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ATTORNEY GENERAL OF TEXAS

May 18, 2017

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

OR2017-10888

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# 658257 (HHSC ID# 12354).

The Texas Health and Human Services Commission (the "commission") received a request for e-mails to or from a named commission employee relating to a specified program during a specified time period.¹ You state the commission will release some information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(5). Some of the submitted information consists of information used to estimate the need for or expenditure of public funds or taxes by the commission that is subject to section 552.022(a)(5). The commission must release this information, which we have marked, unless it is made confidential under the Act or other law. *See id.* The commission seeks to withhold the information at issue under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision No. 470 at 7 (1987) (deliberative process privilege under statutory predecessor to Gov't Code § 552.111 subject to waiver); see also Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the commission may not withhold the section 552.022 information at issue under section 552.111. As no other exceptions to disclosure have been raised for this information, the commission must release the information we marked pursuant to section 552.022(a)(5) of the Government Code. However, we will consider your argument under section 552.111 for the information not subject to section 552.022.

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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 that 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 assert the information you marked consists of communications or documents communications between attorneys for the commission and commission employees. You state the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the commission. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may generally withhold the information it marked under section 552.107(1) of the Government Code.³ We note, however, one of the e-mail strings includes an e-mail received from an individual you have not demonstrated is a privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the commission separate and apart from the otherwise privileged e-mail string in which it appears, then the commission may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code:

To the extent the non-privileged e-mail exists separate and apart from the otherwise privileged e-mail string, we note it may contain information subject to section 552.137 of the

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Government Code.⁴ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. See *id.* § 552.137(c). Upon review, to the extent the non-privileged e-mail exists separate and apart from the otherwise privileged e-mail string, the commission must withhold the e-mail address at issue under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure or subsection (c) applies.

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 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. See *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 established. See *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 also found the identities of victims of sexual abuse are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Although we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*, we note the information at issue pertains to an individual who is not identified and, thus, whose privacy interest is protected. Accordingly, the commission may not withhold any portion of the information at issue 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 section 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*

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 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 assert the information you marked consists of advice, opinions, and recommendations relating to policy making for the specified commission program. Based on your representation and our review, we find the commission may withhold the information we marked under section 552.111. However, we find the remaining information is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to establish any portion of the remaining information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the commission. Accordingly, the commission may not withhold any portion of the remaining information under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check

of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You assert the information you marked constitutes audit working papers because they were generated during an audit conducted by the commission's internal audit division. You contend the information at issue was "created during the course of an audit authorized under section 531.008(c)(5) of the Government Code" and should be excepted from public disclosure pursuant to section 552.116. We note, however, the legislature amended section 531.008 of the Government Code in 2015 pursuant to Senate Bill 200. *See* Act of June 17, 2015, 84th Leg., R.S., ch. 837, § 1.09. The current version of section 531.008 provides for the establishment of various divisions of the commission and does not address the commission's authority to conduct an audit. *See* Gov't Code § 531.008. Accordingly, the commission has not explained, or otherwise demonstrated the audit at issue was authorized or required by a statute of this state or the United States or by the other laws or authorities specified in section 552.116(b)(1) of the Government Code. *See id.* § 552.116(b)(1) (defining "audit" for the purposes of section 552.116); *see also* Open Records Decision No. 580 (1990) (addressing statutory predecessor to section 552.116). Thus, we find the commission has not demonstrated any of the information at issue constitutes audit working papers for the purposes of section 552.116. Accordingly, we

conclude the commission may not withhold any of the information at issue under section 552.116 of the Government Code.

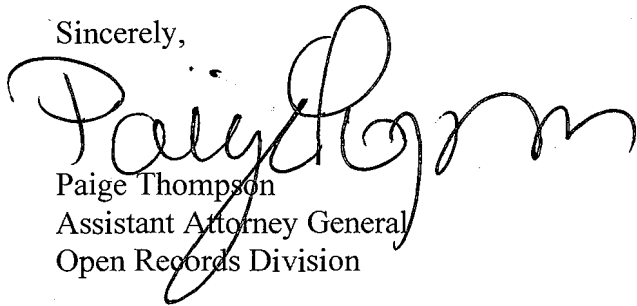
Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees or officials of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal 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) (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 employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals whose cellular telephone numbers we marked timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the cellular telephone numbers we marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the cellular telephone numbers at issue if the service is not paid for by a governmental body.

In summary, the commission may generally withhold the information it marked under section 552.107(1) of the Government Code. If the non-privileged e-mail, which we have marked, is maintained by the commission separate and apart from the otherwise privileged e-mail string in which it appears, then the commission may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. To the extent the non-privileged e-mail exists separate and apart from the otherwise privileged e-mail string, the commission must withhold the e-mail address at issue under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure or subsection (c) applies. The commission may withhold the information we marked under section 552.111 of the Government Code. To the extent the individuals whose cellular telephone numbers we marked timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the cellular telephone numbers we marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the cellular telephone numbers at issue if the service is not paid for by a governmental body. 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,

A handwritten signature in black ink, appearing to read "Paige Thompson". The signature is written in a cursive style with large, flowing loops.

Paige Thompson
Assistant Attorney General
Open Records Division

PT/tdw

Ref: ID# 658257

Enc. Submitted documents

c: Requestor
(w/o enclosures)