



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 3, 2017

Mr. Benjamin Lugg
Attorney
San Antonio Housing Authority
818 South Flores Street
San Antonio, Texas 78204

OR2017-02494

Dear Mr. Lugg:

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# 642389 (SAHA # W001316-102416).

The San Antonio Housing Authority (the "authority") received a request for a specified application and all communications between the authority and the Drug Enforcement Administration (the "DEA").¹ You state the authority released some information. You claim some of the submitted information is excepted from disclosure under sections 552.108, 552.111, 552.117, 552.136, 552.137, and 552.152 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, 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:

¹We note the authority received clarification of the request for information. See Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Although you do not raise section 552.136 of the Government Code in your brief, we understand you to assert this section based on your markings.

(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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Portions of the submitted information consist of information in an account, voucher, or contract relating to the expenditure of public funds subject to section 552.022(a)(3) of the Government Code. This information must be released unless it is made confidential under the Act or other law. *See id.* The authority seeks to withhold the information at issue under sections 552.108 and 552.111 of the Government Code. However, section 552.108 and section 552.111 are discretionary exceptions and do not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the authority may not withhold the information subject to section 552.022(a)(3), which we have marked, under section 552.108 or section 552.111. The authority also claims section 552.152 of the Government Code for this information. This section makes information confidential for purposes of section 552.022(a)(3). Therefore, we will determine the applicability of section 552.152 to the information at issue. Additionally, we will address the authority's argument under section 552.108 and section 552.111 for the information that is not subject to section 552.022(a)(3).

Section 552.108 of the Government Code provides, in part, the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming section 552.108(a)(1) or section 552.108(b)(1) must explain how and why the release of the information at issue would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987) (section 552.108 may be invoked by any proper custodian of information relating to pending investigation or prosecution of criminal conduct). Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of records may withhold the information if it provides this office with a demonstration the information relates to a pending criminal case and a representation from the law enforcement agency that it wishes to have the information withheld. You inform us the authority has entered into a memorandum of agreement with the DEA. However, you have not provided our office with a representation from the DEA, which is the entity with the pertinent law enforcement interest, objecting to the release of the information at issue under section 552.108(a)(1) or section 552.108(b)(1). *See* Open Records Decision Nos. 586 (1991), 474 (1987). Thus, the authority may not withhold any portion of the information at issue under section 552.108(a)(1) or section 552.108(b)(1) of the Government Code.

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 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, 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

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 id.* We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You state the information at issue consists of communications between the authority's employees and officials for the DEA. You assert the authority shares a privity of interest with the DEA for the information at issue. You also assert the communications at issue consist of advice, opinions, and recommendations related to policymaking matters of the authority. However, we find a portion of the information at issue contain communications related to contract negotiations between the authority and the DEA, and their interests were adverse at the time the communications were made. Therefore, the authority may not withhold this information under section 552.111 of the Government Code. Furthermore, we find the remaining information at issue consists of general administrative or factual information not pertaining to the authority's policymaking process. Therefore, we conclude you have failed to demonstrate the information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the authority. Consequently, the authority may not withhold the information at issue under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. Section 552.101 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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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*. Therefore, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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 addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Section 552.117(a) is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the cellular telephone numbers we have marked must be withheld under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. However, we find the remaining information at issue is not subject to section 552.117(a)(1) of the Government Code, and the authority may not withhold it on that basis.

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

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. Gov't Code § 552.1175. Section 552.1175(b) also applies to the personal cellular telephone number of an individual who falls within the scope of section 552.1175(a), provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Upon review, we find the information we have marked consists of personal information of individuals who may be among the types of individuals listed in section 552.1175(a) and who are employed by other law enforcement agencies. Thus, if the cellular telephone numbers we have marked under section 552.1175 relate to individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), then the authority must withhold the marked cellular telephone numbers under section 552.1175 of the Government Code if a governmental body does not pay for the cellular telephone service.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, 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. *See* Gov't Code § 552.130. Accordingly, the authority must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states, “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). Upon review, we find the authority has failed to demonstrate any of the remaining information is subject to section 552.136. Thus, the authority may not withhold the remaining information under section 552.136 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). *Id.* § 552.137(a)-(c). We are unable to determine whether the submitted personal e-mail addresses, which are located within e-mails communicating official business of the authority, belong to authority officials or employees. Thus, we must rule conditionally. To the extent the personal e-mail addresses are the personal e-mail addresses of authority officials or employees, this information is not subject to section 552.137 and may not be withheld on that basis. *See 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)). To the extent the personal e-mail addresses are not the personal e-mail addresses of the authority officials or employees, this information is subject to section 552.137 and must be withheld

under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection (c) applies.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 [of the Government Code] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You argue the information at issue may reveal the identities of the officers working in a certain area or will identify tactics the officers use, and thus, subject the officers to a substantial threat of physical harm. However, upon review, we find you have failed to demonstrate the release of the remaining information at issue would subject an employee or officer of a governmental body to a substantial threat of physical harm. Consequently, the authority may not withhold the remaining information under section 552.152 of the Government Code.

In summary, the authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the cellular telephone numbers we have marked must be withheld under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. If the cellular telephone numbers we have marked under section 552.1175 relate to individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), then the authority must withhold the marked cellular telephone numbers under section 552.1175 of the Government Code if a governmental body does not pay for the cellular telephone service. The authority must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. To the extent the personal e-mail addresses are not the personal e-mail addresses of the authority officials or employees, this information is subject to section 552.137 and must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection (c) applies. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive, flowing style.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sdk

Ref: ID# 642389

Enc. Submitted documents

c: Requestor
(w/o enclosures)