



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 30, 2017

Ms. Diane Morris  
Deputy General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2017-27260

Dear Ms. Morris:

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# 684864 (Ref. Nos. 17-319, 17-321).

The Office of the Governor (the "governor's office") received two requests from different requestors for e-mails between specified entities pertaining to Hurricane Harvey ("Harvey") during specified time periods.<sup>1</sup> You state you are releasing some information. You state you have redacted access device numbers pursuant to section 552.136 of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim the submitted information is excepted

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<sup>1</sup>You state the governor's office sought and received clarification of the first request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date 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 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. See ORD 684.

from disclosure under sections 552.101, 552.107, 552.108, 552.111 of the Government Code. You also state you notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.<sup>3</sup> 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 DPS, DSHS, OGA, TMD, and TREC. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>4</sup>

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have only received comments from DPS, HHSC, OGA, TMD, and TREC. Thus, we have no basis to conclude any of the remaining interested third parties has a protected proprietary interest in the submitted information. See *id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the governor's office may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining interested third parties may have in the information.

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. See Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or

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<sup>3</sup>You state you notified Exxon Mobil Corporation, Federal Emergency Management Agency, Raytheon, Texas Alcoholic Beverage Commission, Texas Appraiser Licensing & Certification Board, Texas Board of Nursing, Texas Commission on Jail Standards, Texas Department of Criminal Justice, Texas Department of Public Safety ("DPS"), Texas Department of Savings and Mortgage Lending, Texas Department of State Health Services ("DSHS"), Texas Department of Transportation, Texas Education Agency, Texas Health and Human Services Commission, Texas Medical Board, Texas Military Department ("TMD"), Texas Oil and Gas Association ("OGA"), Texas Parks and Wildlife Department, Texas State Board of Dental Examiners, Texas State Board of Social Worker Examiners, Texas Real Estate Commission ("TREC"), and Valero Energy Corporation.

<sup>4</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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 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. *See 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 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).

You state the information you have marked consists of communications between attorneys for the governor’s office, employees of the governor’s office, and other privileged parties that were made for the purpose of providing legal services to the governor’s office. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information you have marked consists of privileged attorney-client communications. Therefore, the governor’s office may withhold the information you have marked under section 552.107(1) of the Government Code.<sup>5</sup>

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*

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

*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. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

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 (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.

You state the information at issue consists of advice, opinions, and recommendations of employees of the governor's office and other agencies and groups who share a privity of interest regarding the policymaking matters at issue. You further state some of the information at issue consists of draft documents that were intended to be released in their final forms. Upon review, we find the governor's office may withhold the information we have marked under section 552.111 of the Government Code.<sup>6</sup> However, the remaining information is either factual in nature, consists of internal administrative matters that do not rise to the level of policymaking, or was shared with third parties with whom you have not demonstrated a privity of interest. Therefore, we find the governor's office, DPS, DSHS, TMD, and TREC have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting policymaking processes. Accordingly, the governor's office may not withhold any of the remaining 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." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.176 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 staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

*Id.* § 418.176(a). 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.

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

*Id.* § 418.181. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *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 exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The governor's office asserts the information at issue is critical infrastructure for purposes of section 418.181. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). The governor's office asserts release of the information at issue would reveal technical details and vulnerabilities that would enable terrorists and other criminal actors to harm the critical infrastructure at issue. Based on these arguments and our review, we agree some of the information at issue falls within the scope of section 418.181. Accordingly, the governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.<sup>7</sup>

The governor's office and DPS assert the remaining information at issue contains information pertaining to staffing and deployment numbers of law enforcement agencies in response to criminal activity occurring in areas affected by Harvey. The governor's office and DPS state release of the information at issue would allow wrong-doers, terrorists, or criminals to identify vulnerabilities and avoid detection during such law enforcement efforts. Upon review, we find the information we have marked relates to staffing requirements of a law enforcement agency or a tactical plan of the provider and is 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 governor's office 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.<sup>8</sup> However, we find the governor's office and DPS have not demonstrated the remaining information at issue is confidential for the purposes of section 418.176 or 418.181. Therefore, the governor's office 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 or section 418.181 of the Government Code.

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

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

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 Chapter 552.

*Id.* § 437.232. TMD states, and upon review we agree, some of the remaining information contains military personnel information maintained by the Texas military forces. *See id.* § 437.001(8) (providing “service member” for purposes of chapter 437 means a member or former member of the state military forces or a component of the United States armed forces, including a reserve component), (13) (providing the department is the state agency charged with administrative activities in support of the Texas military forces), (14) (providing that “Texas military forces” for purposes of chapter 437 means the Texas National Guard, the Texas State Guard, and any other military forces under state law). Accordingly, the governor’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 437.232 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. 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 conclude the information we have marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the governor’s office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the governor’s office may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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.” *Id.* at 841. The OGA states it has competitors. In addition, the OGA states

release of the remaining information at issue would substantially harm members of the OGA by providing their competitors with information about their sales capacities. After review of the information at issue and consideration of the arguments, we find the OGA has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the governor's office may withhold the information we have marked under section 552.104(a) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2–3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the information at issue, if released, would interfere with law enforcement or prosecution of crime. While you acknowledge the governor's office is not a law enforcement agency, you explain that, pursuant to section 418.015 of the Government Code, the governor's office was acting as the commander in chief of DPS, a law enforcement agency, when the information at issue was created. *See* Gov't Code § 418.015 (in the event of a proclamation of a state of disaster, the governor's office is the commander in chief of agencies having emergency responsibilities). You state release of the information at issue would allow non-law enforcement individuals to anticipate weaknesses in future law enforcement efforts. Based on your representations and our review, we agree the release of the information at issue, which we have marked, would interfere with law enforcement. Accordingly, the governor's office may withhold the information we have marked under section 552.108(b)(1) of the Government Code.

We understand you have redacted information subject section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code.<sup>9</sup> We note the remaining information contains additional information subject to section 552.117. Section 552.117(a)(1) of the Government Code 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 id.* § 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the governor's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the governor's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the governor's office may not withhold the information at issue under section 552.117(a)(1).

In summary, the governor's office may withhold the information you have marked under section 552.107(1) of the Government Code. The governor's office may withhold the information we have marked under section 552.111 of the Government Code. The governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The governor's office 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 governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. The governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The governor's office may withhold the information we have marked under section 552.104(a) of the Government Code. The governor's office may withhold the information we have marked under

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<sup>9</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

section 552.108(b)(1) of the Government Code. To the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the governor's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the governor's office may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The governor's office must release the remaining information.

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](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,



Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/tdw

Ref: ID# 684864

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

22 Third Parties  
(w/o enclosures)