



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 6, 2012

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

OR2012-19674

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# 471723 (DSHS OR File 20728/2012).

The Texas Department of State Health Services (the "department") received a request for forty specified categories of information related to the termination of a named employee, including information related to the underlying investigation, the termination of employees for the past five years, the personnel files of named employees, communications between and among named employees since July of 2010, and related policies and manuals. You state the department has made some of the requested information available to the requestor but claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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

¹We 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.

Code § 552.101. This section encompasses information protected by other statutes, including section 531.1021 of the Government Code, which provides in relevant part the following:

(g) All information and materials subpoenaed or compiled by the [Office of the Inspector General of the Health and Human Services Commission (the "OIG")²] in connection with an audit or investigation or by the office of the attorney general in connection with a Medicaid fraud investigation are confidential and not subject to disclosure under [the Act], and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the office or the attorney general or their employees or agents involved in the audit or investigation conducted by the office or the attorney general, except that this information may be disclosed to the state auditor's office, law enforcement agencies, and other entities as permitted by other law.

(h) A person who receives information under Subsection (g) may disclose the information only in accordance with Subsection (g) and in a manner that is consistent with the authorized purpose for which the person first received the information.

~~*Id.* § 531.1021(g), (h). You assert some of the submitted information is confidential under section 531.1021(g). Section 531.1021 is located in subchapter C of chapter 531 of the Government Code, titled "Medicaid and Other Health and Human Services Fraud, Abuse, or Overcharges." The legislature's amendment to section 531.1021(g) added express language stating information connected to investigations of Medicaid fraud is confidential. Section 531.102, also found in subchapter C, further specifies the OIG "is responsible for the investigation of fraud and abuse in the provision of health and human services[.]" *Id.* § 531.102(a). Thus, subchapter C addresses the responsibilities of the OIG in conducting investigations of Medicaid and other health and human services fraud and abuse. Therefore, section 531.1021 applies only to audits and investigations of Medicaid and other health and human services fraud and abuse. The information at issue consists of documents related to an internal personnel investigation into the alleged misconduct of a department employee. We find this information is not related to Medicaid or other health and human services fraud, abuse, or overcharges. Therefore, the department may not withhold any of the information at issue under section 552.101 of the Government Code on that basis.~~

Section 552.101 also encompasses sections 418.176 and 418.177 of the Texas Homeland Security Act, chapter 418 of the Government Code (the "HSA"). Section 418.176(a) provides the following:

²We note the Health and Human Services Commission directly oversees the department.

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Gov't Code § 418.176(a). Similarly, section 418.177 provides the following:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body's security concerns or emergency management activities does not make the information *per se* confidential under the HSA. See Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. See Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You inform us the department's Public Health and Emergency Preparedness Branch and Health Care Systems Branch work with local partners to respond to public health emergencies. You state the Health Care Systems Branch manages the Hospital Preparedness Program Cooperative Agreement, works with health care systems to develop and implement hospital preparedness plans and programs, and manages the Texas Disaster Volunteer

Registry. In addition, you state the department created the Public Health Emergency Program initially as a bioterrorism program, but it has since moved to an “all hazards” approach to emergency planning. You argue the information in Exhibit E is related to public health emergency responses by the department in its role as the lead governmental body responsible for insuring public health and safety. You assert some of the information identifies department controls and procedures related to the department’s preparation for emergencies within the state. You also assert some of this information relates to staffing requirements of emergency response providers or an emergency services agency. Upon review, we find you have demonstrated some of the information in Exhibit E was collected, assembled, or maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and relates to a tactical plan of an emergency response provider. *See id.* § 418.176(a). We also find you have demonstrated some of this information was collected, assembled, or maintained by or for the department for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See id.* § 418.177. Therefore, the department must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.³ However, we note some of the information you seek to withhold was provided by state or federal agencies to the department, and these state or federal agencies have published this information on their websites. We find you have not established the applicability of section 418.176 or 418.177 to the information the agencies have published on their websites. We also find the department has failed to establish how any of the remaining information at issue relates to the staffing requirements of an emergency response provider or to a tactical plan of the provider, or consists of a list of telephone numbers of the provider for purposes of section 418.176, or relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity for purposes of section 418.177. Consequently, the department may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.176 or 418.177 of the Government Code.

Section 552.101 also 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). 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 some kinds of medical information or information indicating disabilities or specific illnesses

³As our ruling is dispositive, we do not address your other argument to withhold this information.

are excepted from required public disclosure under common-law privacy. *E.g.*, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Some of the remaining information is highly intimate or embarrassing and is not of legitimate concern to the public. Therefore, the department must withhold this information, which we have marked in the submitted documents and indicated on the submitted recordings, under section 552.101 in conjunction with common-law privacy.

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 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 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, and lawyer representatives. 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 explain 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 B consists of communications between department attorneys and program managing staff, as well as a staff member of the Texas Health and Human Services

Commission, which provides human resources services to the department pursuant to state law.⁴ You state these communications were made in furtherance of the rendition of professional legal services to the department. You state these communications were confidential and the department has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to this information. Therefore, the department may withhold Exhibit B under section 552.107(1) of the Government Code.

You assert Exhibit C is excepted from disclosure under section 552.111 of the Government Code, which 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." 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 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).

⁴Section 531.0055 of the Government Code provides the Texas Health and Human Services Commission is responsible for providing human resources services to health and human services agencies, including the department. *See* Gov't Code §531.0055; *see also id.* § 531.001(4).

This office has also concluded 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 consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (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 assert Exhibit C is excepted from disclosure under section 552.111 because it consists of communications of the department's Community Preparedness Section-Health Care Systems Branch that relate to internal discussions, opinions, and recommendations "regarding broad issues of agency resource allocation and prioritization of responsibilities in light of the agency's overall goals and mission, and constraints on those subjects." You also indicate some of this information consists of drafts of documents that have been or will be released to the public in their final forms. Based on your representations and our review, we find the department may withhold the information we have marked under section 552.111 of the Government Code. However, we note the remaining information at issue includes communications with outside agencies. You have not explained the nature of the relationship between the department and any of these third parties, nor have you established the department has a privity of interest or common deliberative process with them. *See* ORD 561 at 9. Further, the remaining communications include general administrative and purely factual information. Thus, we find you have not demonstrated how the remaining information in Exhibit C consists of advice, opinions, or recommendations pertaining to policymaking matters of the department. Accordingly, we conclude the department may not withhold any of the remaining information in Exhibit C under section 552.111 of the Government Code.

We note the submitted information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.⁵ Section 552.102(a) 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). The Texas Supreme Court held 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). The department must withhold the information we have marked in the submitted documents and indicated on the submitted recordings under section 552.102(a) of the Government Code.

Section 552.117 of the Government Code may also be applicable to some of the submitted information. Section 552.117(a)(1) 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 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 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *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 official or 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, the department must withhold the information we have marked in the submitted documents and indicated on the submitted recordings under section 552.117(a)(1) if the current or former employees at issue made timely elections to keep the information confidential; however, the department may only withhold the cellular telephone numbers at issue under section 552.117(a)(1) if they were not provided to the employees at issue at public expense.

The remaining information contains e-mail addresses of members of the public. Section 552.137 of the Government Code 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). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address 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 e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not

⁵The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses we have marked under section 552.137.⁶

Finally, we note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

To conclude, the department must withhold the information we have marked in the submitted documents and indicated on the submitted recordings under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code and common-law privacy. The department may withhold Exhibit B under section 552.107(1) of the Government Code and the information we have marked in Exhibit C under section 552.111 of the Government Code. The department must withhold the information we have marked in the submitted documents and indicated on the submitted recordings under sections 552.102 and 552.137 of the Government Code. The department must withhold the information we have marked and indicated under section 552.117(a)(1) of the Government Code if the current or former employees at issue made timely elections to keep the information confidential; however, the department may only withhold the cellular telephone numbers at issue under section 552.117(a)(1) if they were not provided to the employees at issue at public expense. The department must release the remaining information, but may only release any copyrighted information in accordance with copyright law.

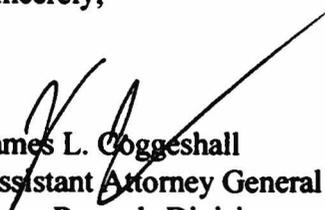
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁶This office issued Open Records Decision No. 684 (2009), 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.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 471723

Enc. Submitted documents

c: Requestor
(w/o enclosures)