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ATTORNEY GENERAL OF TEXAS

July 28, 2022

Mr. Kieran Hillis
Assistant General Counsel
Office of the Governor
Post Office Box 12428
Austin, Texas 78711

OR2022-22125

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# 962474 (OOG ID#: 249-22).

The Office of the Governor (the "governor's office") received a request for communications between the governor's office and the Texas Board of Veterinary Medical Examiners (the "board") during a certain period of time. You state the governor's office will redact information protected by section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code and access device numbers pursuant to section 552.136(c) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, you state the governor's office notified the board of the request for information and of its 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); *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 comments from the board. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304.

¹ Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

Initially, we agree some of the submitted information, which you marked, is not responsive to the instant request for information because it does not consist of communications between the specified agencies. This ruling does not address the public availability of any information that is not responsive to the request and the governor's office is not required to release such information in response to this request.

Section 552.111 of the Government Code exempts 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 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 exempts 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). 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 and the board seek to withhold portions of the responsive 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 the board 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, the governor's office may withhold the information you marked under section 552.111 of the Government Code.² However, we find the remaining information is general administrative and purely factual information or does not pertain to policymaking. Therefore, we find the board has failed to demonstrate any portion of the remaining responsive information at issue reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the governor's office may not withhold any of the remaining responsive information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

The board raises section 552.102 of the Government Code for some of the remaining responsive information. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex.

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

2010). The supreme court also considered the applicability of section 552.102(a) and held it exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find the board has failed to demonstrate any of the remaining responsive information is subject to section 552.102(a), and the governor's office may not withhold the remaining responsive information on that basis.

The board raises section 552.1175 of the Government Code for some of the remaining responsive information. 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. 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). We note section 552.117 also encompasses a personal cellular telephone number, provided the cellular telephone service is 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 a governmental body and intended for official use). Thus, to the extent the information we marked pertains to current or honorably retired peace officers who elect to restrict access to their 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 individuals whose information is at issue are not current or honorably retired peace officers or do not elect to restrict access to their 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.

Section 552.137 of the Government Code exempts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).³ *See id.* § 552.137(a)-(c). The remaining e-mail address is not excluded by subsection (c). Therefore, the governor's office must withhold the information we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, 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 current or honorably retired peace officers who elect to restrict access to their 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

³ 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).*

552.1175 if a governmental body does not pay for the cellular telephone service. The governor's office must withhold the information we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The governor's office must release the remaining responsive 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/jxd

Ref: ID# 962474

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)