



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 11, 2011

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal & Regulatory Affairs
Texas Department of Insurance
Mail Code 110-1A
Austin, Texas 78714-9104

OR2011-11586

Dear Ms. Waitt:

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# 426663 (TDI # 115946).

The Texas Department of Insurance, Division of Workers' Compensation (the "division") received a request for all written materials used by division staff who provide training approving or denying letters of clarification. You state some information has been released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted 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 section 402.092 of the Labor Code, which provides confidentiality and exceptions to confidentiality for the investigation files of the division. Section 402.092 provides in relevant part:

¹We note in your brief dated June 26, 2011, you withdrew your remaining assertions under the Act.

(a) In this section, “investigation file” means any information compiled or maintained by the division with respect to a division investigation authorized under this subtitle or other workers’ compensation law.

(b) Information maintained in the investigation files of the division is confidential and may not be disclosed except [in five specified situations].

(d) Information in an investigation file that is information in or derived from a claim file, or an employer injury report or occupational disease report, is governed by the confidentiality provisions relating to that information.

Labor Code § 402.092(a)-(b), (d). You claim the submitted spreadsheet consists of information contained in and used to assemble investigation files. However, you also state the spreadsheet is entirely derived from claim files. Section 402.092(d) provides that information in or derived from a claim file is governed by the confidentiality provisions applicable to that information. *Id.* § 402.092(d). The confidentiality of a claim file is covered by section 402.083 of the Labor Code. *Id.* § 402.083. Accordingly, we will address your claim under section 402.083 for this information.

Section 552.101 of the Government Code also encompasses section 402.083 of the Labor Code, which provides that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the division except as provided by this subtitle[.]” Labor Code § 402.083(a). This office has interpreted section 402.083 to protect only that “information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers’ compensation claims.” Open Records Decision No. 619 at 10 (1993). However, we also have stated “[w]hether specific information implicitly discloses the identify of a particular employee must be determined on a case-by-case basis.” *Id.* Prior decisions of this office have found information revealing the date of injury, as well as an injured employee’s name, beneficiary name, commission claim number, social security number, home telephone number, home address, and date of birth implicitly or explicitly identifies claimants and is therefore excepted from disclosure under section 552.101 in conjunction with section 402.083.² You state the submitted spreadsheet derived from claim files implicitly or explicitly discloses the identities of employees who have filed workers’ compensation claims. Based on your representations and our review, we find the information we have marked implicitly or explicitly identifies workers’ compensation claimants. Therefore, the division must withhold the information we have marked under section 552.101 in conjunction with section 402.083.³ However, we conclude

²The “commission” refers to the predecessor agency of the division, which was established under House Bill 7, 79th Legislature, R.S. (2005).

³As our ruling for this information is dispositive, we need not address your argument under section 552.147 of the Government Code.

you have failed to show the remaining information at issue either implicitly or explicitly identifies employees who have filed workers' compensation claims. Therefore, the remaining information at issue is not confidential under section 402.083 and may not be withheld under section 552.101.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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 established. *Id.* at 681–82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find some of the remaining information in the submitted spreadsheet is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the division must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.111 of the Government Code 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, 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, orig. proceeding); 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).

This office has also concluded a preliminary draft of a 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 the document entitled Designated Doctor Request for Clarification Procedures constitutes a draft document that discusses policy issues within the regulatory authority of the division and contains advice, opinions, and recommendations. Based on your representations and our review, we find the division has demonstrated this document consists of draft documentation pertaining to the policymaking functions of the division. However, you do not explain whether this document will be released to the public in its final form. Accordingly, to the extent the Designated Doctor Request for Clarification Procedures will be released to the public in its final form, the division may withhold it under section 552.111 of the Government Code. Conversely, to the extent the division will not release the document at issue to the public in its final form, it may not be withheld under section 552.111.

In summary, the division must withhold the information we have marked under section 552.101 of the Government Code in conjunction with (1) section 402.083 of the Labor Code and (2) common-law privacy. To the extent the Designated Doctor Request for Clarification Procedures will be released to the public in its final form, the division may withhold it under section 552.111 of the Government Code. The remaining 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,

A handwritten signature in black ink, appearing to read 'Ana Carolina Vieira', with a stylized flourish at the end.

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 426663

Enc. Submitted documents

c: Requestor
(w/o enclosures)