



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 14, 2022

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

OR2022- 11067

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# 939784 (OOG ID#s 011-22 and 068-22).

The Office of the Governor (the "governor's office") received two requests from the same requestor for communications between the governor's office and the Texas Military Department ("TMD") pertaining to specified topics during stated periods of time. You state the governor's office has released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. Additionally, you state, and provide documentation showing, the governor's office notified TMD of the requests 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). We have received comments from TMD. We have considered the submitted arguments and reviewed the submitted information.

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[.]" *Id.* § 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 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 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 id.*

You and TMD state portions of the information consist of advice, opinions, and recommendations of employees and officials of the governor's office and TMD. Further, you explain the governor's office and TMD share a privity of interest or common deliberative process regarding the policymaking matters at issue. You also inform us the

information at issue includes a draft document that reflects the deliberations of staff of the governor's office and TMD that was intended for release in its final form. Based on these representations and our review, we find the information at issue consists of advice or recommendations on the policymaking matters of the governor's office and TMD. Accordingly, the governor's office may withhold the information you marked under section 552.111.<sup>1</sup>

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. This section encompasses information that is made confidential by other statutes. You and TMD raise section 552.101 in conjunction with sections 418.176 and 418.177 of the Government Code, which were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (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; [or]

(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

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<sup>1</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 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 and TMD state some of the submitted information reveals staffing requirements, tactical plans of emergency response providers in relation to operations at a border of the State of Texas, and possible vulnerabilities related to that border. Further, you and TMD assert 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 state's international border. Based on these representations and our review, we find the information we marked relates to staffing requirements and tactical plans of emergency response providers 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, 532 (1989), 515 (1988), 252 (1980). Accordingly, the governor's office must withhold the information we marked under section 552.101 in conjunction with sections 418.176 and 418.177.<sup>2</sup> Upon review, however, we find you and TMD have failed to demonstrate section 418.176 or section 418.177 are applicable to the remaining information at issue. Thus, the governor's office may not withhold the remaining information at issue under section 552.101 on either of these bases.

Section 552.101 of the Government Code also encompasses section 437.232 of the Government Code, which provides:

- (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.

Gov't Code § 437.232; *see also 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). We note the remaining information TMD seeks to withhold is located in documents maintained by the governor's office. Thus, section 437.232 is not applicable to the information at issue and the governor's office may not

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

withhold the remaining information at issue under section 552.101 in conjunction with section 437.232.

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.<sup>3</sup> 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 [of the Government Code.]” *Id.* § 552.1175(a)(15). Upon review, we find TMD failed to demonstrate the remaining information consists of information subject to section 552.1175. Thus, the governor’s office may not withhold the remaining information at issue on that basis.

In summary, the governor’s office: (1) may withhold the information you marked under section 552.111 of the Government Code; and (2) must withhold the information we 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 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,

Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/jm

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<sup>3</sup> Although TMD raises section 552.117 of the Government Code for portions of the information at issue, we note section 552.1175 of the Government Code is the proper exception to raise for information the governor’s office hold in an non-employment capacity. *See* Gov’t Code §§ 552.117, .1175.

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Third Party  
(w/o enclosures)