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ATTORNEY GENERAL OF TEXAS

November 12, 2015

Ms. Jordan Hale
Public Information Coordinator
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2015-23804

Dear Ms. Hale:

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# 586858 (OOG ID Nos. 15-353 & 15-359).

The Office of the Governor (the "governor's office") received two requests from different requestors for (1) calendars and schedules for the governor for specified time periods, (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. The governor's office states it is releasing some of the requested information. The governor's office informs us it has redacted information pursuant to sections 552.024(c)¹ and 552.130(c)² of the Government Code and Open Records Decision No. 684 (2009).³ The governor's office claims some of the submitted information is excepted from disclosure

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

²Section 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).

³Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of 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 opinion.

under sections 552.101, 552.104, 552.111, and 552.152 of the Government Code.⁴ The governor's office also informs us it has notified the Department of Public Safety ("DPS") of their right to submit comments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have received comments from DPS. We have considered the submitted arguments and reviewed the submitted representative sample of information.⁵

We note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-22210 (2015). In Open Records Letter No. 2015-22210, we determined (1) 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), 2015-19233 (2015), and 2015-19372 (2015) as previous determinations and withhold or release the identical information in accordance with those rulings; (2) may withhold certain information pursuant to Rule 503 of the Texas Rules of Evidence; (3) must withhold certain information under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code; (4) may withhold certain information under section 552.107(1) of the Government Code; and (5) may withhold certain information under section 552.111 of the Government Code; but must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have 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 must continue to rely on Open Records Letter No. 2015-22210 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address the governor's office's arguments for the submitted information, which was not at issue in Open Records Letter No. 2015-22210.

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. The governor's office raises section 552.101 in conjunction with sections 418.176, 418.181, and 418.182 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

⁴Although the governor's office raises section 552.107 of the Government Code, it makes no arguments to support this exception. Therefore, we assume the governor's office has withdrawn its claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

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

provisions make certain information related to terrorism confidential. 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), (a)(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. Section 418.182 provides:

(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 that information may be related to a governmental body's security concerns, emergency preparedness, or security system does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions 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 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).

The governor's office asserts some of the remaining information reveals staffing requirements of a law enforcement agency, the Office of the Governor Protective Detail (the "OOGPD"), which is staffed with security personnel of the Executive Protection Bureau of DPS. We note the information reveals the names of individuals who travel with and protect the governor and details tactical plans for protecting the governor. The governor's office argues 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 the

governor's office has demonstrated the information it has 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 it has marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.⁶

Additionally, the governor's office states the governor's mansion is critical infrastructure for purposes of section 418.181. *See id.* § 421.004 (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). The governor's office argues the release of some of the remaining information could aid terrorists and criminals to avoid detection and in the commission of crimes against the governor's mansion, the governor, the first lady and family, staff, members of the OOGPD, and guests at the governor's mansion. Based on the governor's office's representations and our review, we find the information it has marked falls within the scope of section 418.181. Accordingly, the governor's office must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.⁷

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The governor's office argues expansion and recruitment of businesses to the State of Texas is a competitive process and the governor's office informs us it "works tirelessly to promote Texas, in part by providing state resources to encourage business growth within the state." The governor's office states "Texas devotes substantial resources to programs designed primarily to attract new businesses to the state or assist with the substantial expansion of an existing business as part of competitive recruitment." The governor's office explains it is currently negotiating potential approvals or contracts with the entity at issue, and contracts with this entity have not been executed. The governor's office argues release of this information, before contracts are signed or final approval given, would disadvantage Texas by permitting other states to directly approach this entity with competing incentives. Based on the governor's office's representations and our review, we find the governor's office has demonstrated it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. We also find the governor's office has demonstrated release of the information it has marked would give advantage to a competitor or bidder. Accordingly, the governor's office may withhold the information it has marked under section 552.104 of the Government Code.

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

⁷As our ruling is dispositive, we need not address the governor's office's remaining argument against disclosure of this information.

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 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.

The governor’s office states the information it has marked consists of advice, opinions, and recommendations relating to the governor’s office’s policymaking. The governor’s office also states the information at issue contains draft documents that will be released to the public in final form. Upon review, we find the governor’s office may withhold the information it has marked under section 552.111 of the Government Code.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the governor’s office must continue to

rely on Open Records Letter No. 2015-22210 as a previous determination and withhold or release the identical information in accordance with that ruling. The governor's office must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code and section 418.181 of the Government Code. The governor's office may withhold the information it has marked under section 552.104 of the Government Code. The governor's office may withhold the information it has marked under section 552.111 of the Government Code. 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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 586858

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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