



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 11, 2022

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

OR2022-31223

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# 976939 (PIR# 22-1761).

The Texas Department of Public Safety (the "department") received a request for specified communications from the department's communications director during a certain time period.¹ You state the department will release some information. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have also received and considered comments from the Office of the Governor (the "governor's office") and the Leon County District Attorney'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.²

¹ We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (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). You inform us the department sent the requestor an estimate of charges pertaining to the request pursuant to section 552.2615 of the Government Code, which the requestor accepted on July 22, 2022. *See* Gov't Code §§ 552.2615 (providing governmental body shall provide requestor with estimate of charges if charges exceed \$40).

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 those records contain substantially different types of information than that submitted to this office.

Initially, we note a portion the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2022-25848 (2022). In Open Records Letter No. 2022-25848, we determined the department may withhold the information at issue under section 552.111 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the department may continue to rely on Open Records Letter No. 2022-25848 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination).

Next, we note, and you acknowledge, the department failed to meet the statutory deadlines imposed by section 552.301 of the Government Code for the submitted information. *See* Gov't Code § 552.301(b). 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). The need of a governmental body, other than the governmental body that failed to timely seek an open records decision, to withhold information can provide a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision No. 586 (1991). Because the governor's office and district attorney's office object to the release of the information at issue, we will consider whether the department may withhold the submitted information under sections 552.108 and 552.111 of the Government Code on behalf of the governor's office and district attorney's office. Further, the governor's office claims section 552.101 of the Government Code for a portion of the submitted information. Because section 552.101 can provide a compelling reason to overcome the presumption of openness, we will address this argument for the information at issue.

Next, we note the governor's office argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the department has submitted to us for our review. *See* Gov't Code § 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 the department submitted as responsive to the request for information.

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[.]” *Id.* § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) 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). The district attorney's office objects to release of the information at issue because it relates to its ongoing criminal investigation. Based on this representation, we conclude the 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). Accordingly, the department may withhold the information it marked under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 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 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 would “reveal tactical plans of emergency response providers and assessments in relation to operations at a border of the State of Texas” 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 department must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.³

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

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

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 remaining information consists of advice, recommendations, and opinions of the governor's office and the department's staff with whom the governor's office states it shares a privity of interest regarding policymaking matters. The governor's office informs us the remaining information consists of a draft document that reflects the deliberations of the governor's office and the department's staff. The governor's office states the final version of this draft document has been or will be released to the public in its final form. Based on these representations and our review, we find the department may withhold the remaining information under section 552.111 of the Government Code on behalf of the governor's office.

In summary, the department may continue to rely on Open Records Letter No. 2022-25848 as a previous determination and withhold the identical information in accordance with that ruling. The department may withhold the information it marked under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office. The department must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code. The department may withhold the remaining information under section 552.111 of the Government Code on behalf of the governor's office.

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/pt

Ref: ID# 976939

Enc. Submitted documents

c: Requestor
(w/o enclosures)