



January 6, 2015

Mr. Grant Jordan  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street, Third Floor  
Fort Worth, Texas 76102

OR2015-00174

Dear Mr. Jordan:

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# 547087 (Fort Worth PIR. No. W037285).

The Fort Worth Police Department (the "department") received a request for any and all documents that reference a named corporation (the "corporation") or any products made by the corporation. You state you have released some information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.108, and 552.111 of the Government Code. You state release of the information may implicate the proprietary interests of third parties. You also indicate that release of the submitted information may implicate the interests of the Federal Bureau of Investigation (the "FBI"). Accordingly, you state, and provide documentation showing, you notified the third parties and the FBI of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d)*; *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances); *see id.* § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from a

third party and the FBI. We have considered the submitted arguments and reviewed the submitted information, some of which is a representative sample.<sup>1</sup>

We understand you to assert portions of the submitted information are not responsive to the request for information. You assert only the portion of the document in Exhibit C2 is responsive. You further assert that because the information in Exhibits C5 and D5 consists of drafts that are not complete, this information is not responsive. The present request seeks any documents that reference the corporation or products made by the corporation. Upon review, we find the information at issue constitutes documents that reference the corporation or products made by the corporation. Thus, we find the information at issue to be responsive to the present request, and we will address your arguments against its disclosure.

The department states it sought but did not receive a response to its request for clarification. *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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. *Open Records Decision No. 561* (1990). In this case, as you have submitted information responsive to the request for which you sought clarification and have raised exceptions to disclosure for this information, we will address the applicability of the claimed exceptions to this information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

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<sup>1</sup>We assume that 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.

Gov't Code § 552.022(a)(3). Exhibits C1 and C3 contain a completed contract, purchase agreement, purchase orders, and invoices that are subject to section 552.022(a)(3). The department must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act or other law. *See id.* Although the department raises section 552.108 of the Government Code for this information, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the department may not withhold the information subject to section 552.022(a)(3) under section 552.108. You also claim section 552.101 of the Government Code, which makes information confidential for purposes of section 552.022(a)(3). Therefore, we will determine whether any of the information subject to section 552.022(a)(3) must be withheld under section 552.101 of the Government Code. We will also consider your arguments for the information that is not subject to section 552.022.

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. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.176(a) provides, in part:

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:

...

(2) relates to a tactical plan of the [emergency response] provider[.]

*Id.* § 418.176(a)(2). The fact that information may relate to a governmental body's security measures 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 of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under one of the confidentiality provisions of the HSA must be accompanied by an adequate explanation of 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 Exhibits C1 and C3 relates to security equipment utilized by the department to prevent, detect, and respond to terroristic and criminal activities. You explain release of this information “will compromise law enforcement purposes by enabling terror or criminal suspects to anticipate weakness in law enforcement and alter their methods of operation in order to avoid detection.” Upon review, we find the information subject to section 552.022 in Exhibits C1 and C3 relates to a tactical plan maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Thus, the department must withhold the information subject to section 552.022 in Exhibits C1 and C3 under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes 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* Open Records Decision No. 676 at 6-7 (2002). 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 claim the information in Exhibits D4 and D5 are protected by section 552.107(1) of the Government Code. You state the information constitutes communications involving employees of the department and attorneys representing the department. You state the communications were made in confidence for the purposes of facilitating the rendition of professional legal services to the department and that the communications 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 in Exhibits D4 and D5. Therefore, the department may withhold Exhibits D4 and D5 under section 552.107(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, 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).

You state the information you have marked in Exhibit C6 consists of advice, opinions, and recommendations of department employees regarding policymaking matters. Based on your representations and our review, we find the department has demonstrated Exhibit C6 consists

representations and our review, we find the department has demonstrated Exhibit C6 consists of advice, opinion, or recommendations on policymaking matters of the department. Upon review, we find the department may withhold Exhibit C6 under section 552.111 of the Government Code.

Section 552.108(b) 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 (1) 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.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department’s use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You state the remaining information in Exhibits C1 and C3, as well as the information in Exhibits C2, C4, C5, D1, D2, and D6 reveals specialized law enforcement investigation and communications equipment that would divulge the intricate internal workings of the department’s methods, techniques, and strategies for preventing and detecting crime. You assert release of the information “would permit private citizens with criminal intentions to anticipate weaknesses in [the] department, avoid detection, jeopardize officer safety, and generally undermine police efforts[.]” Thus, you claim release of this information would hinder law enforcement and put the public at risk. Upon review, we find the release of this information would interfere with law enforcement. Therefore, the department may withhold

the remaining information in Exhibits C1 and C3, as well as the information in Exhibits C2, C4, C5, D1, D2, and D6 under section 552.108(b)(1) of the Government Code.<sup>2</sup>

A third party asserts a portion of the information in Exhibit D3 is excepted from disclosure under section 552.110 of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

A third party raises section 552.110(b) for information regarding the pricing of its products contained in Exhibit D3. The third party contends the release of this information has the potential to cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review of the third party’s arguments, we find the third party has demonstrated the information at issue constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, the department must withhold this information, which we have marked, under section 552.110(b).

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”<sup>3</sup> Gov’t Code § 552.136(b). An access device number is one that may be used to 1) obtain money, goods, services, or another thing of value, or 2) initiate a transfer of funds other than a transfer originated solely by a paper instrument, and includes an account number. *See id.* § 552.136(a) (defining “access device”). Upon review, we find the department must withhold the information we have marked under section 552.136 of the Government Code.

We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A

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

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must withhold the information subject to section 552.022 in Exhibits C1 and C3 under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The department may withhold Exhibits D4 and D5 under section 552.107(1) of the Government Code. The department may withhold Exhibit C6 under section 552.111 of the Government Code. The department may withhold the remaining information in Exhibits C1 and C3, as well as the information in Exhibits C2, C4, C5, D1, D2, and D6 under section 552.108(b)(1) of the Government Code. The department must withhold the information we have marked in Exhibit D3 under section 552.110(b). The department must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released; however, any information subject to copyright may only be released in accordance with copyright law.

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 [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Rustam Abedinzadeh  
Assistant Attorney General  
Open Records Division

RA/dls

Ref: ID# 547087

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. W.L. Scott Bean III  
Chief, Technical Surveillance Section  
Operational Technology Division  
Federal Bureau of Investigation  
Engineering Research Facility  
Building 27958-A  
Quantico, Virginia 22135  
(w/o enclosures)

Mr. Charles Cinquemani  
AVP Special Services  
P.O. Box 610687  
DFW Airport 75261-0687  
(w/o enclosures)

Ms. Molly Thoerner  
Director of Emergency Preparedness  
North Central Texas Council of Governments  
P.O. Box 5888  
Arlington, Texas 76005  
(w/o enclosures)

Ms. Cynthia Wenzel Cole  
CONNCT Admin. Volunteer  
Cynergyze  
7312 Circle Avenue  
Forest Park, Illinois 60130  
(w/o enclosures)