



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2012

Ms. Lisa D. Hernandez
General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-07960

Dear Ms. Hernandez:

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# 455047 (DSHS File No. 20035/2012).

The Texas Department of State Health Services (the "department") received a request for correspondence between employees of the department and employees of the Office of the Governor (the "OOG") during a specified time period.¹ You state the department will release or has released some of the requested information 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

¹We note the department asked for and received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Nos. 2010-18849 (2010) and 2005-04917 (2005).² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note a portion of Exhibit D is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless made confidential under this chapter or other law:

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(5). The information we have marked in Exhibit D consists of a budget that constitutes information used to estimate the need for or expenditure of department funds and is subject to section 552.022(a)(5) of the Government Code. Although you raise the deliberative process privilege in section 552.111 for this information, this is a discretionary exception to disclosure and does not make information confidential under the

²Open Records Decision No. 684 serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, 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). Open Records Letter No. 2005-04917 is a previous determination issued to the department permitting it to withhold information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital under section 552.101 of the Government Code in conjunction with section 241.051 of the Health and Safety Code, unless the release provisions of section 241.051(d) or section 241.051(e) apply. *See* Health & Safety Code § 241.051(d), (e); *see also* ORD 673.

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

Act. *See id.* § 552.007; Open Records Decision Nos. 677 at 10-11 (2002) (deliberative process privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). Therefore, the department may not withhold the marked budget under section 552.111 of the Government Code. However, we will address your argument under section 552.111 for the remaining information in Exhibit D.

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 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 demonstrated. *See id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public 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 the information we have marked in Exhibit E is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked in Exhibit E pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information the department has marked pertains to individuals who have been de-identified and whose privacy interests are thus protected. Therefore, the department may not withhold any portion of the remaining information it has marked in Exhibit E under section 552.101 in conjunction with common-law privacy.

You also claim the remaining information you have marked in Exhibit E is subject to constitutional privacy, which is also encompassed by section 552.101. Constitutional privacy protects two kinds of interests. *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. The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th

Cir.1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). In this instance, you have not demonstrated how constitutional privacy applies to the remaining information you have marked in Exhibit E. Consequently, the department may not withhold any of the remaining information in Exhibit E under section 552.101 in conjunction with constitutional privacy.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You assert Exhibit B is excepted from disclosure under section 552.103 because the department is a party to a lawsuit styled *Floyd Taylor v. David L. Lakey*, Cause No. D-1-GN-07-837. You inform us on February 2, 2012, the district court issued its ruling in the lawsuit at issue and on March 2, 2012, the department filed a motion for new trial. You state the information submitted as Exhibit B relates directly to the litigation at issue. Upon review of your arguments and the information at issue, we find litigation was pending when the department received this request for information and Exhibit B relates to the pending litigation. Therefore, the department may withhold Exhibit B under section 552.103.

However, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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 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.⁴ 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must

⁴Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

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).

You state Exhibit C consists of confidential communications between attorneys and staff representing the department, attorneys and staff for the OOG, and attorneys for the Office of the Attorney General (the "OAG"). You state the department, the OOG, and the OAG share a common legal interest with respect to the information at issue. You inform us the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the department. You further state these communications were not intended to be, and have not since been, disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of legal services. Based on your representations and our review of the submitted documents, we find Exhibit C consists of privileged attorney-client communications the department may withhold under section 552.107. *See In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (discussing the "joint-defense" privilege incorporated by rule 503(b)(1)(c)).

You assert Exhibit D is excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure "[a]n 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, no writ); *see also 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 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. *See id.*; *see also City of Garland v. The 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).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafters 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.

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* ORD 561 at 9.

You state Exhibit D consists of communications between the department and the OOG. With respect to these communications, you state the department shares a privity of interest with the OOG. You also state some of the information at issue consists of draft documents. Based on your representations and our review of the information at issue, we find the department has demonstrated portions of Exhibit D, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the department. Thus, the department may withhold the marked information in Exhibit D under section 552.111 of the Government Code. However, you do not state whether the submitted draft document, which we have marked, will be released to the public in its final form. Thus, to the extent the marked draft document in Exhibit D will be released to the public in its final form, the department may withhold the marked draft document in its entirety under section 552.111 of the Government Code. If the marked draft document in Exhibit D will not be released to the public in its final form, then the department may not withhold it under section 552.111 of the Government Code. In that instance, we have marked a portion of the draft document consisting of advice, opinion, or recommendation regarding policy matters the department may withhold under section 552.111 of the Government Code. However, we find the remaining information in Exhibit D does not consist of advice, opinion, or recommendation, but rather consists of general administrative or purely factual information. Thus, we

conclude the department has failed to demonstrate how the remaining information in Exhibit D is excepted under section 552.111. Consequently, the department may not withhold any of the remaining information in Exhibit D under section 552.111.

We note a portion of the remaining information in Exhibit D may be subject to section 552.117(a)(1) of the Government Code. Section 552.117 excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual whose cellular telephone number is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body did not pay for the cellular service, the department must withhold the cellular telephone number we have marked in Exhibit D under section 552.117(a)(1) of the Government Code. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or a governmental body paid for the cellular service, the department may not withhold the marked cellular telephone number under section 552.117(a)(1).

In summary, the department must withhold the information we have marked in Exhibit E under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold Exhibit B under section 552.103 of the Government Code and Exhibit C under section 552.107 of the Government Code. The department may withhold the information we have marked in Exhibit D under section 552.111 of the Government Code. To the extent the marked draft document will be released to the public in its final form, the department may withhold it in its entirety under section 552.111 of the Government Code. To the extent the marked draft document will not be released to the public in its final form, the department may withhold the portion of the draft document we have marked under section 552.111 of the Government Code. To the extent the individual whose cellular telephone number is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body did not pay for the cellular service, the department must withhold the cellular telephone number we have marked in Exhibit D under

section 552.117(a)(1) 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 that reads "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J" and "L".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 455047

Enc. Submitted documents

c: Requestor
(w/o enclosures)