



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 25, 2016

Ms. Rachel Hernandez
Legislative Aide
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

OR2016-16692

Dear Ms. Hernandez:

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# 622978.

The Office of State Representative Gilbert Peña (the "representative's office") received a request for information related to a named employee of the representative's office, time sheets, call logs, and written communications during a specified time period.¹ You state the representative's office is withholding information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.² You also state the representative's office is withholding social security numbers pursuant to

¹You state the representative's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Section 552.117 of the Government Code 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. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c).

section 552.147(b) of the Government Code.³ You further state the representative's office is withholding certain information pursuant to Open Records Decision No. 684 (2009).⁴ You state the representative's office will release some of the requested information. You claim some of the submitted information does not consist of public information subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.⁵

Initially, you argue the information submitted as Exhibit B contains a password that is not subject to the Act. Section 552.002(a) defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body; for a governmental body and the governmental body owns, has a right of access to, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body. Gov't Code. § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. ORD 581 at 5. You state the password you have marked is used only to access records and has no significance other than its use as a tool for the protection of public information. Based on your arguments and our review, we find the information at issue does not constitute public information under section 552.002 of the Government Code. Therefore, the password is not subject to the Act and the representative's office is not required to release it to the requestor.

Next, you claim the information you have marked as Exhibit G is not subject to the Act, but is instead governed by sections 306.003 and 306.004 of the Government Code. Section 306.003 of the Government Code provides, in part:

³Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See id.* § 552.147(b).

⁴Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

⁵We 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.

(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.

(b) The method used to store or maintain a record covered by Subsection (a) does not affect the confidentiality of the record.

Gov't Code § 306.003(a)-(b). 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). While section 306.003 applies to records that are composed of memoranda of communications and records of personal information of a legislator or the lieutenant governor, section 306.004 refers to the communications themselves and provides:

(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.

Id. § 306.004(a)-(c). For the purposes of section 306.004, a “communication” includes “conversation, correspondence, and electronic communication.” *Id.* § 306.001. We note a legislator or the lieutenant governor has the discretion to disclose all or part of records that are subject to section 306.004(a). *Id.* § 306.004(c). However, section 306.004 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. *Id.* § 306.004(b).

You state Exhibit G consists of information governed by section 306.003 or section 306.004 of the Government Code. Therefore, as the representative’s office has determined the information you have marked is subject to section 306.003 or section 306.004, release of the information you have marked is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of the representative’s office to either withhold or release such information.

Section 552.101 of the Government Code exempts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by section 261.201 of the Family Code, which provides, in part, as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, 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 this chapter 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 this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note the representative’s office is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, we note the Texas Department of Family and Protective Services (the “DFPS”) is such an agency. You state the information you marked within Exhibit C relates to an investigation by the DFPS of alleged or suspected child abuse under chapter 261 of the Family Code. Upon review, we find the information we have marked is subject to chapter 261 of the Family Code.

Therefore, we conclude the representative's office must withhold the information we marked within Exhibit C under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Section 552.101 of the Government Code also encompasses section 323.017 of the Government Code, which provides:

Communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the [Texas Legislative] council [the "council"] that relate to a request by the official for information, advice, or opinions from an assistant or employee of the council are confidential. Information, advice, and opinions given privately by an assistant or employee of the council to a member of the legislature, or the lieutenant governor, acting in the person's official capacity, are confidential. However, the member or lieutenant governor may choose to disclose all or a part of the communications, information, advice, or opinions to which this section applies, and such a disclosure does not violate the law of this state.

Id. § 323.017. You state the information you marked within Exhibit E consists of communications between a member of the representative's office and an employee of the council that relate to a request for information, advice, or opinions. Upon review, we agree the information at issue consists of communications between a member of the legislature and an employee of the council that relates to a request for information, advice, or opinion from council employees. Accordingly, the representative's office must withhold the information you marked in Exhibit E under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code.

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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law

privacy). Upon review, we find agree the information you have marked within Exhibit D satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the representative's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); 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).

You state the information you have marked within Exhibit F consists of an e-mail exchange among several employees of the representative’s office discussing a policymaking matter. Thus, you state the information at issue consists of advice, opinions, and recommendations of the representative’s office pertaining to the policymaking functions of the representative’s office. Based on your representations and our review of the information at issue, we find the representative’s office has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the


representative's office. Thus, the representative's office may withhold the information we marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative and purely factual information. Thus, we find you have not shown the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the representative's office. Accordingly, the representative's office may not withhold the remaining information at issue under section 552.111 of the Government Code.

In summary, the password in Exhibit B is not subject to the Act and the representative's office is not required to release it to the requestor. The information you marked within Exhibit G is subject to section 306.003 or section 306.004 of the Government Code, and it is within the discretion of the representative's office to either withhold or release such information. The representative's office must withhold the information you marked within Exhibit C under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The representative's office must withhold the information you marked in Exhibit E under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code. The representative's office must withhold the information you marked within Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. The representative's office may withhold the information we marked under section 552.111 of the Government Code. The representative's office 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 622978

Enc. Submitted documents

c: Requestor
(w/o enclosures)