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ATTORNEY GENERAL OF TEXAS

September 28, 2015

Ms. Kimberley Ellars
Attorney
State Preservation Board
P.O. Box 13286
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OR2015-20324

Dear Ms. Ellars:

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# 579195.

The State Preservation Board (the "board") received a request for records regarding no-bid contracts at the governor's mansion since June 1, 2014 and records regarding maintenance, repairs, or construction needed at the governor's mansion to accommodate the governor or his family. You state the board will redact certain information under sections 552.130(c) and 552.136(c) of the Government Code and section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. Additionally, you state release of this information may implicate the interests of the Texas Department of Public Safety ("DPS") and the Office of the Governor (the "governor's office"); accordingly, you state you notified these governmental bodies of

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

the request of information pursuant to section 552.304 of the Government Code. *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 and the governor's office. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have marked portions of the submitted information as not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the board need not release non-responsive information to the requestor.

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 information that is made confidential by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. Section 418.181 provides,

[t]hose 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. Section 418.182 provides, in relevant part:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. § 418.182(a). The fact information may generally be related to a governmental body's security concerns or to a security system does not make the information *per se* confidential under sections 418.181 and 418.182. *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 confidentiality provision, a governmental body asserting sections 418.181 and 418.182 must adequately explain how the responsive information falls within the scope of the statutes. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

We note the governor's mansion is critical infrastructure for purposes of section 418.181. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). DPS argues release of portions of the submitted information will

negatively impact its ability to effectively protect the governor and the governor's mansion. DPS further argues release of the detailed plans of the exterior and interior construction and modifications of the governor's mansion, including plans, dimensions, photographs, specifications, and comprehensive diagrams, would provide information that could aid criminals to avoid detection in the commission of a crime against the mansion and the governor. Although DPS acknowledges "some of the features described in the plans might be visible to anyone outside the mansion or visitors inside the mansion," DPS asserts "having a diagram would make it exponentially easier to study [the detailed plans] at length without attracting the attention of security personnel." Based on these arguments and our review, we agree portions of the information at issue fall within the scope of section 418.181. Accordingly, we have marked a representative sample of the types of information the board must withhold under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.² However, the remaining information at issue does not identify technical details of the governor's mansion. DPS has failed to establish any portion of the remaining information reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See* Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Additionally, we find DPS has not demonstrated how the remaining information at issue relates to the specifications, operating procedures, or location of a security system used to protect public or private property from terrorism or related criminal activity. Therefore, the board may not withhold any of the remaining responsive information under section 552.101 of the Government Code in conjunction with section 418.181 or section 418.182 of the Government Code.

The governor's office and DPS seek to withhold portions of the remaining information pursuant to section 552.152 of the Government Code. Section 552.152 provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. The governor's office and DPS explain the information at issue reveals details of security at the governor's mansion as well as information about members of DPS's Executive Protection Bureau (the "EPB"), which is tasked with providing protective services to the governor, the governor's family, and other elected officials. The governor's office and DPS state revealing the identities of EPB agents would endanger the agents as well as those they are assigned to protect. Additionally, DPS states it does not publicly reveal the identities of the agents who are assigned to protect the governor or other elected officials. Based on these representations and our review, we find the release of this

²As our ruling for this information is dispositive, we need not address the board's, DPS's, or the governor's office's remaining arguments against its disclosure.

type of information, a representative sample of which we have marked, would subject the officers at issue to a substantial threat of harm. Thus, the board must withhold the types of information we have marked under section 552.152 of the Government Code.³

Section 552.101 of the Government Code also encompasses information made confidential by judicial decision and the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm. *Id.* In applying this standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm. but further cautioned, "vague assertions of risk will not carry, the day." *Id.* at 119. Upon review, we conclude DPS has failed to demonstrate the applicability of the common-law physical safety exception to any of the remaining information. Accordingly, the board may not withhold any of the remaining responsive information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Accordingly, the board must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining responsive information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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

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

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 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).

The board contends the information it has marked consists of advice, opinions, and recommendations relating to a policy matter of the board. Upon review, we find the board has established the deliberative process privilege is applicable to some of the information at issue, which we have marked. Therefore, the board may withhold the information we have marked under section 552.111 of the Government Code. However, we conclude the board has not established the remaining information at issue consists of advice, opinion, or recommendations, or it is purely factual in nature. Accordingly, the board may not withhold any of the remaining responsive information at issue under section 552.111 and the deliberative process privilege.

Section 552.117(a)(1) 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 of a governmental body who requests this information

be kept confidential under section 552.024 of the Government Code.⁴ *See* Gov't Code § 552.117(a)(1). We note section 552.117(a)(1) 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). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the board must withhold the cellular telephone numbers we have indicated under section 552.117(a)(1) if the cellular telephone services are not paid for by a governmental body. The board may not withhold this information under section 552.117 if the individuals did not make a timely election to keep the information confidential, or if the cellular telephone services are paid for by a governmental body.

We note some of the submitted information may 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 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.

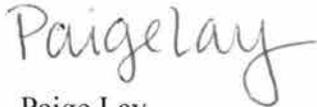
In summary, the board must withhold the information for which we have marked a representative sample under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The board must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The board must withhold the types of information we have marked under section 552.152 of the Government Code. The board may withhold the information we have marked under section 552.111 of the Government Code. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the board must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the board may only withhold the cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. The board must release the remaining responsive information; however, any information subject to copyright may be released only in accordance with copyright law.

⁴The 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 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, 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,



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Open Records Division

PL/bhf

Ref: ID# 579195

Enc. Submitted documents

c: Requestor
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