



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 24, 2022

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

OR2022-25587

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# 967802 (OOG# 319-22).

The Office of the Governor (the "governor's office") received a request for specified communications during a certain time period. You state the governor's office will release some information. You state the governor's office 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).<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101,

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<sup>1</sup> 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 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.

552.103, 552.107, and 552.111 of the Government Code. In addition, you state release of some of the information at issue may implicate the interests of third 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") and the City of Uvalde (the "city"). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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 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].

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<sup>2</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 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.

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.<sup>3</sup>

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

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

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 and DPS state release of the information at issue "reveals tactical plans of emergency response providers in relation to operations at a border . . . [and] further identifies possible vulnerabilities related to the border, including staffing levels and locations of law enforcement." The governor's office and DPS assert 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 under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.<sup>4</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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

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

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).

You state the information at issue consists of communications between the attorneys for the governor's office and governor's office officials and staff. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the governor's office. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the governor's office may withhold the information it marked under section 552.107(1) of the Government Code.<sup>5</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[.]" 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. 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

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<sup>5</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 at 9.

The governor's office asserts the information at issue consists of advice, recommendations, and opinions of employees and officials of the governor's office regarding policymaking decisions. The governor's office and the city also inform us the information at issue includes draft documents that reflect the deliberations of the governor's office, city officials, and representatives of the city. We understand the final version of these draft documents will be released to the public in their final form. Based on your representations and our review, we find the governor's office may withhold the information it marked and the additional information we have indicated under section 552.111 of the Government Code.<sup>6</sup>

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 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 it marked under section 552.107(1) of the Government Code. The governor's office may withhold the information it marked and the additional information we have indicated under section

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<sup>6</sup> As our ruling is dispositive, we need not address the city's remaining argument against disclosure of this information.

552.111 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,

Kelly McWethy  
Assistant Attorney General  
Open Records Division

KM/jm

Ref: ID# 967802

Enc. Submitted documents

c: Requestor  
(w/o enclosures)