



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 29, 2022

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

OR2022-22345

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# 959720 (OOG ID# 209-22).

The Office of the Governor (the "governor's office") received a request for any and all voicemails, text messages, and e-mails received by a named individual during a defined period of time. The governor's office states it will withhold or release some of the requested information pursuant to our decisions in Open Records Letter Nos. 2022-21639 (2022) and 2022-22302 (2022). *See* Open Records Letter 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 information is or is not excepted from disclosure). The governor's office states it will redact information subject to section 552.117(a)(1) of the Government Code pursuant to section 552.024(c) of the Government Code; access device numbers pursuant to section 552.136(c) of the Government Code; and e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ The governor's office claims some of the submitted information

¹ Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c). 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

is excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.111 of the Government Code. In addition, the governor's office states release of some of the information at issue may implicate the interests of unspecified parties. Accordingly, the governor's office states it notified these 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 Texas Department of Public Safety ("DPS"), the Office of the Texas Secretary of State ("SOS"), and the Texas Military Department ("TMD"). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

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 excepts 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

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). 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 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.

may not be released or made public on subpoena or otherwise except as provided by:

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

(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). The governor's office states the information it 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 these representations and our review, we agree section 81.046 governs the release of the information at issue. Additionally, the governor's office states the release provisions of section 81.046 are not applicable in this instance. Accordingly, the governor's office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code.³

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[.]

Gov't Code § 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

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

(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 it marked and indicated would "reveal tactical plans of emergency response providers in relation to operations at a border of the State of Texas [(the "state")] 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 at issue 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. Accordingly, the governor's office must withhold the information it marked and indicated under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.⁴ However, we find DPS and TMD 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 governor's office for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity. Therefore, the governor's office may not withhold any portion of the remaining information at issue under section 552.101 of the Government Code in conjunction with sections 418.176 or 418.177 of the Government Code.

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.

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

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 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 it 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 may generally withhold the information it marked under section 552.107(1) of the Government Code.⁵ We note, however, one of the e-mail strings at issue includes e-mails received from or sent to a non-privileged party. Furthermore, if these e-mails are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the governor’s office separate and apart from the otherwise privileged e-mail string in which they appear, then the governor’s office may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. In that event, we will address the remaining arguments against disclosure of the information at issue.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The governor’s office explains it is tasked by statute with “[facilitating] the location, expansion, and retention of domestic and international business investment to the [state]’ and [‘promoting] and [administering] business and community economic development programs and services in the state, including business incentive programs.” See Gov’t Code § 481.022(2)-(3). The governor’s office also explains it competes on behalf of the state with other states for the expansion and recruitment of businesses by “providing various incentives and employing strategies designed to attract new business to the state or assist with the expansion of an existing business within the state.” Thus, the governor’s office asserts it has specific marketplace interests in the information at issue because it competes on behalf of the state to recruit and expand businesses within the state. The governor’s office argues release of the information at issue would provide a competitive advantage to competing states, as well as companies considering relocation or expansion in the state. Based upon these representations and our review, we find the governor’s office has demonstrated it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. We also find the governor’s office has demonstrated release of the information at issue would give advantage to a competitor or bidder. Accordingly, the governor’s office may withhold the information it marked under section 552.104(a) of the Government Code.⁶

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 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). 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.*

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

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, SOS, and TMD 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 it marked consists of advice, opinions, and recommendations of governor's office employees and officials, employees of other state agencies, and individuals with whom the governor's office states it shares a privity of interest regarding the policymaking matters at issue. 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 most 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 have marked for release, the governor's office may withhold the information it marked under section 552.111 of the Government Code.⁷ However, the governor's office, DPS, SOS, and TMD 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 deliberative process privilege.

⁷ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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. Gov't Code § 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). Upon review, we find DPS has failed to demonstrate any of the remaining information at issue would interfere with law enforcement or crime prevention. Accordingly, the governor's office may not withhold any of the remaining information at issue under section 552.108(b)(1) of the Government Code.

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.

Gov't Code § 437.232. Upon review, we find the remaining information TMD marked 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 governor's office must withhold the remaining information TMD marked

under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code.⁸

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). In Open Records Decision No. 393 (1983), this office concluded information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. ORD 393 at 2; see Open Records Decision No. 339 (1982); see also *Morales v. Ellen*, 840 S.W.2d at 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Upon review, we find some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the governor's office has not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the governor's office may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

In summary, the governor's office must withhold the information it 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 it marked and indicated 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 generally withhold the information it marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the governor's office separate and apart from the otherwise privileged e-mail string in which they appear, then these non-privileged e-mails may not be withheld under section 552.107 of the Government Code. The governor's office may withhold the information it marked under section 552.104(a) of the Government Code. With the exception of the information we have marked for release, the governor's office may withhold the information it marked under section 552.111 of the Government Code. The governor's office must withhold the remaining information TMD marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. The governor's office must withhold the information we have marked under section 552.101 of the Government Code

⁸ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

in conjunction with common-law privacy. 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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/be

Ref: ID# 959720

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Interested Parties
(w/o enclosures)