



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 2, 2022

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

OR2022-15883

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# 948140 (OOG ID#: 107-22).

The Office of the Governor (the "governor's office") received a request for all documents related to specified financial documents during a particular time period related to Operation Lone Star. You claim 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 representative sample of information.¹

Initially, you state some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2022-14566 (2022) and 2022-14600 (2022). In Open Records Letter No. 2022-14566, we determined the governor's office: 1) may withhold the information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503, which it marked; 2) may withhold the information it marked under section 552.107(1) of the Government Code; 3) with the exception of the information we marked and indicated, the governor's office must withhold the information it marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code; 4) may withhold the information it marked under section 552.103 of the Government Code; 5) may withhold the information it marked under section 552.111 of the Government Code; 6) must

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

withhold the information we marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code; and 7) must release the remaining responsive information. In Open Records Letter No. 2022-14600, we determined the governor's office: 1) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code; 2) must withhold the information we indicated under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code; and 3) must release the remaining information. You state there has been no change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, we conclude the governor's office must continue to rely on Open Records Letter Nos. 2022-14566 and 2022-14600 as previous determinations and withhold or release the information at issue in accordance with those rulings.² See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address your arguments for the remaining 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[.]” 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.*

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

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 state the information you marked consists of advice, opinions, and recommendations of employees of the governor’s office and employees of other state agencies with whom the governor’s office states it shares a privity of interest regarding policymaking matters. Upon review, we find the governor’s office may withhold the information you marked under section 552.111 of the Government Code.³

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, such as the Homeland Security Act (the “HSA”). Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the HSA. Section 418.176(a) provides:

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 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:

³ As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

(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. Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. 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 scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

We note some of the remaining information pertains to jails and a detention center. We understand the jails and detention center at issue are critical infrastructure. *See generally id.* § 421.001 (defining "critical infrastructure" to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation"). We understand some of the information, if released, would reveal technical details of the jails and detention center at issue, and that release of some of the submitted information would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the governor's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.⁴ However, upon review, we find you have failed to demonstrate the remaining information at issue consists of information that is confidential under section 418.176, section 418.177, or section 418.181 of the Government Code. Accordingly, 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, section 418.177, or section 418.181 of the Government Code.

In summary, the governor's office must continue to rely on Open Records Letter Nos. 2022-14566 and 2022-14600 as previous determinations and withhold or release the information at issue in accordance with those rulings. The governor's office may withhold the information you marked under section 552.111 of the Government Code. The

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

governor's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 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,

Chase D. Young
Assistant Attorney General
Open Records Division

CDY/be

Ref: ID# 948140

Enc. Submitted documents

c: Requestor
(w/o enclosures)