



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 17, 2014

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2014-01176

Dear Ms. Cost:

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# 511411 (DPS PIR No. 13-3807).

The Texas Department of Public Safety (the "department") received a request for all e-mail correspondence, including attachments, received by two named individuals containing certain keywords during a specified period of time.¹ You state some of the requested information will be made available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, 552.108, and 552.111 of the Government Code.² We have considered your arguments and reviewed the submitted information.

¹You state the department received clarification of the request. See Gov't Code § 552.222(b) (providing that 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 that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. See Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

Initially, we note some of the information, which we have indicated, is not responsive to the instant request because it does not contain any of the terms specified in the request. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

Section 552.101 of the Government Code exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with a provision of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.177 provides that information is confidential if it:

(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.

Gov't Code § 418.177. Section 418.178 provides:

(a) In this section, "explosive weapon" has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Id. § 418.178. Section 418.180 provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

- (1) is part of a report to an agency of the United States;
- (2) relates to an act of terrorism or related criminal activity; and
- (3) is specifically required to be kept confidential:
 - (A) under Section 552.101 because of a federal statute or regulation;
 - (B) to participate in a state-federal information sharing agreement; or
 - (C) to obtain federal funding.

Id. § 418.180. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact that information may be related to a governmental body's security concerns, biological toxins, or emergency preparedness does not make such 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 state the information in Attachment E relates to "assessments produced by the [d]epartment and other law enforcement entities of the threats facing persons and property from acts of terrorism and related criminal activity" and this information "identifies risks to facilities and systems that are considered critical infrastructure." Based on your representations and our review, we find the department must withhold the information we have indicated in Attachment E under section 552.101 of the Government Code in

conjunction with section 418.177 of the Government Code.³ However, we find the department failed to demonstrate how any of the remaining information at issue pertains to assessments of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. Consequently, the department may not withhold any of the remaining information at issue under section 552.101 in conjunction with section 418.177.

You argue the information in Attachments F and G is confidential under section 418.178(b)(2)(A) because it reveals the specific locations of hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. Upon review, we find the information we have marked is confidential under section 418.178 of the Government Code. Therefore, the department must withhold the information we have indicated in Attachments F and G under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code.⁴ However, the department has failed to demonstrate the remaining information is confidential under section 418.178 of the Government Code. Thus, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code on that basis.

You argue the remaining information in Attachment F is confidential for purposes of section 418.180 of the Government Code because it is part of a report to an agency of the United States that relates to an act of terrorism or related criminal activity and is specifically required to be kept confidential under section 552.101 because of a federal statute or regulation and to participate in a state-federal information sharing agreement. You state the information at issue is maintained as part of the department's participation in the Protected Critical Infrastructure Information Program (the "program") through the United States Department of Homeland Security (the "DHS"). In support of your argument, you have submitted an excerpt from the DHS Protected Critical Infrastructure Information Program Procedures Manual (the "manual").⁵

You argue the information is made confidential by the federal Critical Infrastructure Information Act of 2002 ("CIIA"), title 6, sections 131 through 134 of the United States Code. 6 U.S.C. §§ 131 - 134. Section 133 pertains to the protection of certain voluntarily shared critical infrastructure information and the identities of persons or entities submitting such information. *Id.* § 133. We note the term "critical infrastructure information" means information not customarily in the public domain and related to the security of critical

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

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⁵A complete copy of the manual may be found on the DHS website at http://www.dhs.gov/xlibrary/assets/pcii_program_procedures_manual.pdf.

infrastructure or protected systems. *See* App. 2, Protected Critical Infrastructure Information Program Procedures Manual (2009); *see also id.* (defining “in the public domain”).

You also inform us, and the manual indicates, the program is part of an information sharing agreement between the department and the DHS. In this instance, the information sharing agreement protects critical infrastructure information, including the identity of a person providing such information, from disclosure under the federal Freedom of Information Act and similar state and local disclosure laws when the information is voluntarily submitted to the DHS, directly or indirectly. *See* § 1, Protected Critical Infrastructure Information Program Procedures Manual (2009). We note in order to receive protection, the manual requires such information be accompanied by an express statement affirming the information was submitted in expectation of legal protections and in the absence of an exercise of legal authority by the DHS to compel access to or submission of the information. *See id.* § 3.2. After review of your conclusory statements and the information at issue, we find you have failed to demonstrate how any of the specific provisions of the CIIA and the manual apply to the remaining information. *See* Gov’t Code § 552.301(e)(1)(A). Accordingly, the department may not withhold the remaining information in Attachment F under section 552.101 of the Government Code in conjunction with section 418.180 of the Government Code on that basis.

You also contend the remaining information in Attachments F and G identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Upon review, we find no portion of the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, none of the remaining information is confidential pursuant to section 418.181 of the Government Code and the department may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation[.]” *Id.* § 552.106(a), (b). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *Id.* Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

You state the information you have indicated consists of communications between department employees, legislators' offices, and other governmental bodies regarding the development, analysis, and evaluation of proposed legislation related to the department. Upon review, we find the information we have marked constitutes advice, opinion, analysis, and recommendations regarding legislation related to the department. Therefore, the department may withhold the information we have marked under section 552.106 of the Government Code. However, we find you have failed to demonstrate how the remaining information at issue constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the department may not withhold any of the remaining information at issue under section 552.106.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Attachment A consists of attorney-client privileged communications between department attorneys or attorney representatives, and department employees or members of the Public Safety Commission. You explain that these communications were made in furtherance of the rendition of professional legal services to the department. You further state the communications were intended to be and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may withhold Attachment A under section 552.107(1) of the Government Code.

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[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information in Attachment D relates to a pending criminal investigation. Based on this representation, we find the release of the information at issue would interfere with the detection, investigation, and prosecution of a 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 Attachment D under section 552.108(a)(1) of the Government Code.

Section 552.108(b)(1) 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). 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 Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). 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 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 seek to withhold the remaining information in Attachment E under section 552.108(b)(1) of the Government Code. However, upon review, we find you have failed to demonstrate how release of any of the remaining information at issue would interfere with law enforcement or crime prevention. Thus, we find you have failed to demonstrate the applicability of section 552.108(b)(1) of the Government Code, and none of the remaining information in Attachment E may be withheld on this basis.

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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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, orig. proceeding); 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, orig. proceeding). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, opinions, recommendations, 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 that are 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

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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the entities between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See id.* 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.

You state the e-mails and attachments in Attachment B consist of communications among department staff and among department staff and staff of the Office of the Governor (the "governor's office") regarding drafts of letters and agency budgets. We understand the department is working with the governor's office regarding the incident at issue. Accordingly, we find the department has demonstrated it shares a privity of interest with the governor's office with respect to the submitted information. You further state the information at issue reflects the discussions and thought processes used in developing the drafts at issue. However, you do not state whether the draft documents will be released to the public in their final form. Thus, as to the draft documents, we rule conditionally. If the draft documents will be released to the public in their final form, the department may withhold the draft documents in their entirety under section 552.111. If the draft documents will not be released in their final form, the department may not withhold the draft documents in their entirety on this basis. In that case, we find portions of the submitted draft documents, which we have indicated, consist of advice, opinion, and recommendations relating to the department's policy matters. As such, the department may withhold the information we have indicated under section 552.111 of the Government Code. In either case, the department may withhold the information we have indicated in the remaining information in Attachment B under section 552.111 of the Government Code. However, we find the remaining information at issue to be general administrative information or purely factual in nature. Therefore, we find you have failed to establish the applicability of section 552.111 to the

remaining information at issue. Accordingly, the department may not withhold any of the remaining information in Attachment B under section 552.111 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁶ See Gov't Code § 552.117(a)(2). 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 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). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code if the cellular service is not paid for by any governmental body.

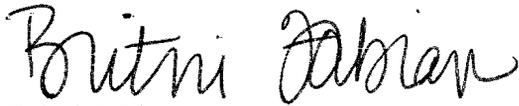
In summary, the department must withhold the information we have indicated in Attachment E under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code, and the information we have indicated in Attachments F and G under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The department may withhold the information we have marked in Attachment C under section 552.106 of the Government Code. The department may withhold Attachment A under section 552.107(1) of the Government Code, and Attachment D under section 552.108(a)(1) of the Government Code. The department may withhold the draft documents in Attachment B under section 552.111 of the Government Code only if they will be released to the public in their final form. If the draft documents will not be released in their final form, the department may withhold the information we have indicated within the draft documents under section 552.111 of the Government Code on the basis of the deliberative process privilege. In either case, the department may withhold the information we have indicated in the remaining information in Attachment B under section 552.111 of the Government Code. The department must withhold the cellular telephone numbers we have marked under section 552.117 of the Government Code if the cellular 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.

⁶The 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).

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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/tch

Ref: ID# 511411

Enc. Submitted documents

c: Requestor
(w/o enclosures)