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ATTORNEY GENERAL OF TEXAS

October 12, 2022

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

OR2022-31254

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# 974467 (PIR No. 22-1950).

The Texas Department of Public Safety (the "department") received a request for all e-mail communications between the department and specified entities containing certain terms during a stated period of time. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. Additionally, you state release of the submitted information may implicate the interests of the Texas Military Department ("TMD"). Accordingly, you state, and provide documentation showing, the department notified TMD of the request for information and of its right to submit arguments to this office. *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 TMD. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

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*

¹ 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.

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, 364 (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. *See 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 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 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 and TMD state the information you indicated consists of advice, opinions, and recommendations of department employees and third parties with whom the department

shares a privity of interest regarding policymaking matters. You and TMD inform us the information at issue includes draft documents that reflect policymaking deliberations, which have been or will be released in their final forms. Based on your representations and our review of the information at issue, we find you and TMD have demonstrated some of the information at issue, which we have marked, consists of advice, opinions, or recommendations on the policymaking matters of the department. Accordingly, the department may withhold the information we have marked and indicated under section 552.111 of the Government Code.² However, we find the remaining information at issue is general administrative and purely factual that does not rise to the level of policymaking. Thus, we find you and TMD have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the department. Therefore, the department may not withhold any portion of the remaining information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section 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.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). Rather than merely making a conclusory assertion that releasing the information would interfere with law enforcement, the governmental body claiming section 552.108(b)(1) 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 Record Decision Nos. 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment). However, section 552.108(b)(1) is not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (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 and TMD assert the remaining information is excepted from disclosure under section 552.108(b)(1) of the Government Code. You state the information you indicated “include[s] assessments produced by the [d]epartment and partner agencies of the threats facing persons and property from acts of terrorism and related criminal activity.” You also state some of the information at issue pertains to tactical plans related to border operations. You assert release of the information at issue “would provide wrong-doers, drug traffickers,

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

terrorists, and other criminals with invaluable information concerning how [d]epartment operations are planned, implemented and staffed, the techniques used to investigate and detect activities of suspected criminal elements; how information is assessed and analyzed; and the lessons learned from the analysis of prior criminal activities.” Based upon your representations and our review, we conclude you have demonstrated release of some of the information at issue would interfere with law enforcement. Accordingly, the department may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code.³ However, we find you and TMD have failed to demonstrate release of the remaining information at issue would interfere with law enforcement or crime prevention. Therefore, the department may not withhold any portion of the remaining information under section 552.108(b)(1) of the Government Code.

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. This section encompasses information made confidential by other statutes, such as 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;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a). 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

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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).

You and TMD assert the remaining information at issue is made confidential by sections 418.176 and 418.177 of the Government Code. Upon review, we find you and TMD have failed to demonstrate the remaining information at issue relates to staffing requirements or a tactical plan of an emergency response provider, or relates to an assessment by or for a governmental entity that 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. 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 section 418.177 of the Government Code.

Section 552.101 of the Government Code also encompasses section 437.232 of the Government Code, which provides:

(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 TMD 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.⁴ However, we find TMD has

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

failed to demonstrate the remaining information at issue consists of military personnel information that is subject to section 437.232; therefore, the department may not withhold any portion of the remaining information under section 552.101 on that basis.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See id.* § 552.1175. Section 552.1175 applies, in part, to “a current or former member of the United States Army, Navy, Air Force, Coast Guard, or Marine Corps, an auxiliary service of one of those branches of the armed forces, of the Texas military forces, as that term is defined by [s]ection 437.001 [.]” *Id.* § 552.1175(a)(15). Section 552.1175 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). Accordingly, to the extent the cellular telephone numbers within the remaining information pertain to individuals who are subject to section 552.1175(a)(15) of the Government Code, the individuals elect to restrict access to the information in accordance with section 552.1175(b) of the Government Code, and the cellular telephone services are not paid for by a governmental body, the department must withhold such cellular telephone numbers within the remaining information under section 552.1175 of the Government Code.

Section 552.117(a)(1) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.⁵ *See* Gov’t Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6 (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, to the extent the cellular telephone numbers within the remaining information pertain to department employees who timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone services are not paid for by a governmental body, the department must withhold such cellular telephone numbers, a representative sample of which we have marked, under section 552.117(a)(1) of the Government Code.

In summary, the department may withhold the information we have marked and indicated under section 552.111 of the Government Code. The department may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code. The department must withhold the names of TMD 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

⁵ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

552.101 of the Government Code in conjunction section 437.232 of the Government Code. To the extent the cellular telephone numbers within the remaining information pertain to individuals who are subject to section 552.1175(a)(15) of the Government Code, the individuals elect to restrict access to the information in accordance with section 552.1175(b) of the Government Code, and the cellular telephone services are not paid for by a governmental body, the department must withhold such cellular telephone numbers within the remaining information under section 552.1175 of the Government Code. To the extent the cellular telephone numbers within the remaining information pertain to department employees who timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone services are not paid for by a governmental body, the department must withhold such cellular telephone numbers, a representative sample of which we have marked, under section 552.117(a)(1) 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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/eeee

Ref: ID# 974467

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Party
(w/o enclosures)