



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 23, 2020

Ms. Hadassah Schloss
Director
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2020-29276

Dear Ms. Schloss:

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# 855072 (GLO ID Nos. 20-0796 and 20-0840).

The Texas General Land Office (the "GLO") received two requests from the same requestor for certain information pertaining to a specified facility.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. In addition, you state you notified the Texas Health and Human Services Commission (the "commission") of the requests for information and of its right to submit arguments to this office as to why the requested information should not be released.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹ We note the GLO sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.2d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

² As of the date of this letter, we have not received comments from the commission explaining why the information at issue should not be released.

³ 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

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses information made confidential by section 81.046 of the Health and Safety Code, which provides, in part, as follows:

(a) Reports, records, and information received from any source, including a federal agency or from another state, furnished to a public health district, a health authority, a local health department, or the [Texas Department of State Health Services] that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (c-1), (d), and (f).

Health & Safety Code § 81.046(a), (b). In Open Records Decision No. 577 (1990), this office concluded any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception in the statute applies. *See* ORD 577; Health & Safety Code § 81.046(b)-(d), (f). Upon review, we find Attachment F consists of records and information relating to cases or suspected cases of a contagious disease. None of the release provisions of section 81.046 are applicable. Accordingly, the GLO must withhold Attachment F under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses section 181.006 of the Health and Safety Code, which provides the following:

[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; and

(2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Section 181.001(b)(2)(A) defines “covered entity” to include any person who

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.

(A) 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(2)(b)(A). You assert the GLO is a covered entity for purposes of section 181.006 of the Health and Safety Code. However, in order to determine whether the GLO is a covered entity, we must address whether the GLO engages in the practice of “assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information.” *Id.* 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 [(“HIPPA”).]” *Id.* § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPPA’s definition of the term. HIPPA defines “protected health information” as 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. HIPPA 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. You state the information you marked consists of medical information pertaining to certain current residents at a specified facility. You indicate the information at issue identifies patients and includes protected health information. Upon review, we find the information you marked consists of protected health information for purposes of section 181.006 of the Health and Safety Code. The GLO indicates it collects and stores this information for the purpose of providing health care-related services. Therefore, with respect to this information, the GLO is a health care entity that is in the practice of collecting, using, and storing protected health information, and is a covered entity for purposes of section 181.006 of the Health and Safety Code. Accordingly, the GLO must

withhold the information you marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code.⁴

Section 552.107(1) of the Government Code protects information coming with 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See 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 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 state Attachment D consists of communications between GLO attorneys that were made for the purpose of providing legal services to the GLO. You state the communications were intended to be, and have remained, confidential. Based upon these representations and our review, we find Attachment D consists of privileged attorney-client communications. Therefore, the GLO may withhold Attachment D under section 552.107(1) of the Government Code.⁵

⁴ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

⁵ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Section 552.111 of the Government Code exempts 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 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 exempts 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 information 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 2002, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendations 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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

You seek to withhold the remaining information in Attachment E under section 552.111 of the Government Code. You state the information at issue consists of advice, recommendations, and opinions of GLO staff members and employees and third parties with whom the GLO shares privity regarding policymaking decisions of the GLO. Based upon your representations and our review, we find you have demonstrated some of the information at issue, which we marked, consists of advice, opinions, or recommendations on the policymaking matters of the GLO. Accordingly, the GLO may withhold the

information we marked under section 552.111 of the Government Code. However, upon review, we find the remaining information in Attachment E consists of information that is administrative or purely factual in nature. Thus, you have failed to demonstrate the remaining information in Attachment E reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the GLO may not withhold any portion of the remaining information in Attachment E under section 552.111 of the Government Code on the basis of the deliberative process privilege.

In summary, the GLO must withhold Attachment F under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code. The GLO must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code. The GLO may withhold Attachment D under section 552.107(1) of the Government Code. The GLO may withhold the information we marked under section 552.111 of the Government Code. The GLO 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 <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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/mo

Ref: ID# 855072

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Interested Party
(w/o enclosures)