



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 31, 2020

Mr. Kieran Hillis
Public Information Coordinator
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2020-21880

Dear Mr. Hillis:

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# 842231 (OOG ID# 329-20).

The Office of the Governor (the "governor's office") received a request for information related to a specified topic.¹ You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the interests of the Texas Military Department (the "department"). Accordingly, you state, and provide documentation showing, the governor's office notified the department of the request for information and of its right to submit arguments to this office. *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 the department. We have reviewed the submitted arguments and reviewed the submitted information.

¹ You state the governor's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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).

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).

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 and the department state the information you marked consists of advice, opinions, and recommendations of governor’s office employees and officials and employees of other state agencies with whom you state you share a privity of interest regarding policymaking matters. Based upon your representations and our review, we find some of the remaining information at issue consists of advice, opinion, or recommendations on policymaking matters of the governor’s office. Therefore, the governor’s office may withhold the

information we marked under section 552.111 of the Government Code. However, 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 you and the department have failed to demonstrate the remaining information at issue consists of advice, opinions, or recommendations that reflect deliberative or policymaking processes and the governor's office may not withhold this information under section 552.111.

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 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.² See Gov't Code § 552.1175. Section 552.1175 applies, in part, to "a 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 [s]ection 437.001 [.]” *Id.* § 552.1175(a)(15). Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use).

Thus, to the extent the information we marked pertains to an individual who is subject to section 552.1175(a)(15), the individual elects to restrict access to the information in accordance with section 552.1175(b), and the cellular telephone service is not paid for by a governmental body, the governor's office must withhold the information we marked under section 552.1175 of the Government Code. However, if the individual does not elect to restrict access to his information in accordance with section 552.1175(b) or the cellular telephone service is paid for by a governmental body, the information at issue may not be withheld under section 552.1175 of the Government Code.

Section 552.137 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). Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. See *id.* § 552.137(c). We are unable to determine whether the e-mail addresses within the remaining information are subject to subsection (c). Thus, we rule conditionally. To the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. However, to the extent the e-mail addresses within the remaining information, which we marked, are not subject to subsection (c), this information is subject to section 552.137 and

² The 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).

must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, the governor's office may withhold the information we marked under section 552.111 of the Government Code. To the extent the information we marked pertains to an individual who is subject to section 552.1175(a)(15), the individual elects to restrict access to his information in accordance with section 552.1175(b), and the cellular telephone service is not paid for by a governmental body, the governor's office must withhold the information we marked under section 552.1175 of the Government Code. To the extent the e-mail addresses within the remaining information, which we marked, are not subject to subsection (c) of section 552.137, this information must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/gw

Ref: ID# 842231

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Party
(w/o enclosures)