



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 18, 2022

Ms. Sarah E. Alexander
Chief Warrant Officer 2
Texas Military Department
P.O. Box 5218
Austin, Texas 78763-5218

OR2022-11216

Dear Ms. Alexander:

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# 941910 (ORR T22-42).

The Texas Military Department (the "department") received a request for information pertaining to hardship requests for Operation Lone Star. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the 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 section 437.232 of the Government Code, which provides, as follows:

(a) In this section, "military personnel information" means a service member's name, home address, rank, official title, pay rate or grade, state active duty orders, deployment locations, military duty addresses, awards and decorations, length of military service, and medical records.

¹ Although you raise section 552.1175 of the Government Code, we note section 552.117 of the Government Code is the proper exception to raise for information the department holds in its capacity as an employer.

(b) A service member's military personnel information is confidential and not subject to disclosure under Chapter 552.

Id. § 437.232. Upon review, we find the information we have marked consists of military personnel information maintained by the Texas military forces. *See id.* § 437.001(8) (providing "service member" for purposes of chapter 437 means a member or former member of the state military forces or a component of the United States armed forces, including a reserve component), (13) (providing the department is the state agency charged with administrative activities in support of the Texas military forces), (14) (providing that "Texas military forces" for purposes of chapter 437 means the Texas National Guard, the Texas State Guard, and any other military forces under state law). Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code.² However, you have failed to demonstrate section 437.232 is applicable to the remaining information. Therefore, the department may not withhold any of the remaining information under section 552.101 on that basis.

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 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, 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,

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

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).

You state the remaining information consists of a tracker for all hardship requests from department servicemembers who seek a waiver from serving on Operation Lone Star and identifies certain information about each servicemember. You assert release of the information at issue would “aid criminal organizations in harming [department] Servicemembers and would have an overall effect of decreasing [department] readiness on [Operation Lone Star].” Based on your representations and our review, we agree release of the information we have marked would interfere with law enforcement. Accordingly, the department may withhold the information we have marked under section 552.108(b)(1) of the Government Code.³ However, we find you have failed to demonstrate release of any of the remaining information would interfere with law enforcement or crime prevention. Accordingly, the department may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

Section 552.101 of the Government Code also encompasses sections 418.176 and 418.177 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Section 418.176 provides, in relevant part, as follows:

(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 a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (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). Section 418.177 provides:

Information is confidential if the information:

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

(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. 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). As with any confidentiality provision, a governmental body asserting these sections must adequately explain how the responsive information falls within the scope of the provisions. See Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You claim the remaining information is confidential under sections 418.176 and 418.177 of the Government Code. However, we find you have failed to demonstrate the remaining information relates to staffing requirements or a tactical plan of an emergency response provider or relates to an assessment by or for a governmental entity that was collected, assembled, or maintained by or for the department for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity. Therefore, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with sections 418.176 or 418.177 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” *Id.* § 552.111. This section 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 information 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). 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 (Tex. App.—Austin 2002, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendations 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).

The department seeks to withhold the remaining information at issue under section 552.111 of the Government Code. Upon review, however, we find the remaining information is general administrative and purely factual information that does not rise to the level of policymaking. Thus, the department has failed to demonstrate the remaining information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the department may not withhold any of the remaining information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

Section 552.117(a)(11) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a current or former member of the Texas military forces, as well as information that reveals whether the individual has family members. *See id.* § 552.117(a)(11). Section 552.117(a)(11) applies to the Texas military forces as that term is defined by section 437.001 of the Government Code. *See id.* § 437.001. We note, for purposes of section 552.117, "family member" means a spouse, minor child, or adult child who resides in the person's home. *See id.* § 552.117(c) (providing "family member" has meaning assigned by Fin. Code § 31.006(d)). Upon review, we find none of the remaining information is subject to section 552.117(a)(11) and it may not be withheld on that basis.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. The department may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The department 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/jxd

Ref: ID# 941910

Enc. Submitted documents

c: Requestor
(w/o enclosures)