ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2010

Ms. Jacqueline Hojem
Public Information Officer and Senior Paralegal
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208

OR2010-06937

Dear Ms. Hojem:

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# 379422 (MTA Request No. 2010-0353).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for e-mails for a named authority employee and for his assistant from January 27, 2010, through February 25, 2010. You state the authority has released a portion of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note a portion of the submitted information was the subject of a previous request for information received by the authority, in response to which this office issued Open Records Letter No. 2010-06854. In that ruling, we determined the authority: (1) may withhold the information it marked under section 552.107 of the Government Code, (2) must

[1]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.

withhold an e-mail address under section 552.137 of the Government Code, and (3) must release the remaining information. Thus, with regard to the requested information that was previously requested and ruled on by this office, we conclude the authority must continue to rely on Open Records Letter No. 2010-06854 as a previous determination and withhold or release the identical information in this request in accordance with that ruling.[2] *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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). We will address your raised exceptions for the remaining submitted information.

You raise section 552.101 of the Government Code for one of the submitted e-mails. Section 552.101 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, which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. However, determinations under common-law privacy must be made on a case-by-case basis. *See* Open Records Decision No. 373 at 4 (1983).

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village*, Tex., 765 F.2d 490 (5th Cir. 1985)).

The e-mail communication you marked pertains to the authority's verification of a doctor appointment for an authority employee. This office has found some kinds of medical information or information indicating disabilities or specific illnesses to be excepted from

[2]As our ruling is dispositive for this information, we need not address your claimed exceptions to its disclosure.

required public disclosure under common-law privacy. *See* ORD 455 (prescription drugs, illnesses, operations, and physical handicaps). However, information pertaining to an employee's performance as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Upon review, we find this e-mail does not reveal any personal medical information, and you have not explained how this information is otherwise highly intimate or embarrassing. We also find this information relates to the authority's verification of an employee's actions, and is thus of legitimate public interest. You also have not explained how the information in this e-mail falls within one of the constitutional zones of privacy. Accordingly, we conclude you have not established this information is confidential under the principles of common-law privacy or constitutional privacy, and the information you marked under section 552.101 may not be withheld on that basis.

Section 552.101 also encompasses the Medical Practices Act ("MPA"). Medical records are confidential under the MPA, subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a), (b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we marked the medical record in the submitted information, which

must be withheld under section 552.101 of the Government Code in conjunction with the MPA.

You raise section 552.107 of the Government Code for some of the remaining information. Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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). 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.*, 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 pet.). 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). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You have identified the individuals in the e-mails you marked under section 552.107 as authority employees, attorneys who represent the authority, and representatives of those employees and attorneys. You represent these e-mails were made for the purpose of

facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Thus, based on your representations and our review, we conclude the e-mails you marked are protected by the attorney-client privilege and may be withheld under section under section 552.107 of the Government Code.

You claim a portion of the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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 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.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

This office has also concluded a preliminary draft of a document 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 contend the information you marked under section 552.111 consists of notes, memoranda, and documents that pertain to communications, deliberations, and negotiations related to projects involving the authority. Upon review, some information you marked constitutes drafts of policymaking documents that are internal to the authority. However, you do not inform us whether the authority intends to release these documents in their final form. Therefore, to the extent the draft documents we marked will be released to the public in their final form, the authority may withhold them in their entirety under section 552.111. To the extent these draft documents will not be released in their final form, they may not be withheld in their entirety under section 552.111 of the Government Code. We have marked the parts of the remaining information that consist of advice, opinion, or recommendation regarding policy matters of the authority. Based on your representations and our review, the authority may withhold this information under section 552.111 of the Government Code. However, we find the remaining information consists of either general administrative information that does not relate to policymaking, information that is purely factual in nature, or information that has been communicated with employees at the United States Department of Transportation. You do not explain how the remaining administrative and factual information consists of the advice, opinion, or recommendation of the authority related to its policy. You also do not provide any information explaining the nature of the authority's relationship with the Department of Transportation, or how the Department of Transportation shares a privity of interest or common deliberative process with the authority. Thus, you have failed to demonstrate that this remaining information is protected by the deliberative process privilege, and it may not be withheld under section 552.111.

You raise section 552.137 of the Government Code for personal e-mail addresses in the remaining information. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not except from disclosure the general e-mail address of a business or the work address of a government employee. The e-mail addresses we marked are not a type excluded by subsection (c). You inform this office the authority has not received consent to release these e-mail addresses. Accordingly, we agree the

authority must withhold the e-mail addresses we marked under section 552.137.[3] However, the remaining e-mail addresses at issue are the work e-mail addresses of governmental employees, and thus may not be withheld.

Some of the remaining information may be subject to section 552.117(a)(1) of the Government Code.[4] This section excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The authority may only withhold information under section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the former authority employee whose information we marked timely elected to keep his home address, home telephone number, and family member information confidential pursuant to section 552.024, the authority must withhold the information we marked under section 552.117(a)(1). However, if this former employee did not timely elect under section 552.024, this information must be released.

In summary, the authority must continue to rely on Open Records Letter No. 2010-06854 as a previous determination and withhold or release the identical information in this request in accordance with that ruling. The medical record we marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA. The authority may withhold the information we marked under section 552.107 of the Government Code. To the extent the draft documents we marked will be released to the public in their final form, they may be withheld under section 552.111 of the Government Code, and the authority may withhold the portions of the remaining information we marked under section 552.111 of the Government Code. The authority must withhold the e-mail addresses we marked under section 552.137 of the Government Code. The authority must also withhold the information we marked under section 552.117 of the Government Code if the former employee whose information we marked properly elected to keep his information confidential. The remaining information must be released.

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[3]We 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 e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

[4]The 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.

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,

Lauren J. Holmsley

Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/eeg

Ref: ID# 379422

Enc. Submitted documents

cc: Requestor
(w/o enclosures)