



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2006

Ms. Sylvia F. Hardman
General Counsel
Texas Department of Assistive and Rehabilitative Services
4800 North Lamar Blvd., Suite 300
Austin, Texas 78756

OR2006-06477A

Dear Ms. Hardman:

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# 258327.

On behalf of the Texas Department of Assistive and Rehabilitative Services (the "department"), you ask this office to examine Open Records Letter No. 2006-06477 (2006). When this office determines that an error was made in the decisional process under sections 552.301 and 552.306 of the Government Code and that the error resulted in an incorrect decision, we will correct the previously issued ruling. As we have determined that Open Records Letter 2006-06477 (2006) is incorrect, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2006-06477 (2006) and serves as the correct ruling.

The department received a request for all investigations and monitoring reports, documentation, notes, and testimony involving HirePlaces as well as any investigation and relevant documents in Region One involving a named individual. The department states that it has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.116, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

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 made confidential by other statutes. Section 111.018(b) of the Human Resources Code provides that:

(b) In carrying out his or her duties under this chapter, the commissioner [of the department] shall, with the approval of the board, implement policies addressing personnel standards, the protection of records and confidential information, the manner and form of filing applications, eligibility, investigation, and determination for rehabilitation and other services, procedures for hearings, and other regulations subject to this section as necessary to carry out the purposes of this chapter.¹

Hum. Res. Code § 111.018(b). Under the authority of section 111.018(b), the department has promulgated rules making certain information confidential. Specifically, section 101.4015 of title 40 of the Administrative Code provides in relevant part:

(a) Client records.

(1) All personal information made available to [the department] employees in the course of the administration of rehabilitation services programs, including lists of names, addresses, and records of agency evaluation is confidential.

...

(3) Information is not to be disclosed directly or indirectly, other than in the administration of the rehabilitation programs, unless the consent of the client has been obtained in writing, in compliance with a court order, or in accordance with a federal or state law or regulation. Information containing identifiable personal information may not be shared with advisory or other bodies that do not have official responsibilities for administration of the program.

40 T.A.C. § 101.4015. A portion of the submitted information consists of personal information regarding clients that were made available to the department in the course of the administration of rehabilitative services. You state that none the release provisions in this section apply. Based on your arguments and our review of the submitted information, we find that the client names and social security numbers you have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 101.4015(a)(1) of Title 40 of the Administrative Code.

¹The 78th Legislature transferred all powers, duties, functions, programs, and activities of the former Texas Rehabilitation Commission to the department effective March 1, 2004. *See* Act of June 1, 2003, 78th Leg., R.S., ch. 198, §§ 1.01, 1.21, 1.26, 2003 Tex. Gen. Laws 611, 612, 641.

Section 552.101 of the Government Code also encompasses section 531.1021 of the Government Code. Section 531.1021 provides in relevant part as follows:

(g) All information and materials subpoenaed or compiled by the office [of inspector general] in connection with an investigation are confidential and not subject to disclosure under Chapter 552, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the office [of inspector general] or its employees or agents involved in the investigation conducted by the office, except that this information may be disclosed to the office of the attorney general and law enforcement agencies.

Gov't Code § 531.1021(g). You explain that the purpose of the Health and Human Services Commission Office of the Inspector General ("OIG") was created "to prevent, detect and investigate fraud, abuse and waste in state health and human service programs."² You state that the information in Exhibits 5, 6A, and 6B was compiled by the OIG during its investigation of HirePlaces. Upon review, we find that the information in Exhibits 5, 6A, and 6B is confidential under section 531.1021(g) and must be withheld under section 552.101 of the Government Code.

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 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

²We note that the Health and Human Services Commission directly oversees the department. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 198 § 1.01, 2003 Tex. Gen. Laws 611.

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 department asserts that some of the documents in Exhibit 8 as well as certain documents in Exhibit 7B are confidential communications between attorneys for and employees of the department made for the purpose of rendering professional legal advice. You state that you believe the confidentiality of these communications has been maintained. Based on these representation and our review of the information, we agree that the information at issue in Exhibit 8, as well as the information we have marked in Exhibit 7B, consists of privileged attorney-client communications that the department may withhold under section 552.107.

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, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 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, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(A) intra-agency and interagency communications; and

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

Gov’t Code § 552.116. You indicate that the information in Exhibit 7A and a portion of the remaining information in Exhibit 7B consists of audit working papers. You inform this

office that department's internal auditor is authorized to gather records for an audit that is required under section 321.0132 of the Government Code. *See* Gov't Code § 321.0132 (authorizing compliance audits); *see also* Gov't Code § 2102.007 (providing general method for a government body to conduct an audit). Based on these representations and our review of the submitted information, we find that the information in Exhibit 7A and the information we have marked in Exhibit 7B may be withheld under section 552.116 of the Government Code.

Section 552.111 of the Government Code 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." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). 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 from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect 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) (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). However, 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. 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). This office has also 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.

Upon review of the remaining information at issue, we find that the draft document in Exhibit 7B, which we have marked, may be withheld under section 552.111 of the Government Code. However, we find that you have failed to demonstrate that section 552.111 is applicable to any of the remaining information.

In summary, the client names and social security numbers you have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 101.4015(a)(1) of Title 40 of the Administrative Code. Exhibits 5,6A, and 6B must be withheld under section 552.101 of the Government Code in conjunction with section 531.1021(g) of the Government Code. Further, the information you wish to withhold in Exhibit 8 and the information we have marked in Exhibit 7B may be withheld under section 552.107 of the Government Code. The information in Exhibit 7A and the marked information in Exhibit 7B may be withheld pursuant to section 552.116 of the Government Code. The department may also withhold the information we have marked in Exhibit 7B pursuant to section 552.111 of the Government Code. The remaining submitted information must be released.³

Lastly, you ask this office to issue a previous determination authorizing the department to withhold investigative information subject to section 531.1021 of the Government Code and client identifying information subject section 111.018(b) of the Human Resources Code and section 101.4015(a)(1) of Title 40 of the Administrative Code if requested in the future. We decline to issue such a previous determination at this time. See Open Records Decision No. 673 (2001). Therefore, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

³As our ruling is dispositive, we do not address your remaining argument.

Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/eb

Ref: ID# 258327

Enc. Submitted documents

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