



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 13, 2004

Mr. Edward Seidenberg  
Assistant State Librarian  
Texas State Library and Archives Commission  
P.O. Box 12927  
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OR2004-6882

Dear Mr. Seidenberg:

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# 206143.

The Texas State Library and Archives Commission ("TSLAC") received a request for "[a]ll documents relating to prison abuse and prison condition[s] in the legal opinions and advice files on the Texas Department of Criminal Justice and the executive assistant's subject files on criminal justice in the papers and archives of former Gov. George W. Bush." You state that some of the requested information is being released to the requestor. The remaining requested information has been submitted to this office for review.

At the request of the Office of the Governor (the "governor"), you raise sections 552.107 and 552.111 of the Government Code for some of the submitted information. At the request of the Texas Department of Criminal Justice ("TDCJ"), you raise sections 552.101, 552.107, 552.108, 552.111, 552.117, and 552.134 for some of the submitted information.<sup>1</sup> You take no position as to whether any of the claimed exceptions apply to the information at issue.

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<sup>1</sup>We understand that the documents for which TDCJ argues exceptions to disclosure were created by TDCJ, forwarded to the former governor, and are now maintained in the former governor's archives. We note that information subject to the Act may be transferred between governmental bodies without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989).

We have received arguments regarding the applicability of these exceptions from both the governor and TDCJ. We have considered the exceptions raised and reviewed the submitted information.

First, we consider TDCJ's arguments under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes such as section 508.313 of the Government Code, which provides in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of TDCJ] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

(b) Statistical and general information relating to the parole and mandatory supervision system, including the names of releasees and data recorded relating to parole and mandatory supervision services, is not confidential or privileged and must be made available for public inspection at any reasonable time.

(c) [TDCJ] may provide information that is confidential and privileged under Subsection (a) to:

(1) the governor;

(2) a member of the [B]oard [of Pardons and Paroles];

(3) the Criminal Justice Policy Council in performing duties of the council under Section 413.017 [of the Government Code]; or

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

Gov't Code § 508.313(a)-(c); *see also id.* § 508.001(9) (“releasee” means person released on parole or to mandatory supervision). TDCJ asserts that a memorandum dated September 16, 1996, and the attachment to the memorandum are confidential under section 508.313(a). TDCJ explains that these documents concern a parolee who was under the supervision of TDCJ’s Parole Division at the time the documents were created. We note that section 508.313(c) permits TDCJ to provide information that is confidential under section 508.313(a) to the governor. Based on TDCJ’s representations and our review of the documents at issue, we conclude that the memorandum and attachment are confidential under section 508.313 and must be withheld from disclosure under section 552.101 of the Government Code.

Next, we consider the arguments of both the governor and TDCJ under section 552.107(1) of the Government Code. Section 552.107(1) 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 Texas 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).

The governor claims that the memoranda which TSLAC has labeled Attachments A and E are excepted from disclosure under section 552.107(1). The governor explains that these memoranda were prepared by legal counsel for the former governor and constitute communications made in furtherance of the rendition of legal services to the governor. Both the governor and TSLAC indicate that the confidentiality of these memoranda has been maintained. Accordingly, we conclude that Attachments A and E may be withheld from disclosure under section 552.107(1).<sup>2</sup>

TDCJ claims that a memorandum dated November 1, 1994 is excepted from disclosure under section 552.107(1). TDCJ explains the memorandum constitutes a communication of legal advice from TDCJ's general counsel to the general counsel's clients and clients representatives. We, therefore, conclude that the memorandum may be withheld from disclosure under section 552.107(1).

TDCJ also claims that certain documents are excepted from disclosure under section 552.108 of the Government Code. TDCJ indicates that a memorandum dated December 1, 1994, concerns a criminal investigation by the TDCJ Office of Inspector General. TDCJ asserts that the memorandum is excepted from disclosure under section 552.108(a)(2), which excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we understand TDCJ to assert that the memorandum dated December 1, 1994, pertains to a criminal investigation that concluded in a result other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest information, the memorandum may be withheld from disclosure based on section 552.108(a)(2).

TDCJ also claims that several memoranda relating to security issues are excepted from disclosure under section 552.108(b)(1). Section 552.108(b)(1) excepts from disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would

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<sup>2</sup>Because we reach this conclusion, we need not address the governor's claim that Attachments A and E are also excepted from disclosure under section 552.111 of the Government Code.

interfere with law enforcement or prosecution.” Generally, a governmental body claiming section 552.108(b)(1) must reasonably 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 (Tex. 1977). This office has on numerous occasions concluded that section 552.108 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) (holding that predecessor to section 552.108 excepts detailed guidelines regarding a police department’s use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that predecessor to section 552.108 excepts sketch showing security measures for execution). Having reviewed TDCJ’s arguments and the information at issue, we agree that the release of some of the information would interfere with law enforcement or crime prevention. Accordingly, the information we have marked may be withheld from disclosure under section 552.108(b)(1) of the Government Code.

The governor claims that the memoranda which TSLAC has labeled Attachments B, C and D are excepted from disclosure under section 552.111 of the Government Code.<sup>3</sup> TDCJ also claims that some of the submitted information is excepted under section 552.111. Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” The purpose of this exception 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, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), 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 that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov’t Code § 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 that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. If, however, the factual

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<sup>3</sup>We note that although TSLAC raised both sections 552.107(1) and 552.111 for Attachments B, C, and D, the governor has argued only section 552.111 for these documents.

information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses 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. *See id.* at 2.

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 governor explains that the memoranda labeled Attachments B, C, and D consist of internal communications of advice, opinions and recommendations intended to assist the former governor in formulating policy on criminal justice issues. We agree that portions of these memoranda are excepted from disclosure under section 552.111, and we have marked this information accordingly. The information we have not marked as protected under section 552.111 is severable factual information that must be released.

The submitted information includes several draft documents that reflect TDCJ's deliberations on policymaking issues such as inmates' use of telephones and TDCJ's contracts with private correctional facility operators. The submitted information indicates that TDCJ and the former governor shared a privity of interest with regard to the policy matters addressed in these draft documents. For these reasons, we conclude that these draft documents may be withheld from disclosure in their entirety under section 552.111.

Section 552.117(a)(3) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former employees of TDCJ. However, the submitted documents do not contain any information within the scope of section 552.117(a)(3). Therefore, none of the information at issue may be withheld from disclosure on the basis of section 552.117(a)(3).

Finally, TDCJ contends that section 552.134 of the Government Code excepts certain information from disclosure. Section 552.134 provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.029 states:

Notwithstanding Section 508.313 or 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Gov't Code § 552.029(8). We have previously held that TDCJ has the discretion to transfer to another governmental body information subject to the statutory predecessor to section 552.134, and the transferred information remains confidential in the hands of the receiving governmental body. *See* Open Records Decision No. 667 (2000) (TDCJ has discretion to release inmate's social security number made confidential by statutory predecessor to section 552.134 to voter registrar for purpose of maintaining accurate voter registration lists and transferred social security number remains confidential in possession of voter registrar). The information at issue consists of memoranda regarding inmates, copies of which were provided to the former governor's staff.<sup>4</sup> We agree that the memoranda are within the scope of section 552.134. However, several of the memoranda concern the death of an inmate in custody or an alleged crime involving an inmate. TDCJ acknowledges basic information regarding these types of incidents is subject to disclosure under section 552.029(8) of the Government Code. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. Accordingly, we conclude that, with the

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<sup>4</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

exception of basic information that is subject to section 552.029, the memoranda must be withheld pursuant to section 552.134 of the Government Code.

We note, however, that portions of the basic information in the memoranda are excepted from disclosure pursuant to section 552.101 in conjunction with the common law right to privacy. Section 552.101 encompasses information that is protected from disclosure by the common law right to privacy. Information is protected from disclosure by common law privacy if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683.

This office has found that the following types of information are also protected from disclosure by the common law right to privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Based on our review of the basic information, we have marked the portions of this information that must be withheld pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy. The remaining basic information must be released to the requestor pursuant to section 552.029(8) of the Government Code.

In summary, the memorandum dated September 16, 1996, and its attachment must be withheld from disclosure under section 552.101 in conjunction with section 508.313 of the Government Code. Attachments A and E and the memorandum dated November 1, 1994 may be withheld from disclosure under section 552.107(1). With the exception of basic front page offense and arrest information, the memorandum dated December 1, 1994, which pertains to a criminal investigation may be withheld under section 552.108(a)(2). We have marked the information that may be withheld from disclosure under section 552.108(b)(1). We have also marked information in Attachments B, C, and D that may be withheld from disclosure under section 552.111. TDCJ's draft documents relating to policymaking issues may be withheld under section 552.111. With the exception of basic information, the memoranda regarding inmates must be withheld under section 552.134. Additionally, the

marked basic information within these memoranda must be withheld under section 552.101 in conjunction with the common law right to privacy. All remaining 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 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,



Karen Hattaway  
Assistant Attorney General  
Open Records Division

KEH/sdk

Ref: ID# 199985

Enc. Submitted documents

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