



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 21, 2022

Ms. Karol Davidson
Deputy General Counsel
Texas Juvenile Justice Department
P.O. Box 12757
Austin, Texas 78711

OR2022-29092

Dear Ms. Davidson:

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# 971090 (ORR #37845).

The Texas Juvenile Justice Department (the "department") received a request for e-mails between staff members of the department and staff members of the Office of the Governor (the "governor's office"). You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. In addition, you state release of the information at issue may implicate the interests of the governor's office. Accordingly, you state, and provide documentation showing, you notified the governor's office of the request for information and of the right to submit arguments as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the governor's office. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the governor's office argues against disclosure of information not submitted to this office for our review. This ruling does not address information beyond what the department has submitted to us for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information submitted by the department as responsive to the request for information.¹

¹ As we are able to make this determination, we need not address the arguments of the governor's office against disclosure of this information.

Next, we must address the department's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from disclosure. *See id.* § 552.301. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state, and provide documentation showing, the department received the instant request for information on July 8, 2022. You do not inform us the department was closed for any business days between July 8, 2022, and July 29, 2022. This office does not count the date the request was received or holidays for purposes of calculating a governmental body's deadlines under the Act. Accordingly, the department was required to provide the information required by section 552.301(e) by July 29, 2022. However, you provided the information required by section 552.301(e) by electronic submission on July 30, 2022. *See id.* § 552.309(a) (requirement to submit information within specified time period under the Act is met in timely fashion if it is submitted through attorney general's designated electronic filing system within that period). Consequently, we conclude the department failed to comply with the procedural requirements of section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). You claim the information at issue is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. Because sections 552.101 and 552.117 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these exceptions to the information at issue.² However, we find you have failed to establish a compelling reason to address your remaining claimed exceptions. Furthermore, because third party interests can also provide a compelling reason to overcome the presumption of openness and the governor's office objects to disclosure of some of the information at issue under section 552.111 of the Government Code, we will also consider whether the department may withhold information at issue under section 552.111 of the Government Code on behalf of the governor's office. *See Gov't Code* §§ 552.007, .302; Open Records Decision No. 150 at 2 (1977).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial

² 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).

decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 58.008(b) of the Family Code, which provides as follows:

Except as provided by Subsection (c), law enforcement records concerning a child and information concerning a child that are stored by electronic means or otherwise and from which a record could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult records;
- (2) if maintained electronically in the same computer system as adult records, accessible only under controls that are separate and distinct from the controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subsection (c) or Subchapter B, D, or E.

Fam. Code § 58.008(b); *see also id.* § 51.03(a)-(b) (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of title 3 of Family Code). Section 58.008(b) is applicable to records of juvenile conduct that occurred before, on, or after September 1, 2017. *See* Act of May 28, 2017, 85th Leg., R.S., ch. 746, § 22. The juvenile must have been at least ten years old and less than seventeen years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining “child” for purposes of title 3 of Family Code). The department asserts some of the submitted information is confidential under section 58.008(b) of the Family Code. However, we find the information at issue consists of internal administrative records that do not constitute juvenile law enforcement records for purposes of section 58.008(b). Therefore, the department may not withhold any portion of the submitted information under section 552.101 of the Government code in conjunction with section 58.008(b) of the Family Code.

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). 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).

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 seeks to withhold portions of the submitted information under section 552.111 of the Government Code. The governor's office states the information it marked consists of advice, opinions, and recommendations of employees and officials of the governor's office and employees and officials of the department with whom the governor's office states it shares a privity of interest and common deliberative process regarding the policymaking matters at issue. Based upon these representations and our review, we find the information at issue consists of advice, opinions, or recommendations on policymaking matters of the governor's office. Therefore, the department may withhold the information we marked under section 552.111 of the Government Code on behalf of the governor's office.

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). This office has also held common-law privacy protects the identifying information of a juvenile offender or a juvenile victim of abuse or neglect. See Open

Records Decision No. 394 (1983); *cf.* Fam. Code §§ 58.008(b), 261.201(a). The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). We note the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F.Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 6251 (1977)); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds.

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we note some of the information pertains to individuals who will be de-identified and whose privacy interests will, thus, be protected. Accordingly, the department must withhold all living identifiable public citizens' dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(8) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, and social security number of a current or former employee of the [department] or of the predecessors in function of the department, regardless of whether the current or former employee complies with Section 552.024 or section 552.1175. Gov't Code § 552.117(a)(8). We note, for purposes of section 552.117, “family member” means a spouse, minor child, or adult child who resides in the person's home. *See id.* § 552.117(c) (providing that “family member” has meaning assigned by Fin. Code § 31.006(d)). Section 552.117(a)(8) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)*. Upon review, we find the department must withhold the information we marked under section 552.117(a)(8) of the Government Code; however, the department may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body.

In summary, the department may withhold the information we marked under section 552.111 of the Government Code on behalf of the governor's office. The department must withhold all living identifiable public citizens' dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we marked under section 552.117(a)(8) of the Government Code; however, the department may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. 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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/mo

Ref: ID# 971090

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Interested Party
(w/o enclosures)