



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 17, 2010

Mr. Walter Ehresman
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-03790

Dear Mr. Ehresman:

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# 372193.

The Department of State Health Services (the "department") received a request for information regarding the uses of newborn "bloodspot" or "heel stick" blood samples from infants born in Texas hospitals.¹ You state you have provided or will provide some of the requested information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note that the requestor clarified her request. *See* Gov't Code § 522.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We 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.

Initially, we note you have marked portions of the submitted information as not responsive to the request. The department is not required to release non-responsive information in response to this request, and this ruling will not address such 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." Gov't Code § 552.101. This section encompasses information protected by other statutes, including chapter 33 of the Health and Safety Code. This chapter provides for a program requiring Texas newborn children to be screened for certain rare genetic disorders. You raise section 552.101 in conjunction with section 33.017 of the Health and Safety Code, which provides in part:

(a) Reports, records, and information obtained or developed by the department under [Chapter 33 of the Health and Safety Code] are confidential and are not subject to disclosure under Chapter 552, Government Code, are not subject to subpoena, and may not otherwise be released or made public except as provided by this section.

b) Notwithstanding other law, reports, records, and information obtained or developed by the department under this chapter may be disclosed:

(1) for purposes of diagnosis or follow-up authorized under Section 33.014;

(2) with the consent of each identified individual or an individual authorized to consent on behalf of an identified child;

(3) as authorized by court order;

(4) to a medical examiner authorized to conduct an autopsy on a child or an inquest on the death of a child; or

(5) to public health programs of the department for public health research purposes provided that the disclosure is approved by an institutional review board or privacy board of the department as authorized by the federal privacy requirements adopted under the Health Insurance Portability

and Accountability Act of 1996 Pub. L. No. 104-191) contained in 45 C.F.R. Part 160 and 45 C.F.R. Part 164, Subparts A and E.

(c) Notwithstanding other law, reports, records, and information that do not identify a child or the family of a child may be released without consent if the disclosure is for:

(1) statistical purposes;

(2) purposes related to obtaining or maintaining certification, approval, or quality assurance for the department's laboratory or a public or private laboratory to perform newborn screening tests;

(3) purposes relating to review, quality assurance, or improvement of the department's newborn screening under this chapter or the department's newborn screening program services under Subchapter C;

(4) research purposes, provided that the disclosure is approved by an institutional review board or privacy board of the department; or

(5) quality assurance related to equipment and supplies, provided that:

(A) the assessment is performed by a person who is not a laboratory

(B) only newborn screening specimens are disclosed; and

(C) the disclosure is approved by an institutional review board or privacy board of the department.

Health & Safety Code § 33.017(a)-(c). The legislative history for section 33.017 indicates the statute's intent was to provide for the development of a disclosure statement, policies, and procedures relating to the authorization, management, and use of genetic material used in newborn screenings. *See* House Comm. on Public Health, Bill Analysis, Tex. H.B. 1672, 81st Leg., R.S. (2009). The legislative history further states the purpose of section 33.017(a) is to codify the confidentiality standards the department already applies regarding the usage and protection of information pertaining to the actual genetic material collected for newborn screenings. *See* House Research Org., Bill Analysis, H.B. 1672, 81st Leg., R.S. (2009) at 2. The information at issue consists of internal e-mails and attachments discussing the department's policies regarding various aspects of the newborn screening program such as storage, retention, protocol, and uses of the genetic material samples. You contend the information you have marked is confidential because it was either furnished to or created by the department and is related to newborn screening. However, based upon our review, we find this information pertains to the newborn screening program as a whole, not to the genetic material collected for newborn screenings as contemplated by section 33.017(a). As such, we conclude no portion of the submitted information may be withheld under section 33.017(a).

You also claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. 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." 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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 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).

You state the information at issue consists of communications between department employees pertaining to the development of department policy regarding the uses of newborn "bloodspots." Based upon your representations and our review, we agree the department may withhold the information we have marked under section 552.111. However, we conclude the remaining e-mail communications consist of purely factual information that is not excepted under section 552.111. Accordingly, you may only withhold the information we have marked under section 552.111.

We note a portion of the remaining information is subject to section 552.137 of the Government Code.³ 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). We note section 552.137(a) does not apply to the e-mail address provided by a person who has a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1). Therefore, the department must withhold the e-mail addresses we have marked under section 552.137, unless the department receives consent for their release. However, to the extent any of the personal e-mail addresses fall under any of the exceptions listed under subsection 552.137(c), the marked e-mail addresses may not be withheld under section 552.137.

In summary, the department may withhold the information we have marked under section 552.111 of the Government Code. To the extent the e-mail addresses we have marked are not excluded by subsection (c), they must be withheld under section 552.137 of

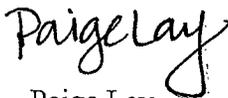
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the Government Code, unless the department receives consent for their release.⁴ The remaining responsive information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

PL/cc

Ref: ID# 372193

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.