



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 7, 2022

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

OR2022-03271

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# 928543 (OOG ID# 548-21).

The Office of the Governor (the "governor's office") received a request for six specified categories of information pertaining to Operation Lone Star.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. Additionally, you state the governor's office notified unspecified third parties of the request for information and of the right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code §§ 552.304, .305(d); (permitting interested third party to submit to attorney general reasons why requested information should or should not be released); *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 and

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). Further, you inform us the governor's office sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the governor's office received the required deposit on November 1, 2021. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

considered comments from the Hidalgo County, the City of Falfurrias (“Falfurrias”), the City of McAllen (“McAllen”), and the City of South Padre Island (“South Padre Island”). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Section 552.101 of the Government Code exempts 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 that is made confidential by sections 418.176 and 418.177 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. 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;

(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 418.177 provides that information is confidential if it:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the HSA. *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 HSA must adequately explain how the responsive records fall within the

² We 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.

scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the information you marked reveals staffing requirements and tactical plans of emergency response providers in relation to operations at the state's international border and the capitol, and reveals possible vulnerabilities related to the border and capitol. Further, you argue release of the information at issue could aid terrorists and other criminals in avoiding detection and in the commission of crimes against critical infrastructure related to the border. Additionally, Falfurrias, Hidalgo County, and McAllen assert portions of their information are subject to the HSA. Based on these representations and our review, we find most of the information you marked relates to staffing requirements and tactical plans of emergency response providers or assessments maintained by the governor's office for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. *See* Open Records Decision Nos. 542 (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Accordingly, with the exception of the information we marked to release, the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.³ However, we find the governor's office Falfurrias, Hidalgo County, and McAllen have not demonstrated the remaining information is confidential for the purposes of section 418.176 or 418.177. 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 418.177 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).

³ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Further, section 552.111 does not protect facts and written observations of facts and events that are 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 that is 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.

The governor's office seeks to withhold some of the remaining information under section 552.111. You state the information you marked reflects internal communications between governor's office employees and officials and third parties with whom the governor's office shares a privity of interest or common deliberative process communicating in their official policymaking capacities. Additionally, you state the remaining information includes drafts of policymaking documents that will be made available to the public in their final forms. Based on these representations and our review of the information at issue, we find the governor's office has demonstrated most of the information you marked consists of advice, opinions, or recommendations by the governor's office. Therefore, with the exception of the information we have marked for release, the governor's office may withhold the information you marked under section 552.111 of the Government Code. However, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have not shown the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the governor's office. Accordingly, the governor's office may not withhold the remaining information at issue under section 552.111 of the Government Code.

Section 552.101 of the Government Code also encompasses federal law. On November 25, 2002, the president signed the federal Homeland Security Act ("HSA"). The HSA created

the United States Department of Homeland Security (“DHS”) and transferred the Transportation Security Administration (“TSA”), a new agency created in the Department of Transportation (“DOT”) the previous year to oversee the security of transportation, to DHS. *See* 6 U.S.C. §§ 111, 203.

In connection with the transfer of TSA to DHS, the HSA also transferred TSA’s authority concerning sensitive security information (“SSI”) under section 40119 of title 49 of the United States Code to section 114(r) of title 49 of the United States Code and amended section 40119 to vest similar SSI authority in the secretary of DOT.⁴ Section 114(r) of title 49 states, in relevant part:

(1) Notwithstanding [the Federal Freedom of Information Act (the “FOIA”),] the Administrator [of TSA] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . . if the Administrator decides disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the security of transportation.

49 U.S.C. § 114(r)(1). This provision authorizes the TSA’s Administrator to prescribe regulations that prohibit disclosure of information requested not only under the FOIA, but also under other disclosure statutes. *Cf. Public Citizen, Inc. v. Federal Aviation Admin.*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized Federal Aviation Administration administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under FOIA). Thus, the Administrator is authorized by section 114(r) to prescribe regulations that prohibit disclosure of information requested under the Act.

Pursuant to the mandate and authority of section 114 of title 49, TSA published regulations in title 49 of the Code of Federal Regulations that took effect June 17, 2004. *See* 69 Fed. Reg. 28066. Section 1520.1(a) of these regulations provides that the regulations govern the “maintenance, safeguarding, and disclosure of records and information that TSA has determined to be [SSI], as defined in § 1520.5.” 49 C.F.R. § 1520.1(a). Section 1520.7 states that the covered persons to which these regulations apply include, among others, to “[e]ach person who has access to SSI, as specified in § 1520.11.” *Id.* § 1520.7(j). Pursuant to section 1520.11(a), a person has a need to know SSI “[w]hen the person requires access to specific SSI to carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT.” *Id.* § 1520.11(a)(1). Section 1520.11(b)(1) further states that a state or local government employee, contractor, or grantee has a need to know SSI “if access to the information is necessary for performance of the employee’s official duties on behalf or in defense of the interests of the Federal, State, local, or tribal government. *Id.* § 1520.11(b)(1). Section 1520.11(b)(2) further states a person acting in the performance of a contract with or a grant from a Federal, State, local, or tribal

⁴ This ruling does not construe the parallel federal statutes and regulations that apply to DOT.

government agency has a need to know SSI “if access to the information is necessary to performance of the contract or grant.” *Id.* § 1520.11(b)(2). Thus, the regulations in title 49 of the Code of Federal Regulations apply to the governor’s office.

As to the release of information by persons other than TSA, section 1520.9(a) of title 49 provides in part that a person to which these regulations apply has a duty to protect information and may disclose SSI “only to covered persons who have a need to know, unless otherwise authorized in writing by TSA, the Coast Guard, or the Secretary of DOT.” *Id.* § 1520.9(a)(2). Section 1520.9(a)(3) of title 49 further provides that those covered by the regulation must “[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.” *Id.* § 1520.9(a)(3). SSI is defined to include certain information obtained or developed in the conduct of security activities, the disclosure of which TSA has determined would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information obtained from any person, or be detrimental to the security of transportation. *Id.* § 1520.5(a). Section 1520.5(b) of title 49 specifically defines fifteen categories of SSI and provides SSI includes “[a]ny information not otherwise described in [section 1520.5] that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119.” *See id.* § 1520.5(b).

Some of the remaining information consists of information pertaining to grant applications made to DHS. We understand the information at issue consists of SSI. Based on the statutory and regulatory scheme described above and our review, we conclude the decision to release or withhold the information at issue is not for this office or the governor’s office to make, but rather is a decision for the Administrator as head of the TSA. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (state law is preempted to extent it actually conflicts with federal law). Therefore, the governor’s office may not release the information we indicated at this time under the Act, but instead must refer the information to the TSA to make a determination concerning disclosure of that information.

Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.”⁵ Gov’t Code § 552.104(a). 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. South Padre Island argues release of its application could compromise future grant applications, giving a benefit to other cities and putting South Padre Island at a disadvantage. However, this office has consistently interpreted section 552.104 to apply in competitive bidding and procurement situations. *See, e.g.*, Open Records Decision Nos. 604 at 1 (1992), 593 at 1 (1991) (statutory predecessor to section 552.104 “designed to protect interests in commercial transactions”), 592 at 5 (1991), 568 at 2 (1990), 541 at 3 (1990), 514 at 1 (1988) (statutory predecessor to section 552.104 protects purchasing interests), 463 at 1-2 (1987) (statutory predecessor to section 552.104 “has been construed to protect the sealed bid process”), 231 (1979) (statutory predecessor not applicable to

⁵ South Padre Island also claims section 552.101 of the Government Code for its submitted information. However, South Padre Island has not directed our attention to, and we are not aware of, any law under which any of the remaining information at issue is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Accordingly, we do not address section 552.101 of the Government Code for the information at issue.

feasibility study where no actual bidding process was under way). Upon review, we find South Padre Island has not demonstrated the information at issue relates to a competitive situation as contemplated by section 552.104. Therefore, we find South Padre Island has failed to demonstrate the applicability of section 552.104 in this instance. Accordingly, the governor's office may not withhold any of the information at issue under section 552.104.

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.⁶ 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 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. 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, 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.,* ORDs 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).

Falfurrias, Hidalgo County, McAllen, and South Padre Island state portions of their information, if released, would interfere with law enforcement activities. Falfurrias asserts information contained within the documents relates to the prevention of crime and is not commonly known to the public. Hidalgo County argues its information contains specific details regarding staffing levels and strategies for the prevention of crime. McAllen states its information contains detailed operation guidelines the city's police department uses to deter crime. South Padre Island asserts its grant applications reveal specific threats and hazards the city faces as well as existing law enforcement resources. Based on these representations and our review, we agree the release of some of Falfurrias's, Hidalgo County's, McAllen's, and South Padre Island's information at issue, which we marked, would interfere with law enforcement. Accordingly, the governor's office may withhold the information we marked under section 552.108(b)(1) of the Government Code.⁷ However, we find Falfurrias, Hidalgo County, McAllen, and South Padre Island have not demonstrated release of any of their remaining information at issue would interfere with law enforcement or crime prevention. Accordingly, the governor's office may not withhold

⁶ Although South Padre Island does not cite section 552.108(b)(1), we understand it to assert subsection 552.108(b)(1) of the Government Code based on the substance of its arguments.

⁷ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

any of Falfurrias's, Hidalgo County's, McAllen's, or South Padre Island's remaining information at issue under section 552.108(b)(1) of the Government Code.

In summary, with the exception of the information we marked for release, the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code. The governor's office may withhold the information you marked under section 552.111 of the Government Code. The governor's office may not release the information we indicated at this time under the Act, but instead must refer the information to the TSA to make a determination concerning disclosure of that information. The governor's office may withhold the information we marked under section 552.108(b)(1) of the Government Code. 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,

Joseph Hoggatt
Assistant Attorney General
Open Records Division

JWH/eb

Ref: ID# 928543

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)