



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2012

Ms. Barbara H. Owens
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Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-09591

Dear Ms. Owens:

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# 457057 (DSHS File: 20153/2012).

The Texas Department of State Health Services (the "department") received a request for e-mails to or from eight department employees for a specified time period with specified keywords.¹ You state you have or will release some information to the requestor. You also state you are withholding materials obtained or compiled by the department in connection with a complaint investigation of a specified mental hospital under section 552.101 of the Government Code in conjunction with section 577.013(d) of the Health and Safety Code pursuant to a previous determination issued to the department in Open Records Letter No. 2008-00113 (2008). *See* Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). You claim the submitted information is excepted from disclosure under sections 552.101,

¹You indicate the department sought and received clarification from the requestor. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the requestor has excluded from her request patient identifying information. Thus, any such information is not responsive to the request. This ruling does not address the public availability of non-responsive information, and the department need not release such information in response to the request.³

Section 552.107(1) 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 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 Tex. 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, 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 (Tex. App.—Waco 1997, orig. proceeding). Section 552.107(1) generally excepts an entire communication that is demonstrated to be

²We 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.

³Thus, we need not address your argument under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code.

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 the e-mails you have marked consist of communications that were made to facilitate the rendition of legal services between the department's attorneys and staff. You have generally identified the parties to the communications. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we agree the department may generally withhold the e-mails you have marked under section 552.107 of the Government Code.⁴ However, we note one of the individual e-mails in an otherwise privileged e-mail string was communicated with an individual you have not established is a privileged party. Therefore, to the extent this non-privileged information, which we have marked, exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107.

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 privilege 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*.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 also has concluded a preliminary draft of a document that has been or 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.

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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 the communications and drafts of documents you have marked consist of internal communications between the department's attorneys and executive staff and from the Division for Mental Health and Substance Abuse Services relating to opinions and recommendations involving the department's decision making process. You indicate the drafts of documents either have been or will be released in their final form. 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 the information we have marked under section 552.111 of the Government Code.⁵ However, we find you have failed to demonstrate how the department shares a privity of interest or common deliberative process with some of the individuals in the remaining communications. Additionally, we note some of the remaining information at issue consists of purely factual information or does not pertain to policymaking. Thus, we conclude the

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

remaining information at issue does not consist of advice, opinion, or recommendations on policymaking matters, and the department may not withhold it under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(a), (b)(1)-(2). You state Exhibit D consists of communications between the department and the State Auditor's Office ("SAO") in connection with an audit being conducted by the SAO. We note the SAO is an independent auditor for Texas state government. The SAO has authority under section 321.013 of the Government Code to conduct investigations and audits of all state departments as specified in the audit plan or as directed by the Legislative Audit Committee. *See id.* § 321.013(a), (f). We note, however, section 552.116 is intended to protect the auditor's interests. As previously noted, the audit

is being conducted by the SAO. In this instance, the department cannot assert section 552.116 in order to protect the information at issue. You do not inform us the SAO seeks to withhold the information at issue under section 552.116. Accordingly, section 552.116 is inapplicable and does not protect the information at issue from disclosure.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 of the Government Code also encompasses section 611.002(a) of the Health and Safety Code, which provides "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See Health & Safety Code §§ 611.004, .0045*. Upon review, we find none of the remaining information you seek to withhold on this basis consists of communications between a patient and a professional or records of the identity, diagnosis, evaluation, or treatment of a patient that were created or maintained by a professional. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

We note portions of the remaining responsive information may be subject to sections 552.117(a)(1) and 552.137 of the Government Code.⁶ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, 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 Gov't Code § 552.117(a)(1)*. Section 552.117 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and 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 only be withheld under section 552.117(a)(1) on behalf of a current or

⁶The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

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. Therefore, if the individual whose cellular telephone number we have marked timely requested confidentiality under section 552.024 and pays for the cellular telephone service with his own funds, the department must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election under section 552.024 or does not pay for the cellular telephone service with his own funds, the department may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁷

In summary, the department may generally withhold the e-mails you have marked under section 552.107 of the Government Code. However, if the non-privileged e-mail we have marked exists separate and apart from the privileged e-mail string in which it is included, the department may not withhold it under section 552.107 of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. If the individual whose cellular telephone number we have marked timely requested confidentiality under section 552.024 of the Government Code and pays for the cellular telephone service with his own funds, the department must withhold the marked information under section 552.117(a)(1) of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining responsive 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.

⁷We note 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 opinion.

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 457057

Enc. Submitted documents

c: Requestor
(w/o enclosures)