



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2013

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2013-22258

Dear Mr. Smith:

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# 508324.

The Texas Health and Human Services Commission (the "commission") received a request for invoices, payment information, purchase orders, proposals, meeting notes regarding any financial transactions, and communications between the commission and sixteen named individuals and entities during the last five years. You state you have released or will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note you have marked a portion of the submitted information as not responsive to the present request for information. This ruling does not address the public availability of non-responsive information, and the commission need not release it in response to this request.

¹We 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.

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 of the Government Code also encompasses sections 12.003 and 21.012 of the Human Resources Code. Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the [commission's] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [commission] or acquired by employees of the [commission] in the performance of their official duties.

Hum. Res. Code § 12.003(a); *see also id.* § 21.012 (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs). The term "assistance" in sections 12.003 and 21.012 includes "all forms of assistance and services for needy persons authorized by Subtitle C" of title 2 of the Human Resources Code. *Id.* § 11.001(4); *see also id.* § 31.001 *et seq.* (Hum. Res. Code title 2, subtitle C, Assistance Programs).

In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of [the commission's] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Open Records Decision No. 584 at 3 (1991). Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See also* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. §§ 431.300 *et seq.*; Open Records Decision No. 166 (1977).

You state some of the information in Exhibit C relates to Medicaid recipients. Additionally, we note some of the information in Exhibit C relates to Medicaid applicants, and applicants and recipients of the Supplemental Nutrition Assistance Program and the Temporary Aid for Needy Families Program, which are programs the commission administers. You inform us the release of this information in this instance would not be for purposes directly connected with the administration of an assistance program. Based on your representations and our review, we conclude the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 12.003 of the Human

Resources Code.² However, we find no portion of the remaining information is confidential under section 12.003 of the Human Resources Code, and the commission may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

We next address your argument for the remaining information in Exhibit C under sections 306.003 and 306.004 of the Government Code, which are also encompassed by section 552.101 of the Government Code. Section 306.003 of the Government Code provides, in part, as follows:

(a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.

...

(c) If a member of the legislature or the lieutenant governor discloses to the Department of Family and Protective Services [(the "department")] or a governmental unit that is a "covered entity" under Section 181.001(b), Health and Safety Code, all or part of a record to which Subsection (a) applies or communicates to the department or governmental unit a description of the information contained in the record that identifies or would tend to identify the resident of this state who communicated with the member or lieutenant governor, the record or the described information, as applicable, in the possession of the department or governmental unit is subject to and confidential under Subsection (a) and may be disclosed to any other person only to the extent that the member of the legislature or lieutenant governor elects to disclose the record or the described information.

(d) If the department or governmental unit that is a "covered entity" under Section 181.001(b), Health and Safety Code, receives a request for public information under [the Act], and information subject to the request is information described by Subsection (c), the department or governmental unit shall promptly notify, in writing or by electronic means, the member of the legislature or the lieutenant governor, as applicable, that the department or governmental entity received the request. The notification must specify the type of information that is requested and include a copy of the request.

²As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Gov't Code § 306.003(a), (c)-(d). The confidentiality provision in section 306.003(a) applies to the records of a member of the legislature or of the lieutenant governor of two kinds of information: (1) memoranda of communications with Texas residents and (2) personal information about the person communicating with the legislator or lieutenant governor. *Id.* § 306.003(a). Thus, "personal information" about a person communicating with a legislator or the lieutenant governor's office is within section 306.003(a) even if it is not recorded in a memorandum prepared by the legislator or lieutenant governor. *Id.* Although section 306.003(a) deems confidential the records that are subject to the provision, it gives a member of the legislature or the lieutenant governor the discretion to disclose all or part of such record. *See id.* Section 306.003(c) provides if a legislator or the lieutenant governor discloses a record subject to section 306.003(a), or a description of the record that identifies or tends to identify the resident, to the department or a covered entity under section 181.001(b) of the Health and Safety Code, the record or the described information is confidential under section 306.003(a) and may only be disclosed at the discretion of the legislator or lieutenant governor. *See id.* § 306.003(c).

While section 306.003 applies to records consisting of memoranda of communications and records of a correspondent's personal information, section 306.004 refers to the communications themselves and provides as follows:

(a) To ensure the right of the citizens of this state to petition state government, as guaranteed by Article I, Section 27, of the Texas Constitution, by protecting the confidentiality of communications of citizens with a member of the legislature or the lieutenant governor, the public disclosure of all or part of a written or otherwise recorded communication from a citizen of this state received by a member or the lieutenant governor in his official capacity is prohibited unless:

(1) the citizen expressly or by clear implication authorizes the disclosure;

(2) the communication is of a type that is expressly authorized by statute to be disclosed; or

(3) the official determines that the disclosure does not constitute an unwarranted invasion of personal privacy of the communicator or another person.

(b) This section does not apply to a communication to a member of the legislature or the lieutenant governor from a public official or public employee acting in an official capacity.

(c) A member or the lieutenant governor may elect to disclose all or part of a communication to which this section applies, and that disclosure does not violate the law of this state.

(d) If a member of the legislature or the lieutenant governor discloses to the [department] or a governmental unit that is a “covered entity” under Section 181.001(b), Health and Safety Code, a communication to which this section applies or communicates to the department or governmental unit a description of the information contained in the communication that identifies or would tend to identify the citizen of this state who communicated with the member or lieutenant governor, the communication or the described information, as applicable, in the possession of the department or governmental unit is subject to and confidential under this section and may be disclosed to another person only to the extent that the member of the legislature or lieutenant governor elects to disclose the communication or the described information.

(e) If the department or governmental unit that is a “covered entity” under Section 181.001(b), Health and Safety Code, receives a request for public information under [the Act], and information subject to the request is information described by Subsection (d), the department or governmental unit shall promptly notify, in writing or by electronic means, the member of the legislature or the lieutenant governor, as applicable, that the department or governmental entity received the request. The notification must specify the type of information that is requested and include a copy of the request.

Id. § 306.004. For purposes of section 306.004, a “communication” includes “conversation, correspondence, and electronic communication.” *Id.* § 306.001. The communication is not subject to public disclosure unless one of the three conditions stated in section 306.004(a) applies. *See id.* § 306.004(a)(1)-(3). However, section 306.004 does not apply to a communication to a legislator or the lieutenant governor from a public official or public employee acting in an official capacity. *Id.* § 306.004(b). As is also true of records subject to section 306.003(a), a legislator or the lieutenant governor has the discretion to disclose all or part of records subject to section 306.004(a). *See id.* § 306.004(c). Additionally, section 306.004(d) provides that if a legislator or the lieutenant governor discloses a communication subject to section 306.004(a), or a description of the information in the communication that identifies or tends to identify the resident, to the department or a covered entity under section 181.001(b) of the Health and Safety Code, the communication or the described information is confidential under section 306.004(a) and may only be disclosed at the discretion of the legislator or lieutenant governor. *See id.* § 306.004(d).

You state the commission is a “covered entity” under section 181.001(b) of the Health and Safety Code by virtue of its administration of the Medicaid and CHIP programs.³ *See* Health & Safety Code § 181.001(b) (defining “covered entity”). You contend the remaining information in Exhibit C consists of correspondence between the commission and

³“CHIP” refers to the Children’s Health Insurance Program, which offers low-cost health coverage for certain qualifying children.

the Office of Senator Judith Zaffirini (the "senator's office") that pertains to communications between the senator's office and residents of this state. Accordingly, you contend the remaining information in Exhibit C is made confidential by sections 306.003(c) and 306.004(d) of the Government Code. Further, you state that you have notified the senator's office of the request for information pursuant to sections 306.003(d) and 306.004(e) of the Government Code.

We note some of the information at issue in Exhibit C pertains to a communication between the senator's office and a public official acting in her official capacity. Accordingly, we find section 306.004 is not applicable to this information. Upon review, however, we agree some of the remaining information at issue, which we have marked, consists of communications between the senator's office and residents of this state, or descriptions of information in such communications that would tend to identify the resident who communicated with the senator's office, that were disclosed to the commission by the senator's office. We note this office has not received any correspondence from the senator's office authorizing release of the information at issue. Accordingly, we find the information we have marked in Exhibit C is confidential under section 306.004 of the Government Code, and must be withheld under section 552.101 of the Government Code.⁴ However, we find you have failed to demonstrate the remaining information at issue consists of communications between the senator's office and residents of this state, or descriptions of information in such communications that would tend to identify the resident who communicated with the senator's office. Additionally, we find you have failed to demonstrate any of the remaining information at issue consists of records of the senator's office or a description of the record that identifies or tends to identify a resident who communicated with the senator's office. Accordingly, we find sections 306.003 and 306.004 are inapplicable to the remaining information in Exhibit C, and the commission may not withhold the remaining information under section 552.101 of the Government Code on those bases.

Section 552.101 of the Government Code also encompasses the doctrine of 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the commission may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

⁴As we are able to make this determination, we need not address your remaining argument against the disclosure of this information.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation[.]” Gov’t Code § 552.106(a), (b). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *Id.* Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

You state the information in Exhibit B consists of drafts of legislation and legislative working papers that are excepted from disclosure under section 552.106. We understand the information at issue consists of communications between commission employees and the senator’s office regarding proposed legislation related to the commission. Upon review, we find the information we have marked constitutes advice, opinion, analysis, and recommendations regarding legislation related to the commission. Therefore, the commission may withhold the information we have marked under section 552.106 of the Government Code.⁵ However, we find you have failed to demonstrate how the remaining information at issue constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.106.

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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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

⁵As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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. 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 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* ORD 561.

You state the remaining information in Exhibit B pertains to proposed legislative matters to which the commission has a direct interest, and the remaining information constitutes the deliberation of policy matters between the commission and the senator's office. However, upon review, we find the remaining information in Exhibit B consists of either general administrative information that does not relate to policymaking, or information that is purely factual in nature. Thus, you have failed to demonstrate how the remaining information in Exhibit B is excepted under section 552.111. Accordingly, we find none of the remaining information at issue may be withheld on this basis.

In summary, the commission must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 12.003 of the Health and Safety Code. The commission must withhold the information we have marked in the remainder of Exhibit C under section 552.101 of the Government Code in conjunction with section 306.004 of the Government Code. The commission may withhold the information we have marked in Exhibit B under section 552.106 of the Government Code. The commission must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 508324

Enc. Submitted documents

c: Requestor
(w/o enclosures)