



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 6, 2020

Mr. Jonathan Miles  
Open Records Attorney  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2020-19715

Dear Mr. Miles:

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# 837970 (HHSC Ref. Nos. 22409, 22415, 22416, 22423, 22431, 22440, 22442, 22448, 22474, 22502, 22504, 22513, 22601, 22715, 22746, 23009, and 23198).

The Texas Health and Human Services Commission (the "commission"), received seventeen requests from different requestors for information pertaining to RFP HHS0007918 – Contact Tracing Program. You state the commission will release some information. We understand the commission will redact certain information pursuant to section 552.136 of the Government Code and personal e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).<sup>1</sup> You claim some of the submitted information is not subject to the Act and some of the information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Accenture; AT&T; Direct Interactions; IBM; LiveOps; Maximus; MTX Group; NTT Data; Performant Technologies; Qualtrics; and Veritas. Accordingly, you state, and provide documentation demonstrating, the

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<sup>1</sup> Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

commission notified the third parties of the requests for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Accenture and NTT Data. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we address your argument that the information you indicated does not consist of public information subject to the Act pursuant to section 552.002(d) of the Government Code. The Act applies to “public information,” which is defined in section 552.002(a) of the Government Code as “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business[.]” Gov't Code § 552.002(a)(1). However, “protected health information” as defined by section 181.006 of the Health and Safety Code is expressly excluded from the Act's definition of “public information.” *See id.* § 552.002(d). Section 181.006 of the Health and Safety Code provides, in relevant part:

[F]or a covered entity that is a governmental unit, an individual's protected health information:

(1) includes any information that reflects that an individual received health care from the covered entity[.]

Health & Safety Code § 181.006(1). Section 181.001(b)(2)(A) defines “covered entity,” in part, as any person who:

for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

*Id.* § 181.001(b)(2)(A). Section 181.001 states, “[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [(“HIPAA”).]” *Id.* § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPAA's definition of the term. HIPAA defines “protected health information” as

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<sup>2</sup> We 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.

individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
  - (i) That identifies the individual; or
  - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

*Id.* Although you assert the commission is a covered entity, you have failed to demonstrate the information at issue consists of protected health information. Accordingly, we find the information at issue is subject to the Act, and the commission must release it unless it falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this ruling, we have only received comments from Accenture and NTT Data. Thus, we have no basis to conclude the remaining interested third parties have a protected proprietary interest in the remaining information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the commission may not withhold any of the information at issue on the basis of any proprietary interest any of the remaining interested third parties may have in the information.

Accenture raises section 552.104 of the Government Code for a portion of its information. Section 552.104 excepts from disclosure information “if a *governmental body* demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” *Id.* § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to

governmental bodies. Gov't Code § 552.104(a). Therefore, we do not address Accenture's arguments under section 552.104.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 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 "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). 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: (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).

Although you state the commission seeks to withhold the information you marked under section 552.107, we note you have not marked any information under section 552.107. Accordingly, the commission has failed to demonstrate that the attorney-client privilege is applicable to any portion of the submitted information, and the commission may not withhold any portion of the submitted information under section 552.107(1) of the Government Code.

Accenture and NTT Data raise section 552.110 for portions of their information. Section 552.110(c) of the Government Code states:

(c) Except as provided by Section 552.0222, commercial or financial information for which it is demonstrated based on specific factual evidence

that disclosure would cause substantial competitive harm to the person from whom the information was obtained is [excepted from required disclosure].

Gov't Code § 552.110(c). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Accenture and NTT Data argue portions of their information consist of commercial or financial information subject to section 552.110(c). Upon review, we find Accenture and NTT Data have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would result in substantial competitive harm. Accordingly, the commission must withhold the portions of Accenture's information we marked and, to the extent the customer information is not publicly available on NTT Data's website, NTT Data's customer information under section 552.110(c) of the Government Code.<sup>3</sup> However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(c). Additionally, we find Accenture and NTT Data have failed to provide specific factual evidence demonstrating any portion of the rest of the information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the commission may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states, "[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret." *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). As noted above, section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Accenture and NTT Data argue portions of the remaining information consist of trade secrets subject to section 552.110(b). Upon review, however, we find some of the information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(b). Additionally, we find Accenture and NTT Data have failed to provide specific factual evidence demonstrating any portion of the rest of the information at issue is a trade secret. Therefore, the commission may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

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<sup>3</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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[.]” *Id.* § 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 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

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.

You argue the information you indicated consists of advice, opinions, and recommendations of the commission pertaining to the commission’s policymaking

functions. You state the information at issue has only been shared internally and with agencies that share a privity of interest in the matters. You also state the information at issue includes drafts of policymaking documents. You inform us the draft documents will be made available to the public in their final forms. Based on these representations and our review of the information at issue, we find the commission has demonstrated portions of the information at issue, which we marked, provide advice, opinions, or recommendations on the policymaking matters consist of commission. Accordingly, the commission may withhold the information we marked and indicated under section 552.111 of the Government Code. However, we find the commission has not shown the remaining information consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the commission. Therefore, the commission may not withhold any of the remaining information under section 552.111.

NTT Data raises section 552.101 of the Government Code for a portion of its information. 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. However, NTT Data has not pointed to any confidentiality provision, nor are we aware of any, that would make any of its information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the commission may not withhold any of NTT Data’s information under section 552.101 of the Government Code.

Section 552.101 of the Government Code 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 the *Industrial Foundation* decision. *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). The Third Court of Appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.).

Upon review, we find the remaining information contains information that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we are unable to determine whether the information at issue pertains to actual living individuals or fictitious individuals. Thus, we must rule conditionally. To the extent the information we marked pertains to real, living individuals, the commission must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked does not pertain to a real, living individual, the commission may not withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the remaining information may be subject to section 552.117 of the Government Code.<sup>4</sup> Section 552.117(a)(1) of the Government Code exempts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service.

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

In summary, the commission must withhold the portions of Accenture's information we marked and, to the extent the information is not publicly available on NTT Data's website, NTT Data's customer information under section 552.110(c) of the Government Code. The commission may withhold the information we marked and indicated under section 552.111 of the Government Code. To the extent the information we marked pertains to real, living individuals, the commission must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. The commission must release the remaining information; however, any

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<sup>4</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

information that is subject to copyright may only be released in accordance with copyright law.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Michelle Garza  
Assistant Attorney General  
Open Records Division

MRG/jxd

Ref: ID# 837970

Enc. Submitted documents

c: 14 Requestors  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)