of title 16 of the Texas Administrative Code, in certain circumstances. *See id.* § 25.472(b)(1). For purposes of this provision, section 25.272(c)(5) of title 16 of the Texas Administrative Code defines “proprietary customer information” as noted above. *See id.* § 25.272(c)(5). However, as previously noted, section 25.272(c)(5) further provides “[i]nformation that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.” *Id.* Upon review, we find TNMP has not demonstrated any portion of its remaining information makes it possible to identify any customer to which the information relates. Therefore, the commission may not withhold any of TNMP’s remaining information under section 552.101 of the Government Code on the basis of section 25.472(b)(1) of title 16 of the Texas Administrative Code.

Multiple third parties assert that portions of their remaining information are confidential under section 39.001 of the Utilities Code. Section 39.001 provides in part that “it is in the public interest to . . . protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information during the transition to a competitive market and after the commencement of customer choice.” Util. Code § 39.001(b)(4). Although section 39.001 reflects concern for the security of competitively sensitive information, this section does not expressly make information confidential for the purposes of section 552.101 of the Government Code. We therefore conclude that none of the information at issue is excepted from disclosure under section 552.101 in conjunction with section 39.001 of the Utilities Code. *See Open Records Decision Nos. 658 at 4 (1998)* (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

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 satisfied. *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 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). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See Open Records Decision No. 455 (1987)*. We note this office has found that names, telephone numbers, and addresses are generally not excepted from public disclosure under common-law privacy. *See id.* at 7.

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commission must withhold the information we have marked and indicated under section 552.101 of the

Government Code in conjunction with common-law privacy.<sup>12</sup> We note some of the individuals at issue have been de-identified pursuant to common-law privacy. Therefore, the privacy interests of those individuals have been sufficiently protected, and the commission may not withhold any information related to them on the basis of their privacy interests under section 552.101 in conjunction with common-law privacy. Further, upon review, we find you have failed to demonstrate any portion of the remaining information is highly intimate or embarrassing or not of legitimate public interest. Thus, the commission may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Calpine Corporation (“Calpine”) and Tenaska Power Services Co. (“Tenaska”) claim section 552.103 of the Government Code for some of their remaining information. However, we note section 552.103 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate the rights of a third party), 522 (1989) (discretionary exceptions in general). As Calpine and Tenaska are not governmental bodies, we do not address their arguments under section 552.103 of the Government Code.

Several third parties raise section 552.104 of the Government Code for their remaining information. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code § 552.104(a). As none of the third parties who argue this exception are governmental bodies, we do not address their arguments under section 552.104 of the Government Code.

Several third parties claim section 552.110 of the Government Code for their remaining information.<sup>13</sup> Section 552.110(b) states, “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

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<sup>12</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

<sup>13</sup> Although some third parties raise former sections 552.110(a) and 552.110(b) of the Government Code, we understand them to raise current sections 552.110(b) and 552.110(c) of the Government Code based on the substance of their arguments.



(1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). Section 552.110(c) of the Government Code states:

[C]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is [excepted from required disclosure].

*Id.* § 552.110(c). Upon review, we find these third parties failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Further, we find these third parties failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the commission may not withhold any of the remaining information at issue under section 552.110 of the Government Code.

Several third parties claim section 552.1101 of the Government Code for their remaining information. Section 552.1101 of the Government Code provides, in relevant part, as follows:

(a) [I]nformation submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contract that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

- (A) work;
- (B) organization structure;
- (C) staffing;
- (D) internal operations;
- (E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents, and

(2) give advantage to a competitor.

*Id.* § 552.1101(a). Several third parties assert some of the remaining information at issue is subject to section 552.1101(a) and would give advantage to a competitor. Upon review, we find these third parties failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is subject to section 552.1101(a). Therefore, the commission may not withhold any of the remaining information at issue under section 552.1101(a) of the Government Code.

We understand several third parties to argue some of their remaining information fits the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the Texas Uniform Trade Secrets Act (the “TUTSA”). Section 552.101 of the Government Code also encompasses information made confidential by the TUTSA. Section 134A.002(6) provides, in relevant part, the following:

(6) “Trade secret” means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of the TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)’s definition of trade secret expressly applies to chapter 134A only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6); *see also id.* § 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act). *See* Open Records Decision Nos. 658 at 4, 478 at 2, 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the commission may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of the Civil Practice and Remedies Code.

Section 552.117(a)(1) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the commission employees or officials at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we have marked and all cellular telephone numbers belonging to commission employees or officials under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the cellular telephone numbers at issue if the cellular telephone services are not paid for by a governmental body.<sup>14</sup> However, we find you have failed to demonstrate the remaining information is subject to section 552.117. Therefore, the commission may not withhold any portion of the remaining information under section 552.117 of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.<sup>15</sup> Gov't Code § 552.1175. Section 552.1175 applies, in part, to an elected public officer. Act of May 10, 2021, 87th Leg., R.S., H.B. 1082, § 2 (to be codified at Gov't Code § 552.1175(a)(17)). We note section 552.1175 is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a government body. *See* ORD 506 at 5-6. Upon review, we find some of the remaining information, which we have marked, pertains to an elected public officer, and is held by the commission in a non-employment capacity. Thus, to the extent the cellular telephone number we have marked pertains to an individual who elects to restrict access to his information in accordance with section 552.1175(b) and a governmental body did not pay for the cellular telephone service, the commission must withhold the cellular telephone number we have marked under section 552.1175 of the Government Code.

Multiple third parties also raise section 552.133 of the Government Code. Section 552.133 of the Government Code excepts from disclosure a public power utility's information that

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<sup>14</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

<sup>15</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

is “reasonably related to a competitive matter.” Gov’t Code § 552.133(b). Section 552.133 provides, in relevant part the following:

(a) In this section, “public power utility” means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, “competitive matter” means a utility related matter that is related to the public power utility’s competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

(A) generation unit specific and portfolio fixed and variable costs, including forecasts of those costs, capital improvement plans for generation units, and generation unit operating characteristics and outage scheduling;

(B) bidding and pricing information for purchased power, generation and fuel, and Electric Reliability Council of Texas bids, prices, offers, and related services and strategies;

(C) effective fuel and purchased power agreements and fuel transportation arrangements and contracts;

(D) risk management information, contracts, and strategies, including fuel hedging and storage;

(E) plans, studies, proposals, and analyses for system improvements, additions, or sales, other than transmission and distribution system improvements inside the service area for which the public power utility is the sole certificated retail provider; and

(F) customer billing, contract, and usage information, electric power pricing information, system load characteristics, and electric power marketing analyses and strategies[.]

*Id.* § 552.133(a)-(a-1)(1). We note section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *See id.* § 552.133(a-1)(2). Section 552.133 only protects the competitive interest of a public power utility. This exception does not protect the interests of the third parties who are not public power utilities. *See* Open Records Decision No. 666 at 2 (2000) (statutory predecessor to section 552.133 enacted to protect municipally owned utilities from public disclosure of competitive matters). We find some of the third parties who claim section 552.133 are not public power utilities. Thus, we find these third parties have failed to demonstrate the applicability of section 552.133 to their information, and the commission may not withhold their remaining information on

that basis. We understand some of the remaining third parties who claim section 552.133 are public power utilities for purposes of section 552.133. However, upon review, we find these third parties have failed to demonstrate their remaining information at issue relates to a competitive matter as defined by section 552.133(a-1). *See* Gov't Code § 552.133(a-1)(1)(A)-(F). Therefore, we conclude the commission may not withhold any portion of the remaining information under section 552.133.

As noted above, we understand you will redact certain information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684. Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by section (c). *Id.* § 552.137(a)-(c). 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, an e-mail address maintained by a governmental entity for one of its officials or employees, or a personal e-mail address belonging to a city employee or official used to conduct official government business. *See id.* § 552.137(c); *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov't Code § 552.137(a)). Accordingly, to the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by section 552.137(c) of the Government Code, the commission must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See* Gov't Code § 552.137(b). However, to the extent an e-mail address within the remaining information is excluded by section 552.137(c) or belongs to a governmental employee or official, the commission may not withhold that e-mail address under section 552.137 of the Government Code.

Section 552.156 of the Government Code provides, in relevant part, as follows:

(a) Except as otherwise provided by this section, the following information is excepted from disclosure under this chapter:

(1) a continuity of operations plan developed under Section 412.054, Labor Code; and

(2) all records, written, produced, collected, assembled, or maintained as part of the development or review of a continuity of operations plan developed under Section 412.054, Labor Code.

(b) Forms, standards, and other instructional, information, or planning materials adopted by the office to provide guidance or assistance to a state agency in developing a continuity of operations plan under [s]ection 412.054, Labor Code, are public information subject to disclosure under this chapter.

*Id.* § 552.156(a)-(b). Section 412.054 of the Labor Code provides, in relevant part, as follows:

(a) Each state agency shall work with the [State Office of Risk Management] to develop an agency-level continuity of operations plan that outlines procedures to keep the agency operational in case of disruptions to production, finance, administration, or other essential operations. The plan must include detailed information regarding resumption of essential services after a catastrophe, including:

- (1) coordination with public authorities;
- (2) management of media;
- (3) customer service delivery;
- (4) assessing immediate financial and operational needs; and
- (5) other services as determined by the office.

...

(c) Except as otherwise provided by this section, the following information is confidential and is exempt from disclosure under [the Act]:

- (1) a continuity of operations plan developed under this section; and
- (2) any records written, produced, collected, assembled, or maintained as part of the development or review of a continuity of operations plan under this section.

Labor Code § 412.054(a), (c). You state the information you have indicated consists of the commission's continuity of operations plan or records written, produced, collected, assembled, or maintained as part of the development or review of a continuity of operations plan. You inform us this information was created in accordance with section 412.054 of the Labor Code. You also inform us the information at issue is not subject to section 552.156(b). Thus, upon review, we find you have demonstrated the applicability of section 552.156 of the Government Code to the information you have indicated, and the commission must withhold it on this basis.

We note some of the remaining information may 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 copyright law and the risk of a copyright infringement suit.

In summary, the commission may withhold the information you have indicated that is subject to section 552.022 of the Government Code under Texas Rule of Evidence 503. With the exception of the information we have marked for release, the commission may generally withhold the remaining information you have indicated under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The commission may withhold the information we have indicated under Texas Rule of Civil Procedure 192.5. The commission may withhold the information we have indicated under section 552.111 of the Government Code as attorney work product. The commission may withhold the information we have marked and indicated under section 552.111 of the Government Code on the basis of the deliberative process privilege. The commission must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The commission must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the commission employees or officials at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we have marked and all cellular telephone numbers belonging to commission employees or officials under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the cellular telephone numbers at issue if the cellular telephone services are not paid for by a governmental body. To the extent the cellular telephone number we have marked pertains to an individual who elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code and a governmental body did not pay for the cellular telephone service, the commission must withhold the cellular telephone number we have marked under section 552.1175 of the Government Code. To the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by section 552.137(c) of the Government Code, the commission must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The commission must withhold the information you have indicated under section 552.156 of the Government Code. The commission must release the remaining responsive information; however, any information protected by copyright may be released only 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Tim Neal  
Assistant Attorney General  
Open Records Division

TN/eb

Ref: ID# 879115

Enc. Submitted documents

c: 38 Requestors  
(w/o enclosures)

52 Third Parties  
(w/o enclosures)