



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 8, 2015

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2015-21155

Dear Ms. Parker:

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# 581420.

The Texas Department of Transportation (the "department") received a request for communications sent to or received from the Governor, his representatives, staff, or agents during a specified period of time. You state you will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code. We have received comments from the Governor's office. *See* Gov't Code § 552.304 (providing interested third party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 of the Government Code encompasses information that other statutes make confidential, such as section 228.057 of the Transportation Code, which provides in part:

¹We 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.

(e) Electronic toll collection customer account information, including contact and payment information and trip data, is confidential and not subject to disclosure under Chapter 552, Government Code.

Transp. Code § 228.057(e). The term “customer” is not defined in the Transportation Code. We note “customer” is generally defined as “a buyer, purchaser, consumer, or patron” or “one who regularly or repeatedly makes purchases of, or has business dealings with, a tradesman or business.” BLACK’S LAW DICTIONARY 386 (6th ed. 1990); *see Henderson v. Central Power & Light Co.*, 977 S.W.2d 439, 447 (Tex. App.—Corpus Christi 1998, pet. denied) (quoting same definition from BLACK’S LAW DICTIONARY 348 (5th ed. 1979)); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 559 (2002) (defining “customer” as “one that purchases some commodity or service”).

The department states portions of the submitted information consist of electronic toll collection customer account information and trip data. The department informs us the information at issue pertains to “actual customers who have business dealings with Toll 45 and have purchased the toll road services offered.” Based on the department’s representations and our review, we find the information we have marked falls within the scope of section 228.057(e). *See* Transp. Code § 228.057(e) (for purposes of Transp. Code § 228.057, “account information” includes contact and payment information and trip data). Thus, we conclude the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 228.057(e) of the Transportation Code.² However, we find none of the remaining information consists of customer account information or trip data. Thus, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

You seek to withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 418.176 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 418.176 of the HSA provides in relevant part:

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

(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[.]

Gov’t Code § 418.176(a)(1). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the

²As our ruling is dispositive, we need not address the department’s remaining argument against disclosure of this information.

provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). A governmental body asserting a confidentiality exception must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A).

You state the information at issue reveals staffing requirements of the security detail on state flights. You explain the security detail is a law enforcement agency section of the Texas Department of Public Safety that accompanies the flights “for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity.” You assert “knowing how many security personnel are likely to be protecting a government official or representative would be valuable information for someone who intended to cause harm to those individuals.” You also assert “knowing which prominent public figures travel without security detail would reveal security risks as it could also allow an individual to detect patterns in travel and thereby endanger the lives of the security detail and the individuals they are assigned to protect.” Based on these representations and our review, we find the department has demonstrated that some of the information at issue relates to staffing requirements 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. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. However, we find the department has not established the remaining information relates to staffing requirements for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

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 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. 600 (1992) (personal financial information includes choice of particular insurance carrier), 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). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the

information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the department has failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The department states portions of the submitted information consist of communications involving department attorneys, department representatives, and other department employees and officials. The department states the communications were made for the purpose of facilitating the rendition of professional legal services to the department and these communications have remained confidential. Upon review, we find the department has demonstrated the applicability of the attorney-client privilege to the information at issue.

Thus, the department may withhold the information it has marked under section 552.107(1) of the Government Code.³

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, 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 v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions 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. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. *See id.* at 2.

³As our ruling is dispositive, we need not address the department’s remaining argument against disclosure of this information.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party, with which the governmental body establishes it has a privity of interest or common deliberative process. *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.

The department states portions of the submitted information consist of advice, opinions, and recommendations relating to the department's policymaking. The department also states the information at issue contains draft documents that will be released to the public in final form. Further, the department informs us some of the communications at issue involve the Office of the Governor, the Texas Parks and Wildlife Department, the Texas Commission on the Arts, and the Texas Historical Commission. The department explains it shares a common interest in carrying out the Office of the Governor's transportation initiatives, and works with the Office of the Governor, the Texas Parks and Wildlife Department, the Texas Commission on the Arts, and the Texas Historical Commission in all matters related to tourism. Thus, the department states, it shares a privity of interest with these agencies. Upon review, we find the department may withhold some of the information at issue, which we have marked, under section 552.111. However, we find some of the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the department has failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the department may not withhold the remaining information at issue under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a

hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

- (A) intra-agency and interagency communications; and
- (B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the information you have marked consists of working papers from the State Auditor's Office (the "SAO") regarding an audit conducted by the SAO of the department. Thus, you contend the information you have marked consists of audit working papers excepted from disclosure under section 552.116. We note the SAO is the independent auditor for the Texas state government. *See generally id.* ch. 321. The SAO has authority under section 321.013 of the Government Code to conduct audits of all state departments as specified in the audit plan. *Id.* § 321.013(a). We note, however, section 552.116 is intended to protect the auditor's interests. The information at issue pertains to an audit of the department by the SAO. In this instance, the department, as the auditee, cannot assert section 552.116 in order to protect the information at issue under section 552.116. You do not inform us the SAO seeks to withhold the information at issue under section 552.116. Accordingly, the department may not withhold the information you have marked under section 552.116.

We note some of the submitted information may be subject to section 552.117(a)(1) of the Government code, which 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.⁴ *See id.* § 552.117(a)(1). 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employee whose information is at issue did not timely request confidentiality under section 552.024, the department may not withhold the information under section 552.117(a)(1).

We note the remaining information contains information subject to section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a). Upon review, we find the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

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). Upon review, we find the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 228.057(e) of the Transportation Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the information it has marked under section 552.107(1) of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.130 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to their release. The remaining information must be released.⁵

⁵We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,

A handwritten signature in black ink that reads "Katelyn Blackburn-Rader". The signature is fluid and cursive, with the first name "Katelyn" being more prominent than the last name.

Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/akg

Ref: ID# 581420

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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