



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2012

Ms. Ashley D. Fourt
Assistant District Attorney
Tarrant County Criminal District Attorney
401 West Belknap
Fort Worth, Texas 76196-0201

OR2012-17822

Dear Ms. Fourt:

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# 470248.

The Tarrant County Medical Examiner's Office (the "medical examiner") received a request for all documents and materials relating to a former employee and incidents involving "dry labbing" or suspected "dry labbing" as reported to the Texas Forensic Science Commission (the "commission"), including five categories of related information. You state the medical examiner does not have information responsive to category five of the request, and you indicate category five requires the medical examiner to answer questions.¹ You state the medical examiner will make some information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108,

¹We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writdism'd); Open Records Decision No. 452 at 3 (1986). The Act also does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. See Open Records Decision Nos. 563 at 8 (1990), 555 at 1–2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. See Open Records Decision No. 561 at 8 (1990). We assume the medical examiner has made a good faith effort to do so.

552.111, 552.117, 552.130, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.³ We have also considered comments submitted to this office by the requestor. *See Gov't Code § 552.304* (providing that interested third party may submit written comments stating why information should or should not be released).

Initially, we note that the requestor has excluded from the scope of his request home addresses, telephone numbers, and family member information of medical examiner employees. The requestor has also excluded all social security numbers and motor vehicle record information and the identifying information of sexual assault victims. Accordingly, these types of information are not responsive to the present request for information. This ruling does not address the public availability of non-responsive information, and the medical examiner need not release such information in response to this request.⁴

Next, we must address the medical examiner's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See Gov't Code § 552.301(b)*. We note that although you timely raised other exceptions, you did not raise section 552.107 of the Government Code until after the ten-business-day deadline had passed. Consequently, we find the medical examiner failed to comply with the procedural requirements of section 552.301 with respect to its claims under section 552.107.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding information from disclosure. *See generally id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling

²We note although you raised section 552.114 of the Government Code, you have provided no arguments regarding the applicability of this exception. Accordingly, we assume you no longer assert this exception. *See Gov't Code §§ 552.301, .302*.

³We assume that 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.

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

reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). We note section 552.107 of the Government Code is a discretionary exception to disclosure that protects only a governmental body's interests and may be waived. See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, in failing to timely raise section 552.107, the medical examiner has waived its argument under that section and may not withhold any portion of the submitted information 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" and encompasses information made confidential by statute. Gov't Code § 552.101. You claim a portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code because it "relates to a pending investigation by the [commission]." However, you have not directed our attention to any law, nor are we aware of any law, that would make pending investigations of the commission confidential for the purposes of section 552.101. See e.g. Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Accordingly, the information at issue may not be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code encompasses information other statutes make confidential. Federal tax return information is confidential under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. For purposes of section 6103, "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. § 6103(b)(2); see also Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). We have marked a W-4 form the medical examiner must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note Exhibits C-5, C-6, C-9, and C-10 were used or developed in investigations of suspected child abuse. *See id.* §§ 101.003(a) (defining “child” for the purposes of this section as a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001 (defining “abuse” for purposes of chapter 261 of the Family Code). Therefore, we find this information falls within the scope of section 261.201 of the Family Code. As we have no indication the medical examiner has adopted a rule that governs the release of this type of information, we assume no such rule exists. Given that assumption, we determine that the information at issue is confidential pursuant to section 261.201 of the Family Code. *See Open Records Decision No. 440 at 2 (1986) (predecessor statute).* Accordingly, the medical examiner must withhold Exhibits C-5, C-6, C-9 and C-10 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. The type of information considered intimate and 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. You seek to withhold the submitted college transcript under section 552.101 in conjunction with common-law privacy. Upon review, we find no portion of the information at issue is highly intimate or embarrassing or of no legitimate public concern. Accordingly, the medical examiner may not withhold the submitted college transcript under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a).⁵ The Texas Supreme Court held

⁵We note that although you initially raised section 552.102 of the Government Code, you provided no arguments regarding the applicability of that exception. However, we note the Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Therefore, the medical examiner must withhold the marked date of birth under section 552.102(a) of the Government Code.

Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state a portion of the submitted information “may still be pending investigation and/or prosecution.” Thus, we understand you to raise section 552.108(a)(1). However, you have not identified which portions of the submitted information you seek to withhold, nor have you demonstrated that any of the submitted information relates to actual pending criminal investigations or prosecutions. Consequently, you have not established how release of any portion of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See* 552.108(a)(1). Therefore, we find the medical examiner may not withhold any portion of the submitted information under section 552.108(a)(1).

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information in Exhibits C-1, C-2, C-3, C-4, C-7, and C-8 relates to cases that were never prosecuted or did not result in a conviction or deferred adjudication. Thus, we understand you to raise section 552.108(a)(2) for this information. Based on your representations and our review, we conclude that section 552.108(a)(2) is applicable to the information at issue, and the medical examiner may withhold Exhibits C-1, C-2, C-3, C-4, C-7, and C-8 under section 552.108(a)(2) of the Government Code.

Next, you argue a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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 that 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 that a preliminary draft of a document that 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 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 id.*

You state the information at issue consists of communications between the medical examiner and the commission which "contain advice, recommendations, and opinions regarding the 'dry labbing' incident and corrective action being taken by the [medical examiner] to ensure such incident does not occur in the future." You state the commission is "required by statute to investigate and then implement any corrective action required of the lab, facility, or entity." Thus, as the communications relate to an investigation of the medical examiner by the commission, we find you have failed to establish that the medical examiner shares a privity of interest or common deliberative process with the commission. Accordingly, we find the medical examiner may not withhold any of the information at issue under section 552.111 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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). Therefore, the medical examiner must withhold the e-mail addresses we have marked under section 552.137, unless the owners affirmatively consent to their release.

In summary, the medical examiner need not release non-responsive information. The medical examiner must withhold under section 552.101 of the Government Code the W-4 form we have marked under section 6103(a) of title 26 of the United States Code, and Exhibits C-5, C-6, C-9, C-10 under section 261.201 of the Family Code. The medical examiner must withhold the date of birth we have marked under section 552.102(a) of the Government Code. The medical examiner may withhold Exhibits C-1, C-2, C-3, C-4, C-7, and C-8 under section 552.108(a)(2) of the Government Code. The medical examiner must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to their release.⁶ 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,

⁶We note this office issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 470248

Enc. Submitted documents

c: Requestor
(w/o enclosures)