



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 16, 2022

Mr. Brian Sears  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2022-24396

Dear Mr. Sears:

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# 965921 (PIR Nos. 22-1413, 22-1422, 22-1452, 22-1453, 22-1454, 22-1457, 22-1458, 22-1460, 22-1464, 22-1466, 22-1467, 22-1471, 22-1472, 22-1473, 22-1476, 22-1477, 22-1478, 22-1479, 22-1480, 22-1484, 22-1486, 22-1487, 22-1489, 22--492, 22-1496, 22-1498, 22-1499, 22-1501, 22-1516, 22-1533, 22-1534, 22-1537, 22-1551, 22-1560, 22-1592, 22-1593, 22-1612, 22-1615, 22-1627, 22-1637, 22-1654, 22-1665, 22-1697, 22-1719, 22-1720, 22-1722, 22-1730, 22-1731, 22-1733, 22-1780, 22-1781, 22-1808, 22-1820, 22-1824, 22-1878, 22-1917, 22-1936, 22-1949, 22-2022).

The Texas Department of Public Safety (the "department") received 59 requests from 46 requestors for information pertaining to a specified incident. You state the department will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, and 552.152 of the Government Code. We have also received and considered comments from requestors, representatives of requestors, and the Office of the Governor (the "governor's office"). *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup> 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

Initially, we note some of the submitted information, is not responsive to some of the requests at issue because it was created after the date the requests were received. This ruling does not address the public availability of any information that is not responsive to the requests and the department is not required to release such information in response to these requests.

We note we have received comments from interested third parties asserting some of the information at issue was previously released. The Act does not permit selective disclosure of information to the public. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Although the department seeks to withhold the information at issue under section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 does not expressly prohibit the release of information to the public nor does it make information confidential under the Act. Therefore, to the extent the department previously released any of the information at issue to a member of the public voluntarily, it may not now withhold any such information from any of the requestors under section 552.108 but must, instead, release it.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information at issue relates to a pending criminal investigation. Based on your representation and our review, we find release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information at issue.

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letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

However, as you acknowledge, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-187; see also Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, the department may withhold the information it marked under section 552.108(a)(1) of the Government Code. As previously noted, section 552.108 is discretionary in nature and does not make information confidential under the Act. See ORDs 665 at 2 n.5, 663 at 5, 177 at 3. Thus, the department has the discretion to release all or part of the information at issue that is not otherwise confidential by law. Gov’t Code § 552.007.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses information that is made confidential by other statutes. The department and the governor’s office raise section 552.101 of the Government Code in conjunction with section 418.176 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.176 of the HSA provides in relevant part:

(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 the 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). The fact that information may relate to emergency preparedness does not make such 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).

The department and the governor’s office assert the information at issue reveals staffing requirements of a law enforcement agency, the Office of the Governor Protective Detail, which is staffed with security personnel of the Executive Protection Bureau of the department. The department and the governor’s office state the information at issue reveals the identity of personnel and the staffing requirements related to the protection of the

governor. The department and the governor's office further state this information is maintained to prevent, detect, respond to, or investigate an act of criminal activity or terrorism. Upon review, we find some of the remaining information relates to the staffing requirements or tactical plan of a law enforcement agency and is 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. Therefore, the department must withhold the information it marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.<sup>2</sup>

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 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. 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).

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

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of the remaining information.

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.

You state the marked records consist of advice, recommendations, and opinions regarding policymaking decisions. You explain this information includes draft documents that were released in their final form, as well as communications among department staff regarding these drafts. Thus, you state the information at issue consists of advice, opinions, and recommendations pertaining to the policymaking functions of the department. Based on your representations and our review of the information at issue, we find the department has demonstrated the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the department. Accordingly, the department may withhold the information it marked under section 552.111 of the Government Code.

In summary, to the extent the department previously released any of the information at issue to a member of the public voluntarily, it may not now withhold any such information from any of the requestors under section 552.108 but must, instead, release it. With the exception of basic information, the department may withhold the information it marked under section 552.108(a)(1) of the Government Code. The department must withhold the information it marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department may withhold the information it marked under section 552.111 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,

Kelly McWethy  
Assistant Attorney General  
Open Records Division

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Enc. Submitted documents

c: 48 Requestors  
(w/o enclosures)