



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 9, 2008

Ms. Margo Kaiser  
Staff Attorney  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street  
Austin, Texas 78778

OR2008-07844

Dear Ms. Kaiser:

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# 312174.

The Texas Workforce Commission (the "commission") received a request for six categories of information pertaining to the Texas Private Sector Industry Program (the "PSIP"). You state that the commission will release a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, 552.134, 552.137, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, we note that some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-05300 (2008). With regard to the submitted information that is identical to the information previously requested and ruled upon by this office in this prior ruling, we conclude that, as we have no indication that the law, facts, and circumstances on which the

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<sup>1</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.

prior ruling was based have changed, you must continue to rely on Open Records Letter No. 2008-05300 as a previous determination, and withhold or release this information in accordance with that decision. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent that the submitted information is not encompassed by the previous ruling, we will address the submitted arguments.

Next, we will address your claim under section 552.111 of the Government Code, as it is potentially the most encompassing. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception 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 (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, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 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. 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). 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. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded that a preliminary draft of a policymaking 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.

You state that the information you have marked pertains to discussions regarding the commission's involvement with the PSIP and that these exhibits should be withheld under section 552.111. You state that the documents at issue involve communications between the commission and the Texas Department of Criminal Justice (the "department"), with which you share a privity of interest, regarding interoffice deliberations between parties of interest regarding policy formation.<sup>2</sup> You also state that the final versions of the drafts you have marked will be released to the public in their final form. Based on your representations and our review, we find that some of the submitted information reflects the policymaking process of the commission. We have marked this information. However, we find that the remaining information you seek to withhold under section 552.111 does not pertain to the commission's own policymaking functions. Rather, as you acknowledge, this information pertains to the commission's responses to requests from the public, other state agencies, and the legislature for official commission positions regarding the PSIP, which is not a commission program. Accordingly, the commission may only withhold the information we have marked under section 552.111.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy. Common-law privacy protects information that (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. *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. *Id.* at 683. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find that the commission has failed to demonstrate

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<sup>2</sup>We note that section 552.111 can encompass a governmental body's communications with other public and private entities. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (statutory predecessor to Gov't Code § 552.111 encompassed communications with party with which governmental body has privity of interest or common deliberative process).

how the information it has marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the commission may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

You assert that the documents you have marked are excepted from disclosure under section 552.107(1) of the Government Code, which 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(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 some of the information you have marked consists of e-mail communications between commission attorneys and commission clients. You explain that the remaining portions of information you have marked are either attachments to the e-mails at issue or documents provided to or created by commission staff members during oral briefings with

commission attorneys regarding the same issues discussed in these e-mails. You state that all of these communications were made in furtherance of the rendition of professional legal services to the commission, were made in confidence, and remain confidential. Based on your representations and our review, we conclude that the commission may withhold the information you have marked under section 552.107.

Section 552.117(a)(1) of the Government Code excepts the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Additionally, section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). You state that the employee at issue elected to keep his information confidential prior to the commission's receipt of the current request for information. Accordingly, the commission must withhold the information we have marked under section 552.117(a)(1).

You claim that some of the submitted information is excepted from disclosure under section 552.134 of the Government Code. This section relates to inmates of the department and provides in relevant part as follows:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] 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). We note that section 552.134 applies only to "information obtained or maintained by" the department. *See id.* § 552.134(a). This office has previously held that the department has the discretion to transfer to another governmental body information subject to the statutory predecessor to section 552.134, and that the transferred information remains confidential in the hands of the receiving governmental body. *See* Open Records Decision No. 667 (2000) (department 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 the voter registrar).

You state, and the submitted information reflects, that some of the remaining documents relate to inmates confined in a department facility. Furthermore, you state that the

documents at issue were provided to the commission by the department. Thus, we agree that section 552.134 is applicable to some of this information, which we have marked. We also find that section 552.029 is not applicable to the marked information. Therefore, the commission must withhold the information we have marked pursuant to section 552.134. Although the remaining information you have marked pertains to department inmates, the information, on its face, reveals that it was not transferred to the commission by the department. This information consists of communications originating with the commission or sent to the commission from an individual inmate, not the department. Accordingly, the commission may not withhold any of the remaining information you have marked under section 552.134.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137 (a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. We have marked the personal e-mail addresses that do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that these individuals have consented to the release of their addresses. Therefore, the commission must withhold the e-mail addresses we have marked under section 552.137. The remaining e-mail addresses you have marked are subject to section 552.137(c) and, thus, may not be withheld under section 552.137.

You also claim that a portion of the submitted information is excepted from disclosure under section 552.139 of the Government Code. Section 552.139 provides that information is excepted from required public disclosure "if it is information that relates to computer network security or to the design, operation, or defense of a computer network." *Id.* § 552.139(a). You state that a portion of the remaining information contains a commission computer network user name and password. Based on your representation and our review of the submitted information, we find that the commission may withhold the information you have marked, as well as the information we have marked, under section 552.139 of the Government Code.

Finally, you assert that some of the remaining information is copyrighted. Upon review, we agree that some of the information at issue may be subject to copyright law, and we note that a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright

law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, with regard to the submitted information that is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2008-05300, the commission may continue to rely on this ruling as a previous determination and withhold or release this information in accordance with that decision. The commission may withhold the information we have marked under section 552.111 of the Government Code. The commission may withhold the information you have marked under section 552.107 of the Government Code. The commission must withhold the information we have marked under sections 552.117(a)(1), 552.134 and 552.137 of the Government Code. The commission must withhold the information you have marked, as well as the information we have marked, under section 552.139 of the Government Code. The remaining information must be released to the requestor, but any information protected by copyright may only be released in accordance with copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/eeg

Ref: ID# 312174

Enc. Submitted documents

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