



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 6, 2012

Mr. Marc Allen Connelly  
Deputy General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2012-01845

Dear Mr. Connelly:

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# 444539 (DSHS File No. 19592/2012).

The Texas Department of State Health Services (the "department") received a request for all e-mails, including attachments, sent by a named individual to the requestor during a specified period. You state some of the responsive information has been or will be released to the requestor. You inform us the department will withhold some of the information pursuant to the previous determinations issued in Open Records Decision No. 684 (2009) and in Open Records Letter No. 2010-18849 (2010).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government

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<sup>1</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information without seeking a ruling from this office. Open Records Letter No. 2010-18849 is a previous determination issued to the department permitting it to withhold information furnished to, or created or gathered by, the department that is related to cases or suspected cases of diseases or health conditions under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code, unless the exceptions to confidentiality listed in subsections 81.046(c), (d), or (f) are applicable. *See* Health & Safety Code § 81.046(c), (d), (f); *see also* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when elements of law, facts, and circumstances have not changed, decision concludes specific, clearly delineated category of information is excepted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests).

Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

We note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-01589 (2012). We have no indication the law, facts, or circumstances on which the previous ruling was based have changed. Thus, with regard to the information we have marked in Exhibits B and D, we conclude the department may continue to rely on Open Records Letter No. 2012-01589 as a previous determination and withhold or release the information we have marked in accordance with that ruling.<sup>3</sup> *See* ORD 673.

Section 552.107(1) of the Government Code 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. ORD 676 at 6–7. 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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

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<sup>2</sup>Although you claim section 552.101 of the Government Code in conjunction with section 552.117 of the Government Code, we note section 552.101 does not encompass exceptions found within the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

<sup>3</sup>As our ruling is dispositive, we do not address your claimed exceptions for this information

(Tex. App.—Waco 1997, orig. proceeding). 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 communications with third parties with whom a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state the remaining e-mail communications submitted as Exhibit B were sent between the department's attorneys and employees in order to facilitate the rendition of legal services. You state these communications were intended to be, and have remained, confidential. Based on these representations and our review, we conclude the department may withhold the remaining information in Exhibit B under section 552.107(1) of the Government Code.

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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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, opinions, recommendations, 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, no pet.); *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 submitted as Exhibit C consists of internal communications by department managers “regarding broad issues of agency resource allocation and prioritization

of responsibilities[.]” Based on your representations and our review, we find the information we have marked consists of advice, opinion, or recommendations on policymaking matters. Accordingly, the department may withhold this information under section 552.111 of the Government Code. However, we find the remaining information you seek to withhold pertains to routine administrative procedures or it does not consist of advice, opinion, or recommendations on policymaking matters. Accordingly, the department may not withhold the remaining information under section 552.111 of the Government Code.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. 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). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. You indicate the employee whose information is at issue in Exhibit D requested confidentiality prior to the date the department received the request for information. Accordingly, the department must withhold the information we have marked in Exhibit D under section 552.117 of the Government Code.<sup>4</sup> The remaining information you have marked is not protected by section 552.117 of the Government Code and may not be withheld on that basis.

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. Section 552.101 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 certain kinds of medical information or information indicating disabilities or specific illnesses are protected by 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 the information we have marked in Exhibit D is highly intimate or embarrassing and of no legitimate public concern. The department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing; therefore, the department may not withhold it under section 552.101 of the Government Code on that basis.

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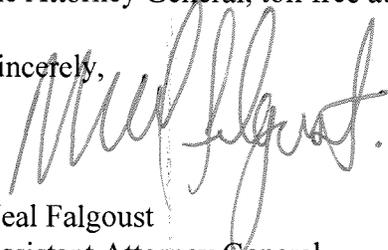
<sup>4</sup>As our ruling is dispositive for some of the information you have marked, we do not address your arguments under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department may continue to rely on Open Records Letter No. 2012-01589 as a previous determination and withhold or release the information we have marked in accordance with that ruling. The department may withhold the remaining information in Exhibit B under section 552.107(1) of the Government Code. The department may withhold the information we marked in Exhibit C under section 552.111 of the Government Code. The department must withhold the information we marked in Exhibit D under section 552.117(a)(1) of the Government Code and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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](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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/agn

Ref: ID# 444539

Enc. Submitted documents

c: Requestor  
(w/o enclosures)