



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2007

Ms. Chelsea Thornton
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711-2482

OR2007-07826

Dear Ms. Thornton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 280458.

The Office of the Governor (the "governor's office") received a request for:

all documents, memos, reports, complaints, e-mails, letters, findings, or any other materials sent, received, or produced by the governor's office since 2000 relating to the sexual abuse, physical abuse, death, neglect, injury, or mistreatment of residents or patients of Texas' state schools for the mentally retarded or developmentally disabled, including but not limited to the Lubbock State School, as well as at the Texas Department of Mental Health and Mental Retardation, or the Texas Department of Aging and Disability Services.

You state that your office has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also inform us that your office has notified the Department of Aging and Disability Services (the "department") and the Civil Rights Division of the U.S. Department of Justice (the "DOJ") of the governor's office's receipt of this request and of their right to submit arguments to us as to why any portion of the submitted information should not be released. *See Gov't Code §552.304.* We have received

comments from the department. We have considered the exceptions you claim, as well as the exceptions claimed by the department, and reviewed the submitted information.

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.¹ 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).

¹ Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

You explain that Exhibits B, D, and E consist of confidential communications, or records of communications, between parties who share a privity of interest concerning legal matters affecting the state.² Further, you assert that these communications were made for the purpose of facilitating the rendition of legal services. You further explain that these documents were not intended to be disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of legal services. Based on your representations and our review of the submitted documents, we find that Exhibits B, D, and E consist of privileged attorney-client communications that the governor's office may withhold under section 552.107 of the Government Code.³

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 section 552.111 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, 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, 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) (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). 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. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data

²*See* Tex. R. Evid. 503(a)(2) (defining "representative of the client" as person having authority to obtain legal services or to act on legal advice on behalf of client, or person who for purpose of effectuating legal representation makes or receives a confidential communication while acting in scope of employment for client).

³Because our ruling on these documents is dispositive, we need not address your remaining arguments or those of the department.

impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). Finally, section 552.111 does not apply unless the agencies between which the information is passed are shown to 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).

You explain that Exhibit F consists of interoffice deliberations between parties of interest regarding policy formation. Based on your arguments and our review of the submitted information, we agree that some of the information in Exhibit F consists of advice, opinion, or recommendations that may be withheld under section 552.111. We have marked the information in Exhibit F that may be withheld. You explain that Exhibit C contains two reports prepared by the DOJ to assess the conditions at the Lubbock State School and that these documents were used to “form policy regarding changes that needed to be made at the Lubbock State School.” However, Exhibit C does not contain any advice, opinion, or recommendations from the governor’s office or the department; rather, it consists entirely of the factual observations made by the DOJ. *See* Open Records Decision No. 615 at 5 (stating that the fact that a document may have been used in the policymaking process does not bring that information within the deliberative process privilege). Further, as the department explains, as of the date this request was received, the department was subject to an action by the DOJ under the Civil Rights of Institutionalized Persons Act (“CRIPA”), 42 U.S.C. § 1997 *et seq.*, based on the DOJ’s investigation of the conditions at the Lubbock State School. The governor’s office has not demonstrated how it shares a privity of interest or common deliberative process with the DOJ, the potential opposing party in this litigation. Accordingly, Exhibit C may not be withheld under section 552.111.

You also assert that some of the information in Exhibit C is confidential under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other law. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). However, Exhibit C consists of investigative documents created by the DOJ; they are not records of the identity, diagnosis, evaluation, or treatment of mental health patients. Accordingly, Exhibit C may not be withheld on this basis.

However, some of the information contained in Exhibit C must be withheld under section 552.101 of the Government Code in conjunction with the doctrine of common law privacy. 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). 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. 540 S.W.2d at 683. We find that the names of the clients of state schools constitutes intimate and embarrassing information and there is no legitimate public interest in their release. Accordingly, the names of the clients found in Exhibit C must be withheld under section 552.101 in conjunction with common law privacy. We note, however, that a person's common law right of privacy terminates upon death. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146- 47 (N.D. Tex. 1979); Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Thus, the governor's office must only withhold the names of those residents of state schools who are living.

In summary, the governor's office may withhold Exhibits B, D, and E under section 552.107 of the Government Code. We have marked the information in Exhibit F that may be withheld under section 552.111 of the Government Code. The names of the living state school clients found in Exhibit C must be withheld under section 552.101 of the Government Code. The remaining submitted 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

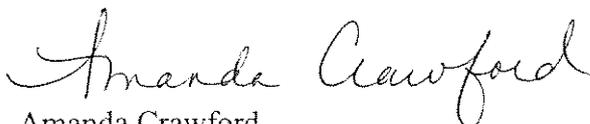
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 280458

Enc. Submitted documents

c: Ms. Emily Ramshaw
Dallas Morning News
1005 Congress Avenue, Suite 903
Austin, Texas 78701
(w/o enclosures)