



ATTORNEY GENERAL OF TEXAS
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October 27, 2011

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Texas Department of Insurance
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OR2011-15809

Dear Ms. Villareal-Reyna:

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# 435266 (TDI # 118952).

The Texas Department of Insurance (the "department") received a request for the form filing for Bunch–First Health Texas Health Care Network ("Bunch"). You state you will withhold information pursuant to section 552.147(b) of the Government Code¹ and Open Records Decision No. 684 (2009).² You claim portions of the submitted information are excepted

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting an attorney general decision under the Act. *See* Gov't Code § 552.147(b). Based on this representation, we need not address your argument under section 552.101 of the Government Code in conjunction with section 59.001 of the Occupations Code for this information.

²Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code and bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684 at 14-15. However, on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) and 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Act of

from disclosure under sections 552.101, 552.111, 552.136, and 552.137 of the Government Code. In addition, you state release of the requested information may implicate the proprietary interests of Bunch. Accordingly, you provide documentation showing you have notified Bunch of the request and its right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from an attorney for Bunch. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

We first address Bunch's assertion that its submitted information is confidential because it was marked as "confidential" when submitted to the department. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W. 2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary. As Bunch does not raise any exceptions to disclosure, the department may not withhold any of the requested information based on any proprietary interest Bunch may have in the 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. You claim the contracts you have marked are confidential under sections 1305.102(k), 1305.152(a) and 1305.154(a) of the Insurance Code.

May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22, 27 (to be codified at Gov't Code §§ 552.130(c) and 552.136(c)). If a governmental body redacts such information, it must notify the requestor in accordance with sections 552.130(e) and 552.136(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 22, 27 (to be codified at Gov't Code §§ 552.130(d)-(e) and 552.136(d)-(e)). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) and 552.136(b) in accordance with sections 552.130 and 552.136, not Open Records Decision No. 684.

³ We assume 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 those records contain substantially different types of information than that submitted to this office.

Section 1305.102(k) provides “[a] management contract filed with the department under this section is confidential and is not subject to disclosure as public information under [the Act].” Ins. Code § 1305.102(k). Section 1305.152(a) provides “[a] network shall enter into a written contract with each provider or group of providers that participates in the network. A provider contract under this section is confidential and is not subject to disclosure as public information under [the Act].” *Id.* § 1305.152(a). Section 1305.154(a) provides “[e]xcept for emergencies and out-of-network referrals, a network may provide health care service to employees only through a written contract with an insurance carrier. A network-carrier contract under this section is confidential and is not subject to disclosure as public information under [the Act].” *Id.* § 1305.154(a). You assert the contracts you have marked are of the types made confidential under sections 1305.102(k), 1305.152(a), and 1305.154(a) of the Insurance Code. Upon review, we find the information we have marked is confidential under sections 1305.152(a) and 1305.154(a) of the Insurance Code and must be withheld under section 552.101 of the Government Code. However, we find the remaining information you have marked does not constitute management contracts as contemplated by section 1305.102(k), provider contracts as contemplated by section 1305.152(a), or network-carrier contracts as contemplated by section 1305.154(a), and it may not be withheld under section 552.101 of the Government Code on those bases.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See id.* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Section 411.106(a) authorizes the department to obtain CHRI; however, the department may release CHRI only in certain instances. *Id.* § 411.106(b). Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. You assert the information you have marked under section 411.106 must be withheld under section 552.101 of the Government Code. Upon review, we find the marked information is not CHRI for purposes of chapter 411 of the Government Code. Therefore, the department may not withhold the information you have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the common-law right to 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 a common-law privacy, both prongs of this test must be met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Finally, this office has found financial information that does not relate to a financial transaction between an individual and a governmental body ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989). Upon review, we find the information we have marked is highly intimate or embarrassing information with no legitimate public interest. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information is not highly intimate or embarrassing information of no legitimate public interest, and it may not be withheld under section 552.101 on that basis.

Section 552.111 of the Government Code 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, orig. proceeding); 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, orig. proceeding). 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. 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).

We note section 552.111 can encompass a governmental body's communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. See Open Records Decision No. 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). In order 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 ORD 561 at 9.

You assert the information you have marked consists of internal communications among department employees containing advice, opinion, and recommendations concerning policy issues regarding the review of certification applications and complaints against regulated entities. Upon review, we find the information we have marked pertains to the department's policymaking processes. Therefore, the department may withhold the information we have marked under section 552.111. However, we find the remaining information you seek to withhold does not consist of advice, opinions, or recommendations, or is purely factual in nature. In addition, a portion of this information consists of communications with third parties. You have not identified the third parties at issue or explained the nature of the relationship between the department and the third parties; thus, we find you have failed to establish a privity of interest with those third parties for purposes of section 552.111. Therefore, the remaining information may not be withheld under section 552.111 of the Government Code.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to "(1) obtain money,

goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). The bank account and bank routing numbers we have marked constitute access device numbers for purposes of section 552.136 and must be withheld on that basis.

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). *See* Gov’t Code § 552.137(a)-(c). You have marked e-mail addresses you state are subject to section 552.137. We have marked additional e-mail addresses on this basis. The marked e-mail addresses are not of a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the marked e-mail addresses under section 552.137, unless their owners have affirmatively consented to disclosure.

We note portions of the remaining information are protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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 copyright law and the risk of a copyright infringement suit.

In summary, the department (1) must withhold the information we marked under section 552.101 of the Government Code in conjunction with sections 1305.152 and 1305.154 of the Insurance Code and common-law privacy, (2) may withhold the information we marked under section 552.111, (3) must withhold the information we marked under section 552.136, and (4) must withhold the marked e-mail addresses under section 552.137, unless their owners have affirmatively consented to disclosure.⁴ The remaining requested information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.

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.

⁴As noted above, Open Records Decision No. 684 (2009) is 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.

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,



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Open Records Division

MHB/agn

Ref: ID # 435266

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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