



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 6, 2019

Ms. Sarah E. Alexander
Warrant Officer 1
Texas Military Department
P.O. Box 5218
Austin, Texas 78763-5218

OR2019-12038

Dear Ms. Alexander:

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# 763831.

The Texas Military Department (the "department") received a request for information relating to the termination of the requestor's employment. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion 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[.]

Gov't Code § 552.022(a)(1). The information we have marked consists of a completed investigation subject to section 552.022(a)(1). The department must release the completed investigation pursuant 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.* Although you raise section 552.111 of the Government Code for some of the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See 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) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver).* Therefore, none of the information subject to section 552.022(a)(1), which we have marked, may be withheld under section 552.111. However, because sections 552.101 and 552.117 make information confidential for the purposes of section 552.022, we will consider the applicability of these sections to the submitted information.¹ Additionally, we will consider your argument under section 552.111 of the Government Code for the information not subject to section 552.022 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. 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*, 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).*

¹The 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 (1987).*

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).

You state the information you marked consists of discussions among department staff consisting of advice, opinions, and recommendations pertaining to a specified investigation. Based on your representations and our review of the information at issue, we find the department has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the department. Accordingly, the department may withhold the information we have marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is either general administrative and purely factual information, or pertains to administrative and personnel matters that do not rise to the level of policymaking for purposes of section 552.111. Thus, we find you have failed to establish that any portion of the remaining information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the department. Accordingly, the department may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code.

Section 552.117(a)(11) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a current or former member of the Texas military forces, as well as information that reveals whether the individual has family members. See Gov't Code § 552.117(a)(11). Section 552.117(a)(11) applies to the Texas military forces as that term is defined by section 437.001 of the Government Code. See *id.* § 437.001. We note section 552.117 is also 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). Therefore, the department must withhold the information we have marked under section 552.117(a)(11) of the Government Code.² However, the cellular telephone numbers may only be withheld under section 552.117(a)(11) if the related cellular telephone service is not paid for by a governmental body.

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

²As our ruling is dispositive, we need not address your argument against disclosure of this information.

Code § 552.101. Section 552.101 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. Upon review, we find most of the information you marked 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, with the exception of the information we have marked for release, the department must withhold the information you marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. However, you have failed to demonstrate section 437.232 is applicable to the remaining information. Therefore, the department may not withhold the remaining information under section 552.101 on that basis.

In summary, the department may withhold the information we have marked under section 552.111 of the Government Code. The department must withhold the information we marked under section 552.117(a)(11) of the Government Code. However, the cellular telephone numbers may only be withheld under section 552.117(a)(11) if the related cellular telephone service is not paid for by a governmental body. With the exception of the information we have marked for release, the department must withhold the information you marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. The department 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](#), 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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/mo

Ref: ID# 763831

Enc. Submitted documents

c: Requestor
(w/o enclosures)