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ATTORNEY GENERAL OF TEXAS

June 30, 2022

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

OR2022-19004

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# 957023 (OOG ID Nos. 186-22 and 197-22).

The Office of the Governor (the "governor's office") received two requests from the same requestor for any and all voicemails, text messages, and e-mails received by a named individual during a defined period of time. You state you will withhold e-mail address of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You also state you will redact dates of birth pursuant to Open Records Letter No. 2018-03412 (2018).² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. In addition, you state release of the information at issue may implicate the interests of unspecified parties. Accordingly, you state you notified these

¹ Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

² Open Records Letter No. 2018-03412 is a previous determination issued to the governor's office authorizing it to withhold the dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy without seeking a ruling from this office. *See* Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code).

interested parties of the request for information and of the right to submit arguments to this office. *See* Gov't Code §§ 552.304, .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 exceptions in the Act in certain circumstances). We have received comments from the Office of the Texas Secretary of State (“SOS”), the Texas Department of Public Safety (“DPS”), and the Texas Department of Transportation (“TxDOT”). We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any remaining notified third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining notified third party has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the governor's office may not withhold the submitted information on the basis of any proprietary interest any remaining notified third party may have in the information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses section 81.046 of the Health and Safety Code, which provides, in part, as follows:

(a) Reports, records, and information received from any source, including from a federal agency or from another state, furnished to a public health district, a health authority, a local health department, or the [Texas Department of State Health Services] that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by:

(1) Subsections (c), (d), and (f); and

³ 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 that those records contain substantially different types of information than that submitted to this office.

(2) Section 181.060 [of the Health and Safety Code].

Health & Safety Code § 81.046(a)-(b). In Open Records Decision No. 577 (1990), this office concluded any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies. *See* ORD 577; *see also* Health & Safety Code § 81.046(b)-(d), (f). You state the information you marked pertains to cases or suspected cases of diseases or health conditions and, thus, section 81.046 governs the release of the information at issue. Based upon your representations and our review, we agree section 81.046 governs the release of the information at issue. Additionally, you state the release provisions of section 81.046 are not applicable in this instance. Accordingly, the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses 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 [or]

(2) relates to a tactical plan of the provider[.]

Id. § 418.176(a)(1)-(2). 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).

The governor's office states release of the information you marked would "reveal tactical plans of emergency response providers and assessments in relation to operations at a border of the State of Texas" as well as "possible vulnerabilities related to the border, including staffing levels and locations of law enforcement" and "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 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. Accordingly, 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.⁴

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the

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

communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The governor’s office states the information you marked consists of communications between governor’s office attorneys, employees, and officials and other privileged parties that were made for the purpose of facilitating the rendition of professional legal services to the governor’s office. Further, the governor’s office states these communications were intended to be, and have remained, confidential. Based upon these representations and our review, we find the governor’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the governor’s office may withhold the information you marked under section 552.107(1) of the Government Code.⁵

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 section 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 information 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).

⁵ 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2002, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendations 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 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 a 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.*

The governor's office, DPS, and TxDOT seek to withhold portions of the remaining information at issue under section 552.111 of the Government Code. The governor's office states 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 the governor's office states it shares a privity of interest regarding policymaking matters. The governor's office further states the information at issue includes draft documents that were intended to be released in their final forms. Based upon these representations and our review of the information at issue, we find some of the information at issue consists of advice or recommendations on the policymaking matters of the governor's office. Accordingly, with the exception of the information we marked for release, the governor's office may withhold the information you marked under section 552.111 of the Government Code.⁶ However, we find the information we marked for release is general administrative and purely factual information or does not pertain to policymaking. Therefore, we find the

⁶ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

governor's office, DPS, and TxDOT have failed to demonstrate the remaining information at issue reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the governor's office may not withhold any of the remaining information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

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.⁷ Gov't Code § 552.1175. Section 552.1175, applies, in part, to "current or honorably retired peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *See id.* §§ 552.1175(a)(1), .003(1-b) (defining "honorably retired" for purposes of the Act). Thus, to the extent the information we marked pertains to a current or honorably retired peace officer who elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code, the governor's office must withhold the information we marked under section 552.1175 of the Government Code; however, the marked cellular telephone number may only be withheld under section 552.1175 if a governmental body does not pay for the cellular telephone service. If the individual whose information is at issue is not a current or honorably retired peace officer or does not elect to restrict access to his information in accordance with section 552.1175(b), then the information at issue may not be withheld under section 552.1175 of the Government Code.

In summary, the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code. 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 552.107(1) of the Government Code. With the exception of the information we marked for release, the governor's office may withhold the information you marked under section 552.111 of the Government Code. To the extent the information we marked pertains to a current or honorably retired peace officer who elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code, the governor's office must withhold the information we marked under section 552.1175 of the Government Code; however, the marked cellular telephone number may only be withheld under section 552.1175 if a governmental body does not pay for the cellular telephone service. The governor's office must release the remaining information.

⁷ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/jxd

Ref: ID# 957023

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)