



March 14, 2000

Mr. Craig Smith
General Counsel
Texas Workers' Compensation Commission
Southfield Building, MS-4D
4000 South IH-35
Austin, Texas 78704-7491

OR2000-1010

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132986.

The Texas Workers' Compensation Commission (the "commission") received a request for information related to the termination of employment of the requestor by the commission. You indicate that the responsive information that is contained in the requestor's personnel file will be released to the requestor. You seek to withhold other responsive information, claiming that this information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 402.092 of the Labor Code, or by sections 552.107, 552.108, and 552.111 of the Government Code. You have submitted this information to this office for review. 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." Section 552.101 encompasses information deemed confidential by other statutes. Section 402.092 of the Labor Code provides:

(a) Information maintained in the investigation files of the commission is confidential and may not be disclosed except:

- (1) in a criminal proceeding;
- (2) in a hearing conducted by the commission;
- (3) on a judicial determination of good cause; or
- (4) to a governmental agency, political subdivision, or regulatory body if the disclosure is necessary or proper for the enforcement of the laws of this or another state or of the United States.

(b) Commission investigation files are not open records for purposes of chapter 552, Government Code.

This statute makes confidential the commission's investigation files concerning compliance with Texas worker's compensation laws. However, the commission's own investigations of internal personnel matters are not investigations into worker's compensation laws. You state, "the documents requested in this case are part of an investigation into violations of the Worker's Compensation Act, in conjunction with violations of personnel policies and procedures." However, our review of the subject file indicates that these materials concern an investigation into personnel matters not contemplated by section 402.092 of the Labor Code. Therefore, we conclude that the information may not be withheld under section 552.101 of the Government Code in conjunction with section 402.092 of the Labor Code.

You also assert that the "information is related to the Commission's duty to enforce its policies to ensure that the conduct of the persons subject to the Act is in compliance with Commission rules, the Act, and other laws relating to workers' compensation." You cite *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995) as authority for your assertion that the subject information is excepted from public disclosure by section 552.108 of the Government Code. In *A & T Consultants*, the Texas Supreme Court held that the Comptroller could withhold from disclosure audit papers pursuant to section 552.108 to protect the Comptroller's interest in enforcing the tax laws. *Id.* at 677. We note that, in the present case, the subject investigation was not forwarded for criminal investigation. We decline to extend *A & T Consultants* to the commission's interest in policy or civil enforcement. See Open Records Decision Nos. 434 at 2 (1986), 287 at 2 (1981) (whether information falls within section 552.108 must be determined on a case-by-case basis). Therefore, the responsive information may not be withheld under section 552.108 of the Government Code.

You next assert that the information is excepted from disclosure under section 552.111 of the Government Code. This section excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). However, an agency's policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). You assert that the subject request may be differentiated from the findings of *Gilbreath* on the basis that the information sought is part of an investigation into violations of policy and law. As previously noted, we conclude that the submitted materials concern a commission personnel matter. *City of Garland v. Dallas Morning News*, 43 Tex. Sup. Ct. J. 303 (Jan.13, 2000) and *Let v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.-Houston [14th Dist.] 1996) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy). We conclude that no responsive information may be withheld under section 552.111 of the Government Code.

Section 552.107(1) excepts information from disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct. This exception does not apply to all client information held by a governmental body's attorney; rather, it excepts from public disclosure only "privileged information," *i.e.*, communications made to the attorney in confidence and in furtherance of rendering professional services or that reveal the attorney's legal opinion or advice. Open Records Decision Nos. 589 at 1(1991), 574 at 3 (1990), 462 at 9-11(1987). Information gathered by an attorney as a fact-finder, purely factual information, and the factual recounting of events including the documentation of calls made, meetings attended, and memos sent, are not excepted from disclosure by section 552.107(1). Open Records Decision No. 574 (1990). Section 552.107 may except from disclosure notes in an attorney's client file if they contain confidences of the client or reveal the opinions, advice, or recommendations that have been made or will be made to the client or associated attorneys. Open Records Decision No. 574 at 6 (1990). We are of the opinion that the memorandum dated October 29, 1999, is a privileged communication to counsel and it may be withheld under section 552.107(1) of the Government Code.

Finally, we believe that one document in the submitted information must be withheld under common law privacy. Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information coming within the common law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931(1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We have marked two copies of an August 26, 1999 e-mail which must be withheld under common law privacy. Except as noted above, the requested information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

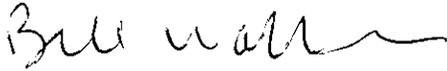
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Walker", with a long horizontal flourish extending to the right.

Bill Walker
Assistant Attorney General
Open Records Division

WMW/nc

Ref: ID# 132986

Encl Submitted documents

cc: Ms. Clara Caldwell
4414 Akard
Houston, Texas 77047
(w/o enclosures)