



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 22, 2022

Ms. Sarah Alexander
Open Records
Texas Military Department
P.O. Box 5218
Austin, Texas 78763-5218

OR2022-29332

Dear Ms. Alexander:

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# 970795 (ORR# T22-110).

The Texas Military Department (the "department") received a request for all memoranda of understanding or guidance documents related to the work of specified teams made during a specified time period.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.117, and 552.152 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted 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 (Tex.

¹ We note the department sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

² Although you also raise section 552.1175 of the Government Code, we note section 552.117 of the Government Code is the proper exception to raise for information the department holds in its capacity as an employer.

1977)). 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.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. See Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). 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).

You state the submitted information, if released, would interfere with law enforcement or prosecution of crime. You state the release of the information at issue would “disclose patterns of military vulnerabilities in staffing personnel and tactics, and which[,] in turn, would interfere with the detection, investigation, or prosecution of crime or law enforcement.” Based on your representations and our review, we agree the release of some of the submitted information, which we have marked, would interfere with law enforcement. Accordingly, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code.³ However, we find you have not demonstrated release of any of the remaining information at issue would interfere with law enforcement or crime prevention. Accordingly, the department may not withhold any of the remaining information under section 552.108(b)(1) of the Government 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 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,

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

recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5; *see also* *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also* *Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *See* *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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).

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 No. 561 at 9 (1990) (section 552.111 encompasses communications with 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.*

You seek to withhold the remaining information under section 552.111 of the Government Code. You represent the information at issue consists of advice, opinions, and recommendations of employees of the department and other law enforcement agencies with whom the department shares a privity of interest or common deliberative process regarding policymaking matters of the department. Upon review, we find the department may withhold the information we have marked under section 552.111 of the Government Code.⁴ However, we find the remaining information at issue is either factual in nature or consists of internal administrative matters that do not rise to the level of policymaking. Thus, we find you have failed to demonstrate the remaining information reveals advice, opinions, or recommendations that pertain to policymaking. Therefore, the department may not withhold any of the remaining information under section 552.111 of the Government Code.

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.” Gov’t Code § 552.101. This section encompasses information protected by chapter 418 of the Government Code. As part of the Texas Homeland Security Act (the “HSA”), sections 418.176 through 418.182 were added to chapter 418 of the Government

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

Code. Section 418.176(a) of the Government Code provides, in relevant part, the following:

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 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 of the Government Code provides the following:

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 relate to a governmental body's security concerns does not make the 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).

You claim the remaining information is confidential under sections 418.176 and 418.177 of the Government Code. Upon review, we find you have failed to demonstrate any of the remaining information at issue was collected, assembled, or maintained by or for the department for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to staffing requirements or a tactical plan of an emergency response provider or relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. Therefore, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 418.176 or 418.177 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.

Id. § 437.232. Upon review, we find the remaining information contains 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 department must withhold the names of the service members at issue, their home addresses, ranks, official titles, pay rates or grades, deployment locations, military duty addresses, awards and decorations, and lengths of military service under section 552.101 of the Government Code in conjunction section 437.232 of the Government Code.⁵ However, we find the department has failed to demonstrate the remaining information consists of military personnel information that is subject to section 437.232. Therefore, the department may not withhold the remaining information under section 552.101 on that basis.

Section 552.117(a)(11) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a current or former member of the Texas military forces who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(11). Section 552.117(a)(11) applies to the Texas military forces as that term is defined by section 437.001 of the Government Code. *See id.* § 437.001. 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)). We note section 552.117 is also applicable to 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 governmental body and intended for official use).* Whether a particular piece of information is protected by section 552.117(a)(11) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* Therefore, the department must withhold information under section 552.117 on behalf of a current or former member of the Texas military forces only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the department must withhold the information we have marked and the personal cellular telephone numbers in the remaining information under section 552.117(a)(11) of the Government Code if the cellular telephone

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

service is not paid for by a governmental body.⁶ However, we find the remaining information is not information subject to section 552.117 of the Government Code. Thus, the department may not withhold the remaining information on that basis.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You represent release of the remaining information would subject employees to a substantial threat of physical harm. Upon review, however, we find the department has failed to demonstrate the release of the remaining information would subject an employee or officer to a substantial risk of physical harm. Therefore, the department may not withhold the remaining information under section 552.152 of the Government Code.

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). Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we note this information pertains to an individual who may be de-identified pursuant to section 552.117 of the Government Code and whose privacy interests would, thus, be protected. Accordingly, to the extent the information at issue pertains to an identifiable individual, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. The department must withhold the names of the service members at issue, their home addresses, ranks, official titles, pay rates or grades, deployment locations, military duty addresses, awards and decorations, and lengths of military service under section 552.101 of the Government Code in conjunction section 437.232 of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the department must withhold the information we have marked and the personal cellular telephone numbers in the remaining information under section 552.117(a)(11) of the Government Code if the cellular telephone service is not paid for by

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

a governmental body. To the extent the information at issue pertains to an identifiable individual, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/jm

Ref: ID# 970795

Enc. Submitted documents

c: Requestor
(w/o enclosures)