ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2012

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

OR2012-14761

Dear Ms. Burton:

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# 465566 (DSHS File No. 20557).

The Texas Department of State Health Services (the "department") received a request for all files and documents related to Advanced Aesthetic Concepts during a specified time period, all complaints or investigations involving four specified devices during a specified time period, and files regarding a specified investigation. You state you will release some information to the requestor. You also state you will redact e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).[1] You claim some of the submitted information is excepted from disclosure pursuant to sections 552.101, 552.107, and 552.111 of the Government Code. We have reviewed the Declaration of Evan J. Rae, Special Agent with the United States Food and

[1]Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

Drug Administration (the "FDA") Office of Criminal Investigations. We have considered the submitted arguments and reviewed the submitted representative sample of information.[2]

Initially, we note some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2012-13477 (2012) and 2012-11972 (2012). In those rulings, we determined (1) to the extent the FDA provided the information at issue to department employees who accepted commissions as FDA officers and who are subject to the same restrictions on disclosure as other FDA employees, and to the extent the FDA considers the information held by these commissioned employees to be the records of the FDA, the decision to release or withhold the information at issue is a decision for the FDA; (2) with the exception of the information we marked for release, the department may withhold the information it marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege; (3) the department must withhold the information we marked under section 552.110 of the Government Code; and (4) the department must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the department must rely on Open Records Letter Nos. 2012-13477 and 2012-11972 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous rulings, we will consider your arguments against its disclosure.

The department asserts some of the submitted information is confidential by federal law and thus is excepted from required public disclosure under section 552.101 of the Government Code. Section 552.101 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 protected by federal law. In this instance, the FDA contends the information at issue is not the department's information, but instead belongs to the FDA.

You inform us the requested information includes confidential information the FDA provided to department employees who have accepted commissions as FDA officers

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[2]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 that those records contain substantially different types of information than that submitted to this office.

pursuant to federal law. *See* 21 U.S.C. § 372(a). Mr. Rae states several department employees have signed Acceptance of Commission documents as officials of the United States Department of Health and Human Services ("DHHS") and the FDA.[3] In addition, Mr. Rae has submitted Certificates of Commission for several department employees. Mr. Rae explains these commissions include the ability to review and receive FDA records. You state any information acquired from the FDA is confidential pursuant to section 331(j) of title 21 of the United States Code, which prohibits

> [t]he using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the [DHHS], or to the courts when relevant in any judicial proceeding under this chapter, any information acquired under authority of sections 344, 348, 350a, 350c, 355, 360, 360b, 360c, 360d, 360e, 360f, 360h, 360i, 360j, 360ccc, 360ccc-1, 360ccc-2, 374, 379, 379e, 387d, 387e, 387f, 387g, 387h, 387i, or 387t(b) of this title concerning any method or process which as a trade secret is entitled to protection[.]

21 U.S.C. § 331(j). Accordingly, we understand the FDA records the commissioned employees receive are subject to federal law, including the Freedom of Information Act, 5 U.S.C. § 552, which applies only to federal agencies and not state agencies. We further understand the employee is subject to criminal penalties under federal law for the unauthorized release of confidential information.

You state the FDA considers the department's commissioned officers to be serving in concurrent jurisdiction of the FDA, and any responsive documents remain the FDA's property. Indeed, Mr. Rae states in his Declaration that the information at issue consists of records belonging to the FDA. Mr. Rae explains department employees have access to the records at issue only in their capacities as commissioned FDA officers and not in their capacities as state officers or employees. Mr. Rae also states a request for the information at issue should have been directed to the FDA rather than the department.

The federal Food, Drug, and Cosmetic Act ("FDC Act") grants DHHS the authority to conduct examinations and investigations by commissioning employees of any state as officers of DHHS. *See* 21 U.S.C. § 372(a)(1)(A). With regard to the disclosure of confidential information by these commissioned officers, section 20.84 of title 21 of the Code of Federal Regulations provides as follows:

> Data and information otherwise exempt from public disclosure may be disclosed to Food and Drug Administration consultants, advisory committees, State and local governmental officials commissioned pursuant to 21 U.S.C. 372(a), and other special government employees for use only in their

[3]The FDA is a component of DHHS.

> work with the Food and Drug Administration. Such persons are thereafter subject to the same restrictions with respect to the disclosure of such data and information as any other Food and Drug Administration employee.

21 C.F.R. § 20.84; *see also id.* § 20.88 (stating state or local governmental officer commissioned by FDA pursuant to 21 U.S.C. § 372(a) shall have same status with respect to disclosure of FDA records as any special government employee). Furthermore, section 20.2(a) of title 21 of the Code of Federal Regulations states any request for records of the FDA shall be handled pursuant to FDA procedures and requires compliance with the FDA rules governing public disclosure.[4] *Id.* § 20.2(a). *See generally id.* pt. 20 (regulations concerning public disclosure of FDA records).

The department states some of the requested information was sent to or received by the commissioned officers from the FDA solely pursuant to their commissions. Under section 372(a) of the FDC Act, "[t]he Secretary [of DHHS] is authorized to conduct examinations and investigations . . . through any . . . employee of any State . . . duly commissioned by the Secretary as an officer of [DHHS]." 21 U.S.C. § 372(a). When an examination or investigation is conducted by an investigator as a commissioned officer of DHHS (or a component of DHHS, in this case, the FDA), it follows that the information gathered pursuant to such an examination is a record of DHHS, the commissioning agency. In other words, the records of such investigation are the records of the agency that authorized the investigation. As noted above, FDA regulation requires commissioned officers to comply with the same federal laws and regulations with respect to disclosure of FDA records in the same way as any other FDA employee. *See* 20 C.F.R § 20.84. In light of DHHS's authority to commission as FDA officers the department employees who maintain the information at issue here, and after consideration of the relevant regulations on disclosure of FDA records by commissioned officers, we do not believe the FDA's position that the records of the commissioned officers require treatment as FDA records is unreasonable.

Therefore, to the extent the FDA provided the information at issue to department employees who have accepted commissions as FDA officers and who are subject to the same restrictions on disclosure as other FDA employees, and to the extent the FDA considers the information held by these commissioned employees to be the records of the FDA, we conclude for purposes of responding to a request for information from a member of the public, the decision to release or withhold the information at issue is a decision for the FDA. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (agency interpretations in formats such as opinion letter are entitled to respect under decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), if persuasive). Thus, neither the department nor this office may determine the extent to which the information at issue is subject to required public

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[4]In particular, Mr. Rae states the requested records contain non-public information that is protected from disclosure by the deliberative process and open investigatory privileges, as well as protected personal information, trade secrets, and other confidential commercial information. *See* 20 C.F.R. §§ 20.61-.64.

disclosure. Upon receipt of a request for the information, the FDA must make that determination in accordance with federal laws and regulations.[5]

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. We note the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2.

You state portions of the submitted information, which you have marked, identify complainants who reported possible violations of the Texas Food, Drug, and Cosmetic Act to the department. *See generally* Health & Safety Code ch. 431 subch. J. You explain the department is responsible for enforcing the relevant portions of the Texas Food, Drug, and Cosmetic Act, and you inform us violations are subject to civil and criminal penalties. We have no indication the subject of the complaint knows the identity of the complainants. However, we note one of the complainants listed is a media outlet and not a person. The informer's privilege only protects the identity of an individual. *See Roviaro v. United States*, 353 U.S. 53, 59 (1957); ORD 515 at 2. In addition, you have failed to demonstrate a portion of the information you have marked identifies an individual who made the initial report of a criminal violation to the department for purposes of the informer's privilege. Thus, we conclude the department has not demonstrated the applicability of the common-law informer's privilege to this information, which we have marked for release, and it may not be withheld under section 552.101 of the Government Code on that basis. Accordingly, with the exception of the information we marked for release, the department may withhold the

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[5]Mr. Rae states some responsive documents may be available on the FDA's internet site without the need for a written request. Mr. Rae also invites the requestor to submit his request to the following address:

Food and Drug Administration
Division of Freedom of Information (HFI-35)
12420 Parklawn Drive
Rockville, Maryland 20857

information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6–7 (2002). First, a governmental body must demonstrate that 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked consists of communications between department attorneys, department staff, and attorneys with the Office of the Attorney General (the "OAG") sharing a privity of interest with the department. You explain the OAG represents the department in civil and administrative law matters and provides legal counsel to the department. You state the communications at issue were made for purposes of rendering legal services to the department, were intended to remain confidential, and have not been disclosed to non-privileged parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information

at issue. Accordingly, the department may withhold the information you have marked under section 552.107(1) of the Government Code.

You have also marked information you seek to withhold 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. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

> (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

> (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You generally assert the information you have marked consists of attorney work product that should be withheld under section 552.111. However, we find you have not demonstrated the information at issue consists of mental impressions, opinions, conclusions, or legal theories of a party or party's representative prepared in anticipation of litigation or for trial. Therefore, we find the department has failed to demonstrate the applicability of the work product privilege to the information at issue, and the department may not withhold any of the

information at issue under the work product privilege of section 552.111 of the Government Code.

Section 552.111 of the Government Code also 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. *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 also can encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* ORD 561

at 9 (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 at 9.

You state some of the information you have marked consists of advice, opinion, and recommendations of department attorneys and staff regarding inspection and enforcement strategies. You further state other portions of the information you have marked consist of drafts of correspondence we understand have been or will be released to the public in their final form. Based on your representations and our review, we determine the department may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining information at issue is purely factual in nature, does not consist of advice, opinions, or recommendations related to the department's policy making functions, or consists of communications with a third party. You have not identified the third party at issue or explained the nature of the relationship between the department and this third party. Thus, we conclude you have failed to demonstrate the applicability of the deliberative process privilege to the remaining information, and the department may not withhold it under section 552.111.

We note some of the remaining information may be subject to sections 552.117(a)(1) and 552.137 of the Government Code.[6] Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to 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 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5(1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individual whose cellular telephone number we have marked timely requested confidentiality under section 552.024 and the cellular service is not paid for by a governmental body, the department must withhold the marked

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

information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election under section 552.024 or the cellular telephone service is paid for by a governmental body, the department may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

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). Gov't Code § 552.137(a)-(c). The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Accordingly, the department must withhold this e-mail address under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release under section 552.137(b).

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the department must rely on Open Records Letter Nos. 2012-13477 and 2012-11972 as previous determinations and withhold or release the identical information in accordance with those rulings. To the extent the FDA provided the information you have identified to department employees who have accepted commissions as FDA officers who are subject to the same restrictions on disclosure as other FDA employees and to the extent the FDA considers the information held by these commissioned employees to be the records of the FDA, we conclude that for purposes of responding to a request for information from a member of the public, the decision to release or withhold the information at issue is a decision for the FDA. With the exception of the information we have marked for release, the department may withhold the information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The department may also withhold the information you have marked under section 552.107(1) of the Government Code and the information we have marked under section 552.111 of the Government Code. The department must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individual whose cellular telephone number we have marked timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body. The department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release under section 552.137(b) of the Government Code. The department 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.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,

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 465566

Enc. Submitted documents

c: Requestor
(w/o enclosures)