



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2004

Mr. Carey Smith
General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2004-1543

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# 196225.

The Texas Department of Human Services (the "department") received a request for various types of information concerning a nutrition program.¹ You state that the department sent the requestor a detailed estimate of allowable charges for responsive information that you have determined can be released. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.110, 552.111, 552.116 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that in a letter dated February 16, 2004 the requestor states that "none of the documents requested by our organization should contain the names or identities of the children receiving federal assistance, and are not a required or necessary part of the Open Records request." We understand the requestor to be modifying his request to exclude the identities of children receiving federal assistance in the form of free and reduced-price meals. Therefore, we need not address the department's assertion that this information is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal and state law.

¹We note that this office was carbon copied on the requestor's follow-up letter to the department dated December 5, 2003. The letter indicates that on September 25, 2003 the requestor submitted a request for information to the department. The September 25, 2003 request for information seeks different information than the requestor's request for information dated November 14, 2003, which is the subject of this ruling. This ruling does not address information responsive to the requestor's September 25, 2003 request for 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 in conjunction with 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 information that reflects an individual’s personal financial decisions and is not related to a financial transaction between the individual and a governmental body is generally excepted from disclosure under common law privacy. Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). Thus, a public employee’s allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy. ORD 600 (TexFlex benefits), 545 (deferred compensation plan). However, the salary of a public employee and an employee’s participation in an insurance program funded wholly or partially by the state are not excepted from disclosure. Open Records Decision Nos. 600 (1992), 342 (1982). We have marked the financial information that is not excepted from disclosure under section 552.101 and which must be released to the requestor. You must withhold the remaining personal financial documents you have marked under section 552.101 in conjunction with common law privacy.

Further, you have marked social security numbers within the submitted documents which may be confidential under section 552.101 in conjunction with federal law. A social security number or “related record” may 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 the social security numbers in the submitted information 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 the department, however, that section 552.352 of the Public Information 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 department pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You state that the marked information “reflects confidential communications from client representatives in the department’s special nutrition program to the client’s attorney, or between representatives of the client for the benefit of the attorney in representing the client in performing its regulatory duties, or represents the attorneys’ legal opinion.” You also state that “these communications were not meant to be disclosed to third persons, except as reasonably needed to transmit the communication or further legal services, and they have not been released outside the attorney-client relationship.” After reviewing the attorney-client information, we agree that it is protected under section 552.107 and may be withheld from disclosure.²

²Because we are able to make a determination under section 552.107, we need not address your additional arguments under Rule 503 of the Texas Rules of Evidence.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. You explain that a portion of the requested information consists of background financial information of a program sponsor which may be protected under section 552.110. Although the department takes no position with respect to the release of this information, you state that the department notified the program sponsor, whose propriety interest may be implicated by the release of this information, of the request pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances).

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the program sponsor has not submitted any comments to this office explaining how release of the background financial information would implicate its proprietary interest. Therefore, the program sponsor has provided us with no basis to conclude that it has a protected proprietary interest in this information. *See* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990), 542 at 3 (1990). Thus, this information must be released.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Evidence. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of

litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. You state that the documents you wish to withhold as attorney work product directly relate to an administrative appeal before the State Office of Administrative Hearings of the department's decision to deny an application. Further, you state that "the department attorneys who created or directed the creation of this information believed in good faith that there was a substantial chance that litigation would ensue or had ensued and created the information for the purpose of preparing for such litigation." After considering your arguments, this office concludes that the marked attorney work product is excepted from disclosure under section 552.111 of the Government Code.

You also claim section 552.111 for policymaking documents. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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, 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.*, 37 S.W.3d at 160; ORD 615 at 4-5.

Section 552.111 applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990). Section 552.111 applies not only to a governmental body's internal memoranda, but also to memoranda prepared for a governmental body by its outside consultant. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).

The documents at issue under this aspect of section 552.111 include staff communications and memoranda, draft administrative rules, and other draft documents relating to the department's special nutrition programs. Having carefully reviewed your arguments and the information at issue, we conclude that some of this information is excepted from disclosure under section 552.111. We have marked this information accordingly. The remaining information at issue under this aspect of section 552.111 must be released.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

You explain:

Through contracts with independent day-care centers and sponsoring organizations, the department's Child and Adult Care Food Program ("CACFP") provides cash reimbursement to child and adult day-care providers ("contractors") for serving meals to participants who meet U.S. Department of Agriculture ("USDA") standards. The CACFP is

administered under the authority of the National School Lunch Act, 42 U.S.C.A. §§ 1751-1769h (1994 & Supp. 2000), and the Child Nutrition Act of 1966, 42 U.S.C.A. §§ 1771-1790 (1994 & Supp. 2000). Section 17 of the National School Lunch Act, as amended, authorizes assistance to States through grants-in-aid and other means to initiate, maintain, and expand nonprofit food service programs for children or adult participants in nonresidential institutions which provide care. 7 C.F.R. § 226.1 (2000).

A portion of the information at issue pertains to the department's administration of the above-described programs. We note that as part of administering the above-described programs, federal regulations specifically provide that the "books and records of the food service management company pertaining to the institution's food service operation shall be available for inspection and audit by representatives of the [department]." 7 C.F.R. § 226.6(i)(5). Thus, the department is specifically authorized to conduct such audits. Further, your representations demonstrate that a portion of the submitted documents meet the definition of an "audit working paper." See Gov't Code § 552.116(b)(2). We therefore conclude that the department may withhold the audit working papers you have marked under section 552.116 of the Government Code.

Finally, the submitted information contains bank account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The department must, therefore, withhold the marked bank account numbers under section 552.136.

In summary, you must release the financial information we have marked. You must withhold the remaining personal financial information under section 552.101 in conjunction with common law privacy. The marked social security numbers may be excepted from disclosure under section 552.101. Section 552.107 protects the attorney-client information you have marked. The marked attorney work product is excepted from disclosure under section 552.111. We have marked the information you may withhold under the deliberative process aspect of section 552.111. You may withhold the audit working papers you have marked under section 552.116. Finally, the marked bank account numbers must be withheld under section 552.136. You must release the remaining responsive 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 196225

Enc. Submitted documents

c: Mr. Blake Stanford
President
Southwest Human Development Services Corp.
P.O. Box 28487
Austin, Texas 78755-8487
(w/o enclosures)