



KEN FAXTON
ATTORNEY GENERAL OF TEXAS

October 22, 2015

Ms. Jordan Hale
Ms. Diane Morris
Assistant General Counsels
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2015-22210

Dear Ms. Hale and Ms. Morris:

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# 582706 (OOG ID No. 15-320).

The Office of the Governor (the "governor's office") received a request for (1) calendars and schedules for the governor for a specified time period, (2) e-mails to or from the governor provided by a specified type of provider for a specified time period, (3) information pertaining to media inquiries for a specified time period, (4) information pertaining to open records requests for a specified time period, and (5) information pertaining to visitors to specified locations for a specified time period.¹ You state the governor's office will withhold information subject to section 552.117 of the Government Code as permitted by

¹We note, and the governor's office acknowledges, it did not comply with section 552.301 of the Government Code in requesting a ruling from this office for some of the information at issue. *See* Gov't Code § 552.301(b), (e). However, the governor's office only raises sections 552.101 and 552.152 of the Government Code for this information. Sections 552.101 and 552.152 are mandatory exceptions that constitute compelling reasons to withhold information sufficient to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .301, .302, .352. Accordingly, we will consider the arguments of the governor's office under sections 552.101 and 552.152. Further, third-party interests can provide compelling reasons to overcome the presumption of openness. *See id.* §§ 552.007, .302, .352.

section 552.024(c) of the Government Code.² You further state the governor's office will withhold motor vehicle record information under section 552.130(c) of the Government Code and certain information pursuant to section 552.136(c) of the Government Code.³ You also state the governor's office will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).⁴ You state the governor's office will release most of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.152 of the Government Code. Further, you state release of some of the submitted information may implicate the proprietary interests of the Texas Department of Public Safety ("DPS"). Accordingly, you state you informed DPS of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *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.⁵

Initially, we note portions of the requested information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-17336 (2015), 2015-19233 (2015), and 2015-19372 (2015). In these rulings, we concluded the governor's office may withhold certain information under sections 552.107(1) and 552.111 of the Government Code and must release the remaining information. There is no indication the law, facts, and circumstances on which the prior rulings were based have

²Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep information confidential. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official makes a proper election. *See id.* § 552.024(c).

³Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 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 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *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).

⁴Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁵We 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.

changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the governor's office may continue to rely on Open Records Letter Nos. 2015-17336, 2015-19233, and 2015-19372 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

Next, we note the submitted information includes information subject to section 552.022(a)(17) of the Government Code. Section 552.022(a) provides, in relevant part:

(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:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The governor's office must release the information subject to section 552.022(a)(17) unless it is made confidential under the Act or other law. *See id.* Although you seek to withhold the court-filed document under section 552.107(1) of the Government Code, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (Gov't Code § 552.107(1) is not other law for purposes of Gov't Code § 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the governor's office may not withhold the court-filed document under section 552.107(1) of the Government Code. The Texas Supreme Court has held, however, the Texas Rules of Evidence are "other law" that make information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider the governor's office's assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also consider your arguments against disclosure of the remaining information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the information subject to section 552.022 consists of an attachment to a privileged attorney-client communication between attorneys for the governor's office and governor's office employees. You state the communication at issue was made for the purpose of the rendition of legal services to the governor's office. You state the governor's office has not waived the attorney-client privilege with regard to the communication. Based on the governor's office's representations and our review of the information at issue, we find the governor's office has established the information at issue constitutes attorney-client communications under Rule 503. Thus, the governor's office may withhold the information

subject to section 552.022 of the Government Code, which we have marked, pursuant to Rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential, including sections 418.176 and 418.181 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 418.176 provides, in relevant part:

(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 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 418.181 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 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) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting this section must adequately explain how the responsive information falls within the scope of the provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert some of the remaining information reveals staffing requirements of a law enforcement agency, the Office of the Governor Protective Detail, which is staffed with security personnel of the Executive Protection Bureau of DPS (“EPB”). DPS states the information reveals the names of individuals who protect the governor and detailed tactical plans for protecting the governor. You argue release of this information would reveal patterns in security arrangements and staffing requirements of the governor and the governor’s mansion. Upon review, we find you have demonstrated the information you marked relates to the staffing requirements or tactical plan of a law enforcement agency and is 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. Therefore, the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.⁶ DPS argues some of the remaining information is confidential under sections 418.176 and 418.181 of the Government Code. Upon review, we find DPS has failed to establish the remaining information at issue was collected, assembled, or maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and relates to the staffing requirements, relates to a tactical plan, or consists of a list or compilation of pager or telephone numbers of an emergency response provider. *See id.* § 418.176(a). Further, we find DPS failed to establish any of the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the governor's office may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.176 or section 418.181 of the Government Code.

Section 552.107(1) protects information that comes within the attorney-client privilege. *See Gov't Code* § 552.107(1). The elements of the privilege under section 552.107 are the same as those for Rule 503. 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. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie*, 922 S.W.2d at 923.

You claim the information at issue consists of a communication between attorneys for the governor's office and governor's office employees. You state the communication was made for the purpose of facilitating the rendition of professional legal services to the governor's office. You further state this communication was intended to be confidential and has 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 governor's office may withhold the remaining information you marked 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*

⁶As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

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 (1993), 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 that 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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 at issue consists of advice, opinions, and recommendations relating to policymaking of the governor's office. Upon review, we conclude the governor's office may withhold the information you marked under section 552.111 of the Government Code.

Section 552.101 of the Government Code also encompasses 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. DPS argues release of portions of the remaining information would subject the governor, EPB agents, and visitors to the governor's mansion to a substantial threat of physical harm. Upon review, we find DPS has not demonstrated how the release of the remaining information at issue would subject any person to a substantial threat of physical harm. Accordingly, the governor's office may not withhold the remaining information at issue under section 552.101 on that basis.

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); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Tex. App.—Austin 2002, no pet.) (Gov’t Code 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

DPS argues release of some of the remaining information would reveal techniques used to identify potential threats to public safety. DPS explains these techniques are used to detect information that is established by criminal predicate and then passed to investigators as leads to ongoing criminal activity. DPS further argues some of the information at issue is used to assess ongoing and future risks to persons and property. DPS also argues release of some of remaining information at issue would subject the governor, EPB agents, and visitors to the governor’s mansion to a substantial threat of physical harm. Based on DPS’s arguments and our review, we agree the release of the information we marked would interfere with law enforcement. Accordingly, the governor’s office may withhold the information we marked under section 552.108(b)(1) of the Government Code on behalf of DPS. However, we find DPS failed to demonstrate release of the remaining information at issue would interfere with law enforcement. Thus, no portion of the remaining information at issue may be withheld under section 552.108(b)(1).

Section 552.152 of the Government Code 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. DPS argues release of the remaining information at issue would subject the EPB agents to a substantial threat of physical harm. Upon review, we find DPS has not demonstrated the release of the remaining information at issue would subject the EPB

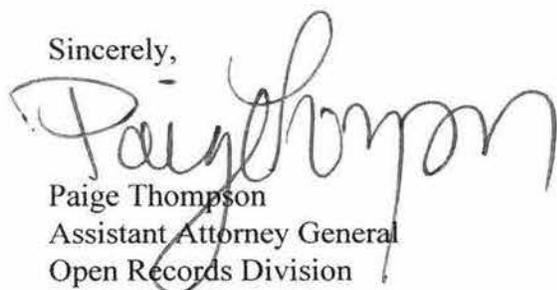
agents at issue to a substantial threat of harm. Therefore, the governor's office may not withhold any of the remaining information at issue under section 552.152 of the Government Code.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, the governor's office may continue to rely on Open Records Letter Nos. 2015-17336, 2015-19233, and 2015-19372 as previous determinations and withhold or release the identical information in accordance with those rulings. The governor's office may withhold the information subject to section 552.022 of the Government Code, which we have marked, pursuant to Rule 503 of the Texas Rules of Evidence. The governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The governor's office may withhold the remaining information it marked under section 552.107(1) of the Government Code. The governor's office may withhold the information it marked under section 552.111 of the Government Code. The governor's office may withhold the information we marked under section 552.108(b)(1) of the Government Code on behalf of DPS. The governor's office 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 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,

A handwritten signature in black ink, appearing to read "Paige Thompson". The signature is written in a cursive, flowing style with a large initial "P".

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 582706

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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