



December 19, 2001

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

OR2001-5970

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# 156380.

The Texas Workers' Compensation Commission (the "commission") received two requests for information concerning the commission's proposed rules 134.500 through 134.506, including: (1) drafts of discussions of comments; (2) copies of comments disseminated between the commission and consultants or other firms; (3) replies and responses to comments; (4) evaluations of individual or staff responses to posed questions; (5) names and qualifications of staff members and other individuals who worked on the development of the proposed rules and responses to public comments; (6) names of the staff assigned to respond to public comments and how the comments are distributed amongst the staff; (7) qualifications of staff members assigned to respond to public comments; (8) the "anecdotal experiences" upon which the proposed rules are based; (9) discussions of the proposed rules; (10) responses to questions posed by third parties about the proposed rules. You indicate that the commission will release some of the responsive information. You also state that the commission does not have information responsive to categories 1, 3, 4, and 10 of the request. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that the remainder of the requested information is excepted from disclosure under sections 552.024, 552.101, 552.111, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 402.083 of the Labor Code provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle." This office has interpreted section 402.083 to protect only that "information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers' compensation claims." Open Records Decision No. 619 at 10 (1993). You have highlighted the information in the submitted Attachment C that you believe is confidential under section 402.083. Upon review of that information, we conclude that all of the information you seek to withhold in Attachment C either implicitly or explicitly discloses the identity of claimants, with the possible exception of the employer's name in certain cases. Information revealing the injured employees' names, dates of injury, commission claim numbers, social security numbers, and home telephone numbers implicitly or explicitly identifies claimants and is therefore excepted from disclosure under section 552.101 in conjunction with section 402.083 of the Labor Code. We are unable to determine whether the release of the identity of the employer of a claimant in Attachment C would implicitly identify the claimant. Therefore, we conclude that only where the release of the employer's identity would reveal the claimant's identity must the identity of an employer be withheld.

Next, you contend that certain highlighted information in Attachment D is excepted from disclosure under section 552.024 of the Government Code. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, 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. 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 commission may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You have submitted several forms in Attachment D indicating that the employees at issue elected to keep their personal information confidential. However, we note that two of the employees did not make this election until after the commission received the instant request for information. The commission must withhold the home addresses and telephone numbers, social security numbers, and any information that reveals whether employees have family members only for those employees who elected to keep this information confidential before the commission received the instant request for information. We have marked the information that must be withheld under section 552.117. The personal information of the other employees is not protected under section 552.117 in this instance.

Nevertheless, the social security numbers of the employees who failed to timely elect to keep their personal information confidential under section 552.024 of the Government Code may still be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C.

§ 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law, enacted on or after October 1, 1990.

We also note that Attachment D contains information that is protected under common law privacy, which is encompassed by section 552.101 of the Government Code. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is the type of intimate information excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked personal financial information contained in Attachment D that must be withheld under section 552.101 in conjunction with common law privacy.

You also contend that portions of Attachment D are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, you must withhold the highlighted Texas driver's license numbers under section 552.130.

Next, you claim that the information in Attachment E is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure]." This section encompasses

the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 615 at 5 (1993). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.); ORD 615 at 4-5.

In Open Records Decision No. 559 (1990), this office concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the advice, opinion, and recommendation of the drafter with regard to the form and content of the final document, so as to be excepted from public disclosure under the statutory predecessor to section 552.111. This office further concluded that section 552.111 excepts factual information in the draft to the extent the factual information also will be included in the final version of the document. *Id.* Thus, section 552.111 excepts from disclosure 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. *Id.*

You indicate that the information in Attachment E relates to the commission's adoption of rules establishing medical policies and guidelines as required by section 413.011(a) of the Labor Code. You further contend that the information contains advice, opinions, and deliberations of commission staff concerning the development of the proposed rules, as well as drafts of rule language. We agree that the information in Attachment E relates to the commission's policymaking functions. We further agree that some of the information in Attachment E consists of interagency and intra-agency communications revealing advice, opinion, and recommendations on the commission's policymaking functions. Thus, you may withhold this information, which we have marked, under section 552.111 of the Government Code. With respect to the remainder of the information in Attachment E, you have not adequately demonstrated that the information consists of interagency or intra-agency communications. Therefore, you may not withhold the remainder of the information in Attachment E under section 552.111.

You also contend that portions of the submitted information are excepted from disclosure under section 552.136 of the Government Code. Section 552.136, recently added to the Public Information Act by the Seventy-seventh Legislature,<sup>1</sup> provides that "[a]n e-mail

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<sup>1</sup>Act of May 22, 2001, 77<sup>th</sup> Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. Laws 974, 975; *see also* Act of May 14, 2001, 77<sup>th</sup> Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 614 (adding this exception as § 552.137).

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 Public Information Act].” We have marked e-mail addresses in Attachments D and E that must be withheld under section 552.136.

In summary, you must withhold from Attachment C injured employees’ names, dates of injury, commission claim numbers, social security numbers, and home telephone numbers under section 552.101 in conjunction with section 402.083 of the Labor Code. In those cases where release of an employer’s identity would reveal a claimant’s identity, the employer’s identity must be withheld from disclosure under section 552.101 in conjunction with section 402.083 of the Labor Code as well. You must withhold the home addresses, home telephone numbers, social security numbers, and family member information under section 552.117 of the Government Code for those employees who made a timely election to keep this information confidential. You must withhold any remaining social security numbers under section 552.101 of the Government Code in conjunction with the federal Social Security Act if the commission obtained or maintained these numbers pursuant to a provision of law enacted on or after October 1, 1990. You must also withhold the personal financial information we have marked in Attachment D under section 552.101 in conjunction with common law privacy. You must withhold the driver’s license numbers you highlighted in Attachment D under section 552.130 of the Government Code. You may withhold portions of Attachment E, which we have marked, under section 552.111. Finally, you must withhold the e-mail addresses we have marked in Attachments D and E under section 552.136 of the Government Code. You must release the remainder of the submitted information.

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); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

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,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 155763

Enc: Submitted documents

c: Dr. C.M. Schade, MD, Ph.D.  
President  
Texas Pain Society  
2729 Exposition Boulevard, Suite 167  
Austin, Texas 78703  
(w/o enclosures)