



TEXAS MILITARY DEPARTMENT
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September 27, 2022

Office of the General Counsel

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711

Dear Attorney General Paxton:

On August 25, 2022, our agency received an open records request (Our Case Number T22-126) via electronic mail from Mr. Robert Montoya (Exhibit A). The request was clarified by the requestor on September 6, 2022. Pursuant to section 552.301(a), the Texas Military Department (TMD) made a timely request for a decision from your office on whether the responsive information is exempted from disclosure under the Texas Public Information Act (Exhibit B). Our office now submits this brief in accordance with section 552.301(e).

The TMD asserts the responsive information (Exhibit C) is exempted from required public disclosure under the Texas Homeland Security Act and sections 552.101, 552.117, and 552.104 of the Government Code. The TMD has copied the requestor as a recipient of this brief pursuant to section 552.301(e-1).

Information Exempted From Required Public Disclosure Under Section 552.101 and the Texas Homeland Security Act

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that other statutes make confidential, including sections 418.176 and 418.177 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code.

Section 418.176 provides, in part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

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

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

Section 418.177 provides:

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity. *Id.* §§ 418.176(a), .177.

The portions of the marked information marked under the HSA and/or 552.101 discloses identifying information of equipment used in assisting law enforcement detect criminal activity. The release of these records would disclose equipment manufacturing make, model, specifications, serial numbers, and other identifying information. The release of these records could expose risk or vulnerability of such equipment. Such a release could aid terrorists and other criminals in exploiting perceived vulnerabilities and in the commission of crimes. Accordingly, the TMD asserts the submitted information is excepted in full from required public disclosure under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.

Information Excepted From Required Public Disclosure Under Sections 437.232 Confidentiality of Military Personnel Information and 552.117 Confidentiality of Certain Personal Identify Information of Peace Officer and Other Officials Performing Sensitive Governmental Functions

Section 552.1175 of the Government Code excepts from required public disclosure for current or former member of the United States Army, Navy, Air Force, Coast Guard, or Marine Corps, an auxiliary service of one of those branches of the armed forces, or the Texas military forces, as that term is defined by Section 437.001. Military members' full names, rank, duty position, and other identifying information is available in the records at issue. The records at issue highlights identifying information of Texas military forces individuals. Highlighting military personnel by name or their personally identifying information would jeopardize their safety and diminish their ability to effectively lead in future operations. Accordingly, the TMD asserts the submitted information is excepted in full from required public disclosure under section 437.232 and 552.117 of the Government Code.

Information Excepted From Required Public Disclosure Under Section 552.104: Information Relating to Competition or Bidding

Section 552.104 of the Government Code excepts from required public disclosure information the release of which 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. The Texas Supreme Court has held the “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W. 3d 831, 841 (Tex. 2015). The records at issue contain information regarding prices paid for equipment in support of Operation Lone Star that will recur and necessitate a competitive situation again in the future. The release of the information at issue would give future competitors who wish to supply such equipment to the Texas Military Department an advantage over current vendors because the information could be used to offer equipment slightly below or at the current prices. This would give an unfair advantage to competitors and make the process less competitive because the competitors might not offer their best price but a price just below current levels to obtain the contract. Accordingly, the TMD asserts the submitted information is excepted in full from required public disclosure under section 552.104 of the Government Code.

On behalf of the Texas Military Department and pursuant to section 552.301 of the Government Code, I respectfully request an open records letter ruling as to the applicability of the above raised exceptions. If you have any questions or need additional information, please contact me at sarah.e.alexander42.mil@army.mil or (512) 782-6754.

Sincerely,

Sarah Alexander
Open Records

Enclosures