

NG TX TXARNG Mailbox Freedom of Information Act

From: NG TX TXARNG Mailbox Freedom of Information Act
Sent: Monday, March 8, 2021 8:32 AM
To: 'AO Records'
Subject: TPIA Response, Case Number T21-08
Attachments: T21-08 OAG Opinion.pdf

TEXAS PUBLIC INFORMATION ACT RESPONSE

March 8, 2021

Via Email: records@americanoversight.org

Dear Mr. Evers:

This email serves as our final response to your TPIA request. Your request was received in our office on November 18, 2020 and assigned case number T21-08.

We have finalized your request pursuant to OAG opinion OR2021-04075.

We are sending records electronically through our secure file transfer system. You will receive an email with the Subject: NoReplyTo@mail.mil. The email will provide a web link and password to download the file. The file will be available for download for seven (7) days.

You will be required to (1) enter the password provided in the automated DOD SAFE email as well as a (2) secure passphrase. The secure passphrase is Evers12345. If you have any problems accessing or downloading the file, please don't hesitate to contact our office.

If you have any questions regarding your records request, please feel free to contact our office at this email address or 512-782-5443.

Sincerely,

Sarah E. Alexander
Chief Warrant Officer 2
Open Records
Texas Military Department
Office: 512.782.5443
Fax: 512.782.6988
P.O. Box 5218
Austin, TX 78763

552.111

-----Original Message-----

From: 437.232/552.111 Col USAF NG TXANG (USA) 437.232/552.111 mil@mail.mil>
Sent: Tuesday, October 27, 2020 10:13 AM
To: Shelia Taylor <shelia.taylor@military.texas.gov>
Cc: 437.232/552.111 LT USARMY NG TXARNG (USA) 437.232/552.111 mil@mail.mil>
Subject: CDO Projection

552.111

I will depart

after we are done discussing this, so you can have the rest of your 1-on-1.

V/R,
TD

437.232/552.111 Col, TXANG
Director, Resource Management
JFHQ-TX, Joint Staff - J8
Camp Mabry (Austin), Texas
DSN: 954-3381 / COMM: 512-782-3381
CELL: 512-750-6240
Email: 437.232/552.111 mil@mail.mil

CLASSIFICATION: UNCLASSIFIED

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Subject: CDO Projection

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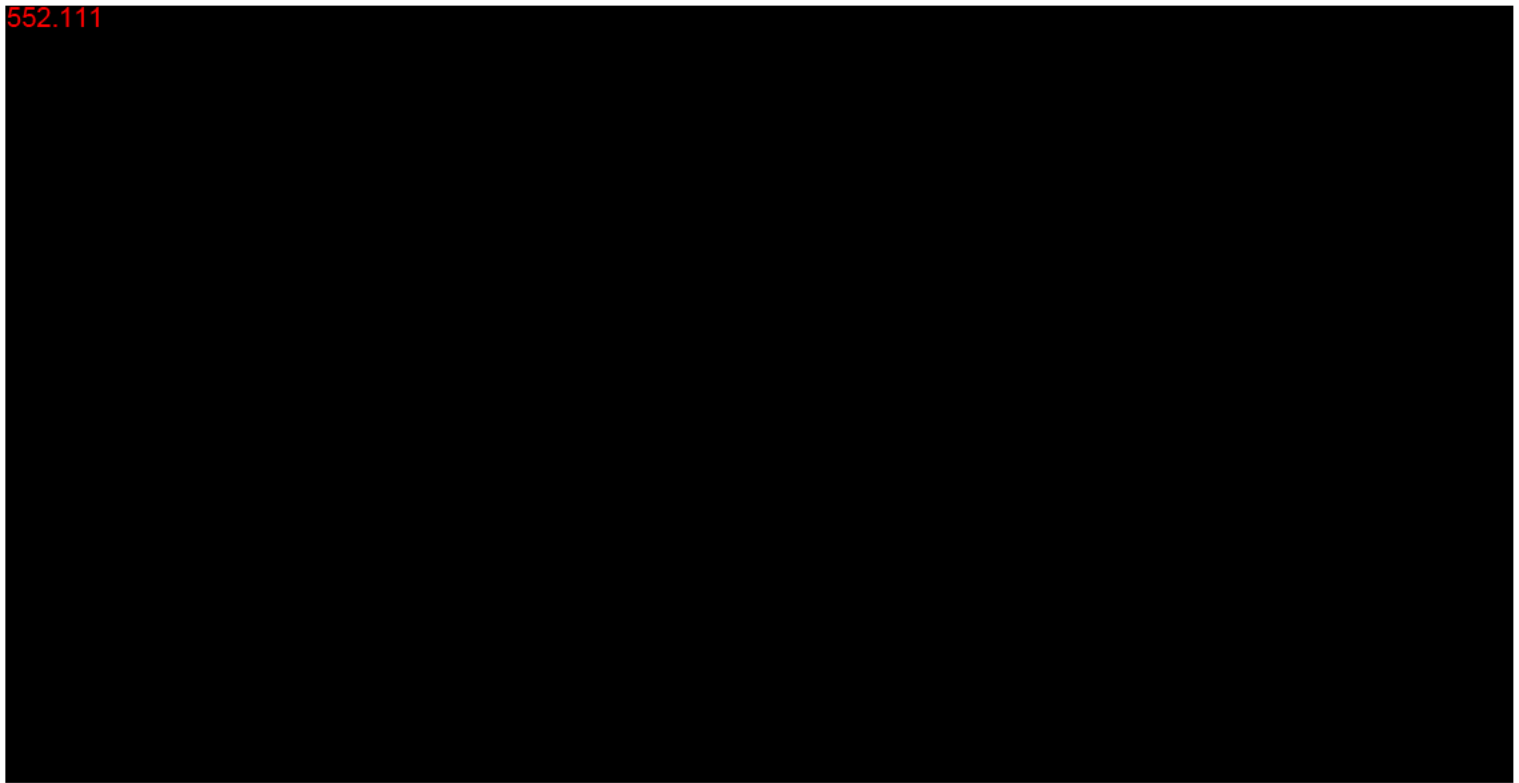
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TD

437.232/552.111 Col, TXANG
Director, Resource Management
JFHQ-TX, Joint Staff - J8
Camp Mabry (Austin), Texas
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Email 437.232/552.111 mil@mail.mil

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437.232/552.111 Col, TXANG
Director, Resource Management
JFHQ-TX, Joint Staff - J8
Camp Mabry (Austin), Texas
DSN: 954-3381 / COMM: 512-782-3381
CELL: 512-750-6240
Email: 437.232/552.111 mil@mail.mil

Robert MacFarland

From: Shelia Taylor
Sent: Thursday, October 1, 2020 5:48 PM
To: [REDACTED]
Cc: Robert MacFarland; Perry Ball; Aakash Gupta; [REDACTED] 1LT USARMY NG TXARNG (USA); Flud, Kenneth R CIV NG TXANG (USA)
Subject: SAD Funding Questions

Good Afternoon [REDACTED]
[REDACTED]

Below are answers to the questions we discussed this morning:

1. How much cash on hand is currently in the SAD account?
Answer: **\$4.5M** (general revenue) and **\$2.9M** (CDO)

[REDACTED]

I am out of the office tomorrow, but you may contact the OSA Budget and Finance Team if you have additional questions or further clarification is needed.

V/r,
Shelia

Shelia Bailey Taylor
Director of State Administration
Texas Military Department
512-782-3390 Office
512-782-5669 Fax
[REDACTED] Mobile

"Texans Serving Texas"



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2021

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

OR2021-04075

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# 865809 (ORR# T21-08).

The Texas Military Department (the “department”) received a request for specified orders received during a certain time period and e-mail communications sent by four named officials pertaining to five key terms during a certain time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. You also state you notified the Office of the Governor (the “governor’s office”) of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov’t Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have received comments from the governor’s office. We have considered the submitted arguments 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.” *Id.* § 552.101. This section encompasses information that is made confidential by other statutes, such as the Homeland Security Act (the “HSA”). Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the HSA. 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)-(2). 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. The fact that information may relate to a governmental body's security concerns does not make the 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 confidentiality provision, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive information falls 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).

The department and the governor's office claim some of the information at issue is confidential under sections 418.176 and 418.177 of the Government Code. The two parties state the information at issue pertains to tactical plans and staffing requirements of emergency response providers related to operations at the Texas Capitol and other strategic locations in response to civil disturbances. The department explains the information at issue contains "specific locations and maps that identify possible vulnerabilities related to critical infrastructure, including specific tactical concerns." The governor's office further explains that the information identifies "possible vulnerabilities related to critical infrastructure, including staffing levels and locations of law enforcement. . . . [and the release of the information] could aid terrorists and other criminals in avoiding detection in the commission of crimes[.]" Based on the department's and the governor's office's representations and our review, we find the information we marked relates to staffing requirements and tactical plans of emergency response providers maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. *See* Open Records Decision Nos. 542 (1990)

(stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.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, 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 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 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, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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

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

the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

You state the remaining information consists of advice, opinions, and recommendations of employees of the department and officials with whom the department shares a privity of interest regarding policymaking matters. Upon review, we find the department may withhold the information we under section 552.111 of the Government Code.² However, we find the remaining information at issue consists of information that is administrative or purely factual in nature. Thus, you have failed to demonstrate the remaining information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the department may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

Section 552.101 of the Government Code also 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.

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

Gov’t Code § 437.232. Upon review, we find the information you 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 you marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code.

Section 552.108(b)(1) 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 . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” *Id.* § 552.108(b)(1). 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.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex.

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

App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (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).

You argue release of the remaining information would reveal mechanisms and training procedures of the department. You assert release of the information would diminish the department's security and jeopardize soldier safety during future operation. Having considered your arguments and reviewed the submitted information, we find you have failed to demonstrate release of the remaining information would interfere with law enforcement. Thus, no portion of the submitted information may be withheld under section 552.108(b)(1).

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.³ Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the employee whose information is 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 cellular telephone number we marked under section 552.117(a)(1) of the Government

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code. Conversely, if the employee 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 at issue under section 552.117(a)(1).

In summary, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code. The department may withhold the information we marked under section 552.111 of the Government Code. The department must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code. To the extent the employee whose information is 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 cellular telephone number we marked under section 552.117(a)(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,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/jm

Ref: ID# 865809

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)