



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 31, 2016

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

OR2016-07262

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# 604106 (PIR # 15-6077).

The Texas Department of Public Safety (the "department") received a request for any and all records related to or referencing racial profiling, as well as communications involving certain named individuals, to include the requestor, during a specified period of time.<sup>1</sup> The department indicates that some of the requested information is being released to the requestor. We understand you have redacted certain responsive information pursuant to section 552.130(c) of the Government Code, and dates of birth pursuant to the previous determination issued to the department in Open Records Letter No. 2015-27249 (2015).<sup>2</sup>

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<sup>1</sup>You state the department sought and received clarification of the request for information. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Additionally, you inform us the requestor was required to make a deposit for payment of anticipated costs under section 552.263 of the Government Code, which the department received on January 7, 2016. *See* Gov't Code § 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).

<sup>2</sup>Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 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). Open Records Letter No. 2015-27249 authorizes the department to withhold dates of birth under section 552.101 of the Government Code in conjunction with common law privacy without requesting a decision.

The department claims the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted information.

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. Open Records Decision No. 676 at 6-7 (2002). 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).

The department states the information in Tab A consists of communications between department attorneys, department representatives, and other department employees. The department states the communications were made for the purpose of facilitating the rendition of professional legal services to the department and these communications have remained

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<sup>3</sup>Although you also raise Texas Rule of Evidence 503 in conjunction with section 552.101 of the Government Code, 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).

confidential. Upon review, we find the department has demonstrated the applicability of the attorney-client privilege to the submitted information in Tab A. Thus, the department may generally withhold the information in Tab A under section 552.107(1) of the Government Code.<sup>4</sup> We note, however, some of the otherwise privileged e-mail strings include e-mails and attachments received from or sent to parties you have not demonstrated are privileged parties. We find these e-mails and attachments are separately responsive. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the department separate and apart from the otherwise-privileged e-mail strings in which they appear, then the department may not withhold them under section 552.107(1) of the Government Code. We will address your arguments under section 552.111 for this information if section 552.107 is inapplicable.

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).

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<sup>4</sup>As our ruling is dispositive, we need not address the department’s remaining arguments against disclosure of some of this information.

The department argues releasing the submitted records would reveal techniques used to identify threats to public safety and would provide criminals with invaluable information concerning law enforcement efforts, allowing criminals to identify vulnerabilities and avoid detection. Upon review, we find the department has demonstrated release of the information we have marked in Tab B would interfere with law enforcement. Thus, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. We find the department has not demonstrated that release of any of the remaining information would interfere with law enforcement. Accordingly, none of the remaining submitted information may be withheld under section 552.108(b).

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *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, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document 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 a privity of interest. *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. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

The department informs us the information in Tab C, and the portion of the information in Tab A we have marked as not privileged, consist of drafts of documents and communications among department staff, and between department staff and other governmental bodies communicating in their policy-making capacities, regarding these drafts and the contents therein. The department states that these records reflect the discussions and thought processes by and among department personnel and personnel of other governmental bodies related to policymaking. The department further states the draft documents will be or have been released to the public in their final form. Upon review, we find the department has established the deliberative process privilege is applicable to the information we have marked in Tab C. Therefore, the department may withhold the information we have marked under section 552.111 of the Government Code. However, we find 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 that reflects communications with parties with whom the department has not demonstrated it shares a privity of interest. Thus, we find the department has not demonstrated 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.

We note some of the submitted information may be subject to section 552.117 of the Government Code.<sup>5</sup> Section 552.117(a)(2) of the Government Code 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

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

sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *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). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We are unable to determine whether the individuals whose information we have marked are currently licensed peace officers as defined by article 2.12. Accordingly, to the extent the individuals are currently licensed peace officers and the cellular telephone service is not paid for by a governmental body, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, if the individuals are not currently licensed peace officers, or the cellular telephone service is paid for by a governmental body, then the department may not withhold information we have marked under section 552.117(a)(2) of the Government Code.

If the individuals are not currently licensed peace officers, then the personal information may be subject to section 552.117(a)(1) of the Government Code, which 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 request that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Thus, to the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, the department may not withhold the information under section 552.117(a)(1).

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. *Id.* § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Section 552.1175 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 (1988). In this instance, it is unclear whether the individual whose information we have marked is a currently licensed peace officer as defined by article 2.12. Thus, if the information we have marked pertains to a

currently licensed peace officer and the officer elects to restrict access to her information in accordance with section 552.1175(b), and the cellular telephone service is not paid for by a governmental body, then the department must withhold the information we have marked under section 552.1175 of the Government Code. However, if the individual whose information we have marked is not a currently licensed peace officer or no election is made, or the cellular telephone service is paid for by a governmental body, then the department may not withhold this information under section 552.1175.

Finally, section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).<sup>6</sup> *Id.* § 552.137(a)-(c). The department must withhold the personal e-mail addresses contained in the submitted information, a representative sample of which we have marked, under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

In summary, the department may generally withhold the information in Tab A under section 552.107(1) of the Government Code. We note, however, if the non-privileged e-mails and attachments we have marked are maintained by the department separate and apart from the otherwise-privileged e-mail strings in which they appear, then the department may not withhold them under section 552.107(1) of the Government Code, and they must be released. The department may withhold the information we have marked in Tab B under section 552.108(b)(1) of the Government Code. The department may withhold the information we have marked in Tab C under section 552.111 of the Government Code. If the individuals whose information we have marked are currently licensed peace officers, then the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code, if the cellular telephone service is not paid for by a governmental body. If the individuals whose information we have marked are not currently licensed peace officers, then to the extent the individuals timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if the cellular telephone service is not paid for by a governmental body. If the information we have marked pertains to a currently licensed peace officer and the officer elects to restrict access to her 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, if the cellular telephone service is not paid for by a governmental body. The department must withhold the personal e-mail addresses, a representative sample of which we have marked, under section 552.137

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<sup>6</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480(1987), 470 (1987).

of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The remaining information must be released.<sup>7</sup>

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/eb

Ref: ID# 604106

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>7</sup>We note the information being released contains the requestor's e-mail address. *See* Gov't Code § 552.137(a)-(c). The requestor has a right of access to his e-mail address under section 552.137(b). *See id.* § 552.137(b). Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold an e-mail address of a member of the public under section 552.137 without requesting a decision. Thus, should the department receive another request for the information at issue from a different requestor, the department is authorized to withhold the requestor's e-mail address without requesting another ruling.