



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2010

Mr. Reg Hargrove
Public Information Coordinator
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

OR2010-05220

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under the Public Information Act ("PIA" or "Act"), chapter 552 of the Government Code. This request was originally received by the Open Records Division of this office and assigned ID# 376394. Preparation of the ruling has been assigned to the Opinion Committee of this office.

The Office of the Attorney General (the "OAG") received a request for numerous specific items of information related to personnel of the Open Records Division.¹ You state that the OAG will make most of the responsive information available to the requestor for inspection pursuant to his request. In doing so, you state that you will redact social security numbers from the submitted information pursuant to section 552.147 of the Government Code, which provides that a governmental body may redact social security numbers of living persons without requesting a decision under subchapter G of the PIA. You assert that portions of the remaining information responsive to the request are excepted from required disclosure under the PIA by sections 552.101 (information confidential by law), 552.106 (deliberative process privilege related to proposed legislation), 552.107 (attorney-client privilege), and 552.111 (deliberative process privilege) of the Government Code, and you have provided representative samples of this information.²

¹You have attached the request to your letter as Exhibit A. You have also attached an email exchange between yourself and the requestor dated February 5, 2010, which sets out the requestor's agreement to "exclude specific references to ORD working files and attachments obtained directly from ORD working files" from his request.

²We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Tex Att'y Gen. ORD-499 (1988), ORD-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.

Government Code section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses the doctrine of common-law privacy. *See* TEX. GOV’T CODE ANN. § 552.101 (Vernon 2004). Common-law privacy protects information about an individual if the information (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) (considering the application of the Act’s predecessor to workers compensation files). The information considered intimate and embarrassing by the Texas Supreme Court 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. Some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure under the doctrine of common-law privacy. *See* Tex. Att’y Gen. ORD-470 (1987) at 4 (information about illness resulting from severe emotional and job-related stress is private), ORD-455 (1987) at 8-9 (information in job applications about an applicants’ illnesses or operations and physical disabilities is intimate personal information). The OAG has marked certain medical information found in an email about an employee and asserts that this information is confidential under common-law privacy and must be withheld under Government Code section 552.101. We have examined this information and agree that it must be withheld under section 552.101.

Government Code section 552.107(1) provides that information is excepted from required public disclosure if “it is information that the attorney general . . . is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.” TEX. GOV’T CODE ANN. § 552.107(1) (Vernon Supp. 2009). This section protects information within the attorney-client privilege as set out in Texas Rule of Evidence 503. *See* Tex. Att’y Gen. ORD-676 (2002) at 4; *see also* TEX. R. EVID. 503. The governmental body claiming this exception must demonstrate (1) that the information constitutes or documents a communication; (2) that the communication has been made “for the purpose of facilitating the rendition of professional legal services to the client governmental body”; (3) that the communication was between or among clients, client representatives, lawyers, and lawyer representatives; (4) that the communication 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”; and (5) that the communication has remained confidential. Tex. Att’y Gen. ORD-676 (2002) at 5, 7-8, 10. If a governmental body demonstrates that any portion of a communication is protected under the attorney-client privilege, then the entire communication will be excepted from disclosure under section 552.107. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

You have marked several documents as protected in whole or part by section 552.107. The first document is a communication between attorneys in the Office of the Attorney General concerning a personnel issue. It contains factual information and information about division

policies, but it does not include any legal advice or reference to law. Your letter does not explain the connection of this document to rendering legal services. You have not demonstrated that the communication was made “for the purpose of facilitating the rendition of professional legal services” to the OAG. For that reason, this document must be released to the requestor.

You claim section 552.107 applies to emails between OAG attorneys that give advice on drafting and revising Open Records Letters. These constitute communications between attorneys “for the purpose of facilitating the rendition of professional legal services” to the OAG. You state that these documents were not intended to be disclosed and have not been disclosed to non-privileged parties. We agree that these emails may be withheld from disclosure pursuant to section 552.107.

You also claim that certain marked portions of a five-page memo by a former assistant attorney general are excepted from disclosure by sections 552.107 and 552.111. You may withhold under section 552.107 the portions of the memo that address the process of drafting specific open records rulings (“ORLs”). We have marked these portions “withhold.”³ The deliberative process privilege under Government Code section 552.111 protects from disclosure intraagency and interagency communications consisting of advice, opinion, or recommendations on policymaking matters of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 361, 364 (Tex. 2000). “An agency’s policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues.” Tex. Att’y Gen. ORD-615 (1993) at 5. Even when an internal memorandum does relate to a governmental body’s policy functions, the deliberative process privilege excepts from disclosure only the advice, recommendations, and opinions found in that memorandum.

You also wish to withhold preliminary drafts of ORLs, which include handwritten reviewer comments. Section 552.111 protects the drafts of a document that has been released in final form to the public, because the draft necessarily represents advice, opinion, and recommendations of the drafter as to the form and content of the final document. Tex. Att’y Gen. ORD-559 (1990) at 2–3 (addressing predecessor to Government Code section 552.111). The draft must, of course, consist of advice, opinion, or recommendations on policymaking matters of the governmental body. *See City of Garland*, 22 S.W.3d at 361, 364. This section does not except from disclosure purely factual information that is severable from the opinion portions of the memorandum. Tex. Att’y Gen. ORD-615 (1993) at 4–5. The drafts and the comments consist of advice, opinion, and recommendations on the matter of preparing an open records ruling and are excepted from disclosure by section 552.111.

³You have marked the ID numbers of these drafts as excepted from disclosure by sections 552.107 and 552.111 and three open records ruling tracking sheets as excepted from disclosure by section 552.111. The requestor agreed to “exclude specific references to ORD working files and attachments obtained directly from ORD working files” from his request. *See* page 1, n. 1. Accordingly, the request does not include the ID numbers or the tracking sheets, and we do not address these items.

Copies of issued ORLs are included in the representative documents you have submitted. Issued ORLs are available to the public on the Attorney General's Internet site⁴ and may not be withheld from disclosure.

With this letter, we are returning the documents marked as "representative samples." We have marked these documents to show our determination as to the exception claimed in connection with them.

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,



Susan L. Garrison
Assistant Attorney General
Opinion Committee

SLG/pdr

Ref: ID# 376394

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴Open Records Letters are available at http://www.oag.state.tx.us/open/index_orl.php.