



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 27, 2012

Ms. Ashley R. Allen  
Administrative Law Section  
Texas General Land Office  
P.O. Box 12873  
Austin, Texas 78711-2873

OR2012-11747

Dear Ms. Allen:

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# 460482.

The Texas General Land Office (the "GLO") received three requests from the same requestor for a specified contract and e-mail correspondence between the GLO and certain entities related to the Texas State Veterans Nursing Homes.<sup>1</sup> You state some information has been released. You claim that the submitted information is excepted from disclosure under

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<sup>1</sup>We note the GLO sought and received clarification from the requestor regarding the requests. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (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).

sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note portions of the submitted information, which we have marked, are 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 unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information at issue contains completed reports that are subject to subsection 552.022(a)(1). The GLO must release the completed reports pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). You seek to withhold the information at issue under section 552.111 of the Government Code. However, section 552.111 is a discretionary exception and does not make information confidential under the Act. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111).* Therefore, the submitted reports may not be withheld under section 552.111 of the Government Code. However, as section 552.101 of the Government Code makes information confidential under the Act, we will consider your arguments under this section for the completed reports.

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 information made confidential by other statutes, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See Occ. Code §§ 151.001-168.202.* Section 159.002 of the MPA provides in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

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<sup>2</sup>We assume the "representative sample" of information 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 those submitted to this office.

confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). You state the information in Attachment B consists of "reports created by [q]uality [n]urses employed by the [GLO] and communications between nurses and staff of the home or agency personnel related to patient care." You further state the information in Attachment B relates to visits these nurses made to the Texas Veterans Nursing Homes. You assert the information at issue contains information subject to the MPA. Upon review, you have failed to demonstrate, however, and the information at issue does not otherwise indicate, that any of the information in Attachment B consists of medical records or was taken directly from medical records created by or under the supervision of a physician. Accordingly, none of the information in Attachment B may be withheld on the basis of the MPA.

Section 552.101 of the Government Code also encompasses the common-law right of 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). The types 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 that 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 some of the information in Attachments B and C is highly intimate or embarrassing and not of legitimate public concern. Thus, the GLO

must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing. Therefore, the GLO may not withhold any of the remaining information under section 552.101 of the Government Code on this basis.

Section 552.111 of the Government Code 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); 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. *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 next address your arguments for the information not subject to section 552.022 of the Government Code. You state the remaining information in Attachment B consists of “advice, recommendations, and opinions reflecting the policy making process of the GLO related to patient care and the management of [the GLO’s] contracted operators.” However, we find this information is either factual in nature or pertains to administrative and personnel matters that do not rise to the level of policy-making for purposes of section 552.111.

Accordingly, the GLO may not withhold any of the information at issue under section 552.111 of the Government Code on basis of the deliberative process privilege.

We next address your section 552.103 of the Government Code claim for the information in Attachment C. Section 552.103 provides in relevant part:

(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 that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.*, 684 S.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 section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *See id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* ORD 518 at 5; *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result").

You assert that the GLO reasonably anticipates litigation because at the time of the instant request, "the GLO was in negotiations with the Operator of the Big Spring home related to operator's contractual duties." You further state the "GLO is still in negotiations with Big Spring, and if these negotiations are unsuccessful will [sic] pursue legal action against the home." You have not explained how the GLO has taken any concrete steps toward the initiation of litigation. Consequently, you have not established that the GLO reasonably anticipated litigation when it received the request for information. Accordingly, the GLO may not withhold any of the information in Attachment C under section 552.103 of the Government Code.

We note portions of the remaining information may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to 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) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024 and the cellular service is not paid for by a governmental body, the GLO must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The GLO may not withhold this information under section 552.117(a)(1) if the individual did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

In summary, the GLO must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The GLO must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024 and the cellular service is not paid for by a governmental body. The remaining information must be released.

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Sean Opperman  
Assistant Attorney General  
Open Records Division

SO/som

Ref: ID# 460482

Enc. Submitted documents

c: Requestor  
(w/o enclosures)