



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2014

Ms. Patricia M. Crawson
Chief Warrant Officer 2
Public Information Officer
Texas Military Forces
P.O. Box 5218
Austin, Texas 78763-5218

OR2014-20020

Dear Ms. Crawson:

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# 540076.

The Texas Military Forces ("TMF") received a request for all rules, policies, and memoranda pertaining to Operation Strong Safety, and all e-mails, or other communications to or from the Office of the Governor (the "governor's office") and the Texas Department of Public Safety ("DPS") related to the operation. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the interests of third parties. Accordingly, you state you notified the governor's office and DPS of the request for information and of the right of each to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments stating why information should or should not be released). We have received comments from the governor's office and DPS. We have reviewed the submitted arguments and the submitted information.

Initially, we note TMF has marked portions of the submitted information as nonresponsive. This ruling does not address the public availability of nonresponsive information, and TMF is not required to release nonresponsive information in response to this request.

Next, we note the submitted information contains information used to estimate the need for or expenditure of public funds or taxes by a governmental body that is subject to section 552.022 of the Government Code. Section 552.022(a)(5) of the Government Code provides for the required public disclosure of “all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate,” unless the information is confidential under the Act or other law. *Id.* § 552.022(a)(5). TMF seeks to withhold the information at issue under sections 552.101, 552.108, and 552.111 of the Government Code. Sections 552.108 and 552.111 are discretionary exceptions and do not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 6-7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, TMF may not withhold the information subject to section 552.022 under section 552.108 or section 552.111. However, because section 552.101 of the Government Code protects information made confidential under law, we will consider the applicability of this exception to the information subject to section 552.022. Additionally, we will consider the applicability of sections 552.108 and 552.111 of the Government Code to the information not subject to section 552.022.

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 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001,

no pet.); ORD 615 at 4-5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document 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.

Further, section 552.111 can encompass communications between a governmental body and a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 at 9.

TMF and the governor's office assert portions of the submitted responsive information not subject to section 552.022 of the Government Code consist of advice, opinions, and recommendations relating to TMF policymaking. TMF states the information at issue consists of communications between staff members of TMF, the governor's office, and DPS. TMF further states these communications were exchanged between these parties in order to request input and provide recommendations, specifically opinions and revisions on a TMF presentation. We understand TMF to assert it shares a privity of interest with the governor's office and DPS in regards to the information at issue. Upon review, we find TMF has established it shares a privity of interest with the governor's office and DPS. Further, the governor's office explains portions of the information consist of draft documents relating to border operation policy issues. The governor's office also explains these drafts were shared with TMF for the purpose of responding to public safety matters and the drafts will be released in their final forms. Thus, TMF may withhold the draft documents we marked in

their entireties under section 552.111 of the Government Code.¹ Additionally, we find the remaining information we marked consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, TMF may withhold the remaining information we marked under section 552.111 of the Government Code. However, TMF has failed to establish that any portion of the remaining responsive information constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of TMF. Accordingly, TMF may not withhold any portion of the remaining responsive information under section 552.111 of the Government Code.

Next, we address TMF's and DPS's arguments under section 552.108 of the Government Code for the remaining information not subject to section 552.022 of the Government Code. Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). A governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. Section 552.108(b)(1) 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." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 at 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

TMF and DPS argue that portions of the information at issue must be withheld under section 552.108(b)(1). TMF states this information includes "military force structure, proposed locations, number of personnel per location, personnel capabilities, types of equipment and their capability, timelines, and proposed number of operational hours." TMF asserts release of the information at issue could provide criminals and terrorist organizations the information necessary to circumvent the law and enter the United States illegally. TMF further asserts release of the information at issue could pose an operational risk to other law

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

enforcement agencies operating along the border. DPS asserts release of the information at issue would provide criminals with “invaluable information concerning the law enforcement efforts at the Texas border, allowing [criminals] to identify vulnerabilities and avoid detection.” DPS additionally asserts release of the information at issue would “reveal confidential staffing requirements and tactical plans of [DPS] and other law enforcement agencies during this ongoing operation, endangering the safety of both law enforcement personnel and the public in these areas.” Based on these representations and our review, we agree the release of some of the information at issue, which we have marked, would interfere with law enforcement. Accordingly, TMF may withhold the information we have marked under section 552.108(b)(1) of the Government Code.² However, we find neither TMF nor DPS have demonstrated how release of any of the remaining information would interfere with law enforcement or crime prevention. Accordingly, TMF may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

DPS raises section 552.101 of the Government Code for portions of the remaining submitted information. Section 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. Section 552.101 encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. Upon review, we find DPS has not demonstrated how disclosure of the remaining information would create a substantial threat of physical harm to an individual. Therefore, TMF may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

TMF and DPS both seek to withhold portions of the remaining information under section 552.101 of the Government Code in conjunction with section 418.176 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 552.101 encompasses information that is made confidential by other statutes, including the HSA. 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:

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(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[.]

Id. § 418.176(a)(1)-(2). The fact that information may generally be related to emergency preparedness does not make the information *per se* confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting this section must adequately explain how the responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

TMF argues release of the information at issue would reveal confidential staffing requirements and tactical plans of TMF, which exist for the purpose of preventing and detecting terrorism or related criminal activity. Additionally, DPS asserts the information at issue discusses “ongoing operations by DPS and other law enforcement agencies at the Texas border to detect, prevent, and respond to terroristic threats and other criminal activities.” Upon review, we find some of the remaining information relates to the staffing requirements or a tactical plan of an emergency response provider 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, TMF must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.³ However, we find TMF and DPS have failed to demonstrate the remaining information at issue is protected under this provision. Therefore, the remaining information is not subject to section 418.176 of the Government Code and TMF may not withhold it on that basis.

DPS also raises section 552.101 of the Government Code in conjunction with section 418.177 of the HSA. 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.

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

Id. § 418.177. Upon review, we find DPS has failed to show how any of the remaining information at issue falls within the scope of section 418.177. Accordingly, TMF may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.

TMF also raises section 552.101 of the Government Code in conjunction with section 418.180 of the HSA. Section 418.180 provides that information is confidential if it:

- (1) is part of a report to an agency of the United States;
- (2) relates to an act of terrorism or related criminal activity; and
- (3) is specifically required to be kept confidential:
 - (A) under section 552.101 because of a federal statute or regulation;
 - (B) to participate in a state-federal information sharing agreements;
or
 - (C) to obtain federal funding.

Id. § 418.180. Upon review, we find you have failed to show how any of the remaining information at issue falls within the scope of section 418.180. Accordingly, TMF may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.180 of the Government Code.

TMF also asserts portions of the remaining responsive information are excepted under section 552.101 of the Government Code in conjunction with the federal Freedom of Information Act ("FOIA"), section 552 of title 5 of the United States Code. We note FOIA is applicable to information held by an agency of the federal government. *See* 5 U.S.C. § 551(1). The submitted information is maintained by TMF, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Open Records Decision No. 561 at 7 n.3 (1990) (federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.,* Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); ORD 124 (fact that information held by federal agency is exempted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas

governmental body). Therefore, TMF may not withhold any of the remaining responsive information on the basis of FOIA.

DPS also raises section 552.152 of the Government Code, which provides the following:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] 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 DPS has not demonstrated the release of the remaining information at issue would subject an employee of either TMF or DPS to a substantial risk of physical harm. Accordingly, TMF may not withhold the any portion of the remaining information under section 552.152 of the Government Code.

In summary, TMF may withhold the information we have marked under section 552.111 of the Government Code. TMF may withhold the information we have marked under section 552.108(b)(1) of the Government Code. TMF must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The remaining submitted responsive information must be released.

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

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

Sincerely,



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Open Records Division

ATA/ac

Ref: ID# 540076

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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