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ATTORNEY GENERAL OF TEXAS

April 29, 2022

Ms. Sarah Alexander
Open Records
Texas Military Department
Post Office Box 5218
Austin, Texas 78763-5218

OR2022-12291

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# 944898 (Case Number T22-54).

The Texas Military Department (the "department") received a request for correspondence pertaining to specified department funds and briefing slides showing breakdown of how the specified department funds were spent during a certain period of time. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.117, 552.136, and 552.152 of the Government Code.¹ In addition, you state release of the information at issue may implicate the interests of the Office of the Governor (the "governor's office"). Accordingly, you notified the governor's office of the request for information and of the right to submit arguments to this office. *See* Gov't Code § 552.304. We have received comments from the governor's office. We have considered the submitted arguments and reviewed the submitted information.

We note some of the submitted information is subject to section 552.022 of the Government Code, which provides, in relevant part, as follows:

(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 Although you raise section 552.1175 of the Government Code, we note section 552.117 of the Government Code is the proper exception to raise for information the department holds in its capacity as an employer.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body [and]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(3), (5). The submitted information includes information in an account, contract, or voucher relating to the receipt or expenditure of funds by the department that is subject to section 552.022(a)(3) and information used to estimate the expenditure of public funds by the department that is subject to section 552.022(a)(5). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (5). Although the department seeks to withhold the information at issue under sections 552.108 and 552.111 of the Government Code, these sections are discretionary in nature and do 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) (statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver).* Therefore, none of the information subject to section 552.022(a)(3) may be withheld under section 552.108 or section 552.111. However, as sections 552.101, 552.117, 552.136, and 552.152 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the information subject to section 552.022. In addition, we will consider the remaining arguments for the information not subject to section 552.022.

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 made confidential by other statutes, such as sections 418.176 and 418.177 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 418.176 provides, in relevant part, as follows:

(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 418.177 provides:

Information is confidential if the information:

(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 generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996). As with any confidentiality provision, a governmental body asserting these sections must adequately explain how the responsive information falls within the scope of the provisions. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You and the governor's office state some of the submitted information reveals "tactical plans of emergency response providers in relation to operations at a border of the State of Texas." You further state the information at issue identifies possible vulnerabilities related to the border, including staffing levels and locations of law enforcement. Additionally, you state the information at issue includes details related to funding specific to operations at the border, which, if disclosed, would reveal the scope of the law enforcement personnel and equipment dedicated to each operation. Further, you state "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 border." Based upon these representations and our review, we find some of the submitted information relates to staffing requirements or a tactical plan of the department and is maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Accordingly, the department must withhold the information we indicated and marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.² However, we find the department and the governor's office have failed to demonstrate the remaining information at issue relates to staffing requirements or a tactical plan of an emergency response provider or relates to an assessment by or for a governmental entity that was collected, assembled, or maintained by or for the department for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity. Therefore, the department may not withhold any portion of the remaining information at issue under section 552.101 of the

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

Government Code in conjunction with sections 418.176 or 418.177 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. *Id.* § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706). 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).

You state some of the remaining information, if released, would interfere with law enforcement or prosecution of crime. You state the release of the information at issue would “aid criminal organizations seeking to harm [the department], its Service Members and allied agencies and would have an overall effect of decreasing [department] readiness on [Operation Lone Star] and other missions.” Based on your representations and our review, we agree release of the information we marked would interfere with law enforcement. Accordingly, the department must withhold the information we marked under section 552.108(b)(1) of the Government Code. However, we find you have failed to demonstrate release of any of the remaining information would interfere with law enforcement or crime prevention. Accordingly, the department may not withhold any of the remaining information under section 552.108(b)(1) 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).

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).

The department and the governor's office argue that some of the remaining information consists of advice, opinions, and recommendations of various department or governor's office staff, employees, and officials regarding policymaking matters. Based upon your representations and our review, we find some of the information at issue consists of advice, opinion, or recommendations on policymaking matters of the department. Therefore, the department may withhold the information we indicated under section 552.111 of the Government Code. However, we find the remaining information is general administrative and purely factual information or does not pertain to policymaking. Therefore, we find the department and the governor's office have failed to demonstrate the remaining information consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the various entities. Accordingly, the department may not withhold the remaining information under section 552.111 of the Government Code.

Section 552.152 of the Government Code provides,

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. Upon review, we find the department has failed to demonstrate the release of any of the remaining information would subject an employee or officer of the department to a substantial threat of physical harm. Thus, the department may not withhold any of the remaining information under section 552.152 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 id.* § 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 services are 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 personal telephone numbers of department personnel under section 552.117(a)(11) of the Government Code; however, any cellular telephone numbers may only be withheld under section 552.117(a)(11) if the cellular telephone services are not paid for by a governmental body.³

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. Upon review, we find some of the remaining information consists of 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 department must withhold the service members’ names within the submitted information under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. However, we find you have failed to demonstrate any of the remaining information consists of military personnel information maintained by the Texas military forces. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

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

assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the department must withhold the information you marked under section 552.136 of the Government Code.

In summary, the department must withhold the information we indicated and marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department must withhold the information we marked under section 552.108(b)(1) of the Government Code. The department may withhold the information we indicated under section 552.111 of the Government Code. The department must withhold the personal telephone numbers of department personnel under section 552.117(a)(11) of the Government Code; however, any cellular telephone numbers may only be withheld under section 552.117(a)(11) if the cellular telephone services are not paid for by a governmental body. The department must withhold the service members’ names within the submitted information under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. The department must withhold the information we marked under section 552.136 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 <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,

D. Michelle Case
Assistant Attorney General
Open Records Division

DMH/eb

Ref: ID# 944898

Enc. Submitted documents

c: Requestor
(w/o enclosures)