



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 13, 2022

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

OR2022-31587

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# 978529 (OOG #449-22).

The Office of the Governor (the "governor's office") received a request for all correspondence sent to or from Governor Abbott and his immediate executive staff or the Texas Department of Public Safety ("DPS") during a defined period of time.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. In addition, you state release of the submitted information may implicate the interests of DPS. Accordingly, you state you notified DPS of the request for information and of the right to submit arguments to this office. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received comments from DPS. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup> You state the governor's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.2d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

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

Initially, we note some of the submitted information, which you marked, is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request and the governor's office is not required to release such information in response to this request.

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 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 you 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 some of the information you marked 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, with the exception of the information we indicated, the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.<sup>3</sup> However, we find the governor's office and DPS have failed to demonstrate the remaining responsive 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 governor's office for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity. Therefore, the governor's office may not withhold any portion of the remaining responsive information at issue under section 552.101 of the Government Code in conjunction with sections 418.176 or 418.177 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[.]” *Id.* § 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).

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

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 and DPS seek to withhold portions of the remaining responsive information at issue under section 552.111 of the Government Code. The governor's office states the remaining responsive information you marked consists of advice, opinions, and recommendations of governor's office employees and officials and employees of another state agency with whom the governor's office states it shares a privity of interest regarding policymaking matters. Based upon these representations and our review of the information at issue, we find the information at issue consists of advice or recommendations on the policymaking matters of the governor's office. Accordingly, the governor's office may withhold the remaining responsive information you marked under section 552.111 of the Government Code.<sup>4</sup> However, we find DPS has failed to demonstrate the remaining responsive information at issue reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the governor's office may not withhold any of the remaining responsive information at issue under section 552.111 of the Government Code on the basis of deliberative process privilege.

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). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. 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.). 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),

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

252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

Upon review, we find DPS has failed to demonstrate any of the remaining responsive information at issue would interfere with law enforcement or crime prevention. Accordingly, the governor's office may not withhold any of the remaining responsive information at issue under section 552.108(b)(1) of the Government Code.

In summary, with the exception of the information we indicated, the governor's office must withhold the information you 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 remaining responsive information you marked under section 552.111 of the Government Code. The governor's office must release the remaining responsive 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# 978529

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Interested Party  
(w/o enclosures)