



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 12, 2015

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

OR2015-23800

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# 586918 (PIR # 15-2841).

The Texas Department of Public Safety (the "department") received a request for all e-mails sent and received by a named individual during a specified period of time.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, 552.108, 552.111, 552.116, and 552.152 of the Government Code.² Additionally, you provide documentation showing you have notified the Austin Police Department, the Federal Bureau of Investigations (the "FBI"), the Office of the Governor (the "governor's office"), the State Auditor's Office (the "SAO"), and the United States Department of Homeland Security of their rights to submit comments to this office explaining why the submitted information should not be released. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We have received

¹You state the requestor modified his request in response to a cost estimate. *See Gov't Code* § 552.263(e-1) (modified request is considered received on the date the governmental body receives the written modification). You also state the requestor was required to make a deposit for payment of anticipated costs for the request under section 552.263 of the Government Code, which the department received on August 24, 2015. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See Open Records Decision No. 676 at 1-2 (2002).*

comments from the FBI and the governor's office.³ We have considered the submitted arguments and reviewed the submitted representative sample of information.⁴ We have also received and considered comments from the requestor. *See id.*

Initially, 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:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

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

Id. § 552.022(a)(1), (3). The submitted information includes a completed evaluation that is subject to section 552.022(a)(1). The department must release the completed evaluation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains information in an invoice that is subject to section 552.022(a)(3), which must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek to withhold the completed evaluation and invoice under section 552.106 of the Government Code. However, section 552.106 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information at issue, which we have marked, may not be withheld under section 552.106 of the Government Code. We note some of the information at issue

³As of the date of this letter, this office has not received comments from any of the remaining third parties explaining why any of the submitted information should not be released.

⁴We 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 those records contain substantially different types of information than that submitted to this office.

is subject to section 552.117 of the Government Code.⁵ As section 552.117 can make information confidential, we will address its applicability to the information at issue.

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. ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. 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. *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 a 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 that 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 the information you have indicated consists of communications between department attorneys, department employees, and employees of other governmental bodies who are privileged parties with respect to the information at issue. You state these communications were made in furtherance of the rendition of professional legal services to the department. You state these communications were not intended to be, and have not been,

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

disclosed to non-privileged third parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the department may withhold the information you have indicated under section 552.107(1) of the Government Code.⁶

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[.]” Gov’t Code § 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 remaining 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.⁷ However, we find you have failed to demonstrate 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 552.108(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 this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex*

⁶As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

parte Pruitt, 551 S.W.2d 706 (Tex. 1977). You state the information in Tab H relates to active criminal cases. Based upon your representation, we conclude release of the information at issue would interfere with the detection, investigation, or prosecution of 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, we find the department may withhold Tab H under section 552.108(a)(1) of the Government Code.

Section 552.108(b) 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 (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 argue release of the information in Tabs I, J, K, and L “would reveal techniques used to identify potential threats to public safety.” You assert the “techniques are used to detect information that is established by criminal predicate and then passed to investigators in the field as leads to ongoing crimes being committed, in the planning stage[,] or criminal conspiracies . . . that are evolving.” You state the information at issue includes “information used to assess ongoing and future risks to persons and property and are maintained by the [d]epartment for this purpose.” You assert release of this information would provide

wrong-doers, terrorists, and other criminals with information concerning law enforcement efforts that would allow these groups to identify vulnerabilities and avoid detection. Additionally, the FBI asserts release of its information would interfere with current investigative interests. Based on your representations and our review, we find the release of some of the information at issue would interfere with law enforcement. Therefore, the department may withhold the information we have indicated under section 552.108(b)(1) of the Government Code.⁸ However, we conclude you have not established the release of the remaining information at issue would interfere with law enforcement. Further, the FBI has failed to demonstrate release of the remaining information would interfere with law enforcement. Therefore, the department may not withhold any of the remaining information at issue under section 552.108(b)(1).

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, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions 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, 157 (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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily

⁸As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, 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 which the governmental body establishes it has a privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body.

The department and the governor's office state some of the remaining information consists of advice, opinions, and recommendations relating to the department's policymaking. You also state the information at issue contains draft documents that will be released to the public in their final form. Further, you inform us some of the communications at issue involve other governmental bodies, with which you state the department shares a privity of interest. Upon review, we find the department may withhold some of the information at issue, which we have marked, under section 552.111 of the Government Code.⁹ However, the remaining information at issue consists of either general administrative information that does not relate to policymaking, information that is purely factual in nature, or information shared with a party you have not demonstrated shares a privity of interest or common deliberative process. Thus, we find the department has failed to demonstrate the remaining information at issue is excepted under section 552.111. Accordingly, the department may not withhold the remaining information at issue under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides,

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003; Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

⁹As our ruling is dispositive, we need not consider the argument of the governor's office against disclosure.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You assert Tab G consists of audit working papers pertaining to audits conducted by the department pursuant to section 411.243 of the Government Code and by the SAO pursuant to section 321.013 of the Government Code. We note the SAO is an independent auditor for Texas state government. The SAO has authority under section 321.013 of the Government Code to conduct investigations and audits of all state departments as specified in the audit plan or as directed by the Legislative Audit Committee. *See id.* § 321.013(a), (f). We note, however, section 552.116 is intended to protect the auditor's interests. As previously noted, some of the audits at issue are being conducted by the SAO. In this instance, the department cannot assert section 552.116 in order to protect the SAO's audit working papers. You do not inform us the SAO seeks to withhold the information at issue under section 552.116. Accordingly, section 552.116 is inapplicable and does not protect the information at issue from disclosure. Section 411.243 provides that the department's office of audit and inspection shall inspect all department divisions to ensure that operations are conducted in compliance with established procedures and make recommendations for improvements in operational performance. *Id.* § 411.243(a)(1); *see also id.* § 411.241(1) (office shall inspect and audit departmental programs and operations for compliance with established procedures and develop recommendations for improvement). Based on your representations and our review, we agree the remaining information in Tab G constitutes audit working papers of the department. Therefore, with the exception of information that pertains to audits conducted by the SAO pursuant to section 321.013 of the Government Code, the department may withhold the information in Tab G under section 552.116 of the Government Code.

The FBI asserts the remaining information pertaining to the FBI is excepted under section 552.101 of the Government Code in conjunction with the federal Freedom of Information Act (“FOIA”), chapter 552 of the United States Code.¹⁰ In Attorney General Opinion MW-95 (1979), this office determined FOIA does not apply to records held by an agency of the State of Texas or its political subdivisions. Furthermore, this office has stated in numerous opinions information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure under the Act merely because the same information is or would be confidential under one of FOIA’s exemptions. *See* Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). However, if a federal agency shares its information with a Texas governmental agency, the Texas agency must withhold the information the federal agency determines to be confidential under federal law. *See* ORD 561 at 6-7; *accord United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (finding documents FBI lent to city police department remained property of FBI and were subject to any restrictions on dissemination of FBI-placed documents). Upon review, we conclude the e-mails at issue were not simply shared with the department by the FBI, but rather are maintained by the department in relation to the official business of the department. *See* Gov’t Code § 552.002(a)(1). Consequently, the e-mails at issue may not be withheld under FOIA.

The FBI also generally asserts the remaining information is excepted under section 552.101 in conjunction with federal law. However, the FBI has not directed our attention to any federal law, nor are we aware of any federal law, that makes the remaining e-mails confidential. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses sections 418.176, 418.177, and 418.181 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 418.176 of the HSA 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 the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

(2) relates to a tactical plan of the provider; or

¹⁰Section 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.

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers of the provider.

Id. § 418.176(a)(1)-(3). 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.

Id. § 418.177. 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).

Upon review, we find you have failed to demonstrate the remaining information you have indicated is confidential under sections 418.176, 418.177, or 418.181 of the Government Code. Therefore, the department may not withhold any of the remaining information you have indicated under section 552.101 of the Government Code in conjunction with sections 418.176, 418.177, or 418.181 of the Government Code.

As noted above, section 552.101 of the Government Code encompasses information made confidential by other statutes. You state the information in Tab B consists of records generated during the department's internal alternative dispute resolution process. You explain the mediation process for employee complaints is governed by section 411.0073 of the Government Code, which provides:

(a) The [Public Safety Commission] shall establish procedures for [a department] employee to resolve an employment-related grievance covered by Section 411.0072 through mediation if the employee chooses. The procedures must include mediation procedures and establish the circumstances under which mediation is appropriate for an employment-related grievance.

(b) Except for Section 2008.054, Chapter 2008, as added by Chapter 934, Acts of the 75th Legislature, Regular Session, 1997, does not apply to the mediation. The mediator must be trained in mediation techniques.

Id. § 411.0073. You state section 411.0073(a) establishes procedures for a department employee to resolve an employment-related grievance through mediation, if the employee chooses. *See id.* You also state the mediation process for employee complaints under section 411.0073 is subject to the confidentiality provided in section 2009.054 of the Government Code. We note chapter 2008, as added by chapter 934 of the 75th Legislature, referenced in section 411.0073(b) was renumbered to chapter 2009 of the Government Code by the 76th Legislature. Act of April 28, 1999, 76th Leg., R.S., ch. 62, § 19.01(55), 1999 Tex. Gen. Laws 127, 415. We agree pursuant to section 411.0073(b), section 2009.054 of the Government Code applies to the department's employment-related grievance process. Section 2009.054 provides:

(a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the impartial third party and the parties.

(b) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:

(1) a communication relevant to the dispute, and a record of the communication, made between an impartial third party and the parties to the dispute or between the parties to the dispute during the course of an alternative dispute resolution procedure are confidential and may not be disclosed unless all parties to the dispute consent to the disclosure; and

(2) the notes of an impartial third party are confidential except to the extent that the notes consist of a record of a communication with a party and all parties have consented to disclosure in accordance with Subdivision (1).

Gov't Code § 2009.054(a)-(b). Section 2009.054(b) provides for the confidentiality of communications made during an alternative dispute resolution procedure and the notes of the impartial third party. *See id.* § 2009.054(b). As noted above, you state the information in Tab B consists of records generated during the department's employment-related grievance

process. We note the information consists of communications made during the grievance process. Accordingly, the department must withhold Tab B under section 552.101 of the Government Code in conjunction with section 2009.054(b) of the Government Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides, in part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a), (b). The remaining information contains information acquired from a polygraph examination. The requestor does not fall within any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, the department must withhold the polygraph information, which we have marked, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.¹¹ Upon review, we find none of the remaining information in Tab C is subject to section 1703.306, and the department may not withhold it under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides, in part, as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

¹¹As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

Fam. Code § 261.201(a). Upon review, we find the information we have marked relates to an investigation of alleged or suspected child abuse or neglect conducted by the department. *See id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). Accordingly, we find this information is subject to chapter 261 of the Family Code. You do not indicate the department has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, we conclude the information we have marked is confidential pursuant to section 261.201 of the Family Code, and the department must withhold it under section 552.101 of the Government Code.¹² *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). However, we find you have failed to demonstrate any portion of the remaining information was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201(a)(2). Furthermore, you have not established the information is a report of alleged or suspected abuse or neglect made under section 261.201(a)(1). *See* Fam. Code § 261.001(1), (4). Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov’t Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. Upon review, we find some of the remaining information, which we have marked, consists of CHRI that is confidential under section 411.083. Thus, the department must withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code.

¹²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. Types of information considered highly intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.¹³ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3.

Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* ORD 600 (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. ORD 545.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under

¹³Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused. However, the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, some of the remaining information is related to a sexual harassment investigation and does not include an adequate summary. Therefore, the department must generally release the information pertaining to the investigation. However, this information contains the identity of the alleged sexual harassment victim. Therefore, the department must withhold the identifying information of the alleged victim, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. *See* 840 S.W.2d at 525. However, we find the department has not demonstrated any portion of the remaining information identifies a victim or witness of sexual harassment and, thus, has not demonstrated the remaining information is highly intimate or embarrassing and not of legitimate public interest. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold all public citizens' dates of birth and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses information made confidential by the common-law physical safety exception. The Texas Supreme Court has recognized 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 (Tex. 2011) (holding "freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). Pursuant to the 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 new 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 find you have not demonstrated disclosure of the remaining information you have indicated would create a substantial threat of physical harm to an individual. Thus, the department may not withhold any of the remaining information you have indicated under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.117(a)(2) of the Government Code applies to records a governmental body holds in an employment capacity and 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. *See Gov’t Code* § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. 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). Accordingly, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, 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. *Gov’t Code* § 552.117(a)(1). As noted above, section 552.117 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See ORD 506 at 5-6*. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. The department may only withhold the information at issue under section 552.117(a)(1) if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals whose information is at issue made a timely election under section 552.024, then the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code.¹⁴ However, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. If the individuals whose information is at issue did not make a timely election under section 552.024, then their information may not be withheld under section 552.117(a)(1) of the Government Code.

¹⁴As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Section 552.1175 applies, in part, to peace officer as defined by article 2.122(a) of the Code of Criminal Procedure, criminal investigators of the United States as described by Article 2.122(a) of the Code of Criminal Procedure, and federal and state judges as defined by section 13.0021 of the Election Code. Gov't Code § 552.1175(a)(1), (7), (13). Some of the remaining information is subject to section 552.1175. Accordingly, if the individuals whose information is at issue elect to restrict access to their information in accordance with section 552.1175(b), then the department must withhold the information we have marked under section 552.1175 of the Government Code; however, the cellular telephone numbers we have marked may only be withheld if a governmental body does not pay for the cellular telephone service. Conversely, if the individuals whose information is at issue do not elect to restrict access to their information in accordance with section 552.1175(b) or a governmental body does pay for the cellular telephone service, then the marked information may not be withheld under section 552.1175.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130(a). Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the personal e-mail addresses in the remaining information, a representative sample of which we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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.

Id. § 552.152. Upon review, we find you have not demonstrated the release of the remaining information you have indicated would subject an employee or officer to a substantial risk of physical harm. Accordingly, the department may not withhold the remaining information you have indicated under section 552.152 of the Government Code.

In summary, the department may withhold (1) the information we have marked under section 552.106 of the Government Code; (2) Tab H under section 552.108(a)(1) of the Government Code; (3) the information we have indicated under section 552.108(b)(1) of the Government Code; (4) the information we have marked under section 552.111 of the Government Code; and (5) with the exception of information that pertains to audits conducted by the SAO pursuant to section 321.013 of the Government Code, the information in Tab G under section 552.116 of the Government Code. The department must withhold (1) Tab B under section 552.101 of the Government Code in conjunction with section 2009.054(b) of the Government Code; (2) the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; (3) the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code; (4) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*; and (5) all public citizens' dates of birth and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code; (2) the information we have marked under section 552.117(a)(1) of the Government Code, if the individuals whose information is at issue timely elected confidentiality under section 552.024 of the Government Code; and (3) the information we have marked under section 552.1175 of the Government Code if the individuals whose information is at issue elect to restrict access to their information in accordance with section 552.1175(b). However, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code and the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the marked e-mail addresses affirmatively consent to their public disclosure. The department must release the remaining information.¹⁵

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.

¹⁵We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/bhf

Ref: ID# 586918

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. John B. Wear
Chief Division Counsel
Federal Bureau of Investigation
U.S. Department of Justice
5740 University Heights
San Antonio, Texas 78249-1835
(w/o enclosures)

Ms. Jordan Hale
Public Information Coordinator
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711
(w/o enclosures)