



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 4, 2003

Mr. William T. Buida
Supervising Attorney
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2003-2294

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178904.

The Department of Human Services (the "department") received a written request for, among other things, "Judge's and State Attorney legal note's [sic]" that pertain to the requestor being entered into the department's nurse aide registry.¹ You state that the department does not possess any judge's notes.² You contend that some of the documents you submitted to this office as responsive to the request are excepted from required disclosure pursuant to sections 552.101, 552.107(1), and 552.111 of the Government Code.³

¹We assume the department has released all of the other requested information to the requestor. If it has not, it must do so at this time to the extent the requested information exists. See Gov't Code §§ 552.301, .302.

²We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990). Nor does the Public Information Act require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

³Although it is not apparent to this office that all of the information you seek to withhold constitutes "attorney notes," we will assume for purposes of this ruling that all of the documents you submitted to this office are responsive to the current records request.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes, such as sections 242.126 and 242.127 of the Health and Safety Code. Section 242.126(g) states that the department must make investigation reports of abuse or neglect public on request, but that the names of the following individuals must be withheld:

- (1) any resident, unless the department receives written authorization from a resident or the resident’s legal representative requesting the resident’s name be left in the report;
- (2) the person making the report of abuse or neglect or other complaint; and
- (3) an individual interviewed in the investigation.

Health & Safety Code § 242.126(g). Section 242.127 provides as follows: “A report, record, or other working paper used or developed in an investigation and the name, address, and phone number of any person making a report under [subchapter E, chapter 242] are confidential and may be disclosed only for purposes consistent with rules adopted by the Texas Board of Human Services or the designated agency.” Health & Safety Code § 242.127. In addition, the department adopted section 19.2010 of title 40 of the Texas Administrative Code, which applies to investigations of complaints of abuse, neglect, and exploitation at nursing facilities and related institutions. Section 19.2010 provides in part as follows:

- (a) Confidentiality. All reports, records, and working papers used or developed by [the department] in an investigation are confidential and may be released to the public only as provided below.
 - (1) Completed written investigation reports are open to the public, provided the report is de-identified. The process of de-identification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to [the department] as part of the investigation.

Many of the records you submitted to this office pertain to two investigations conducted under the authority of chapter 242 of the Health and Safety Code into complaints of abuse or neglect of nursing facility residents. We have identified reports among the submitted documents that appear to have been created pursuant to section 242.126(g). Assuming such is the case, we conclude that all personally identifiable information in those reports is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 242.126 of the Health and Safety Code and section 19.2010 of title 40 of the Texas Administrative Code. We further conclude that the remaining

documents used or developed during the course of the underlying investigations are made confidential under section 242.127 and therefore must be withheld in their entirety. We have marked the documents accordingly.

You also seek to withhold the names of the victims of the abuse contained in other documents you submitted to this office. Section 552.101 of the Government Code also protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. Generally, the intent of statutes containing confidentiality provisions regarding investigations of abuse or neglect is to protect, among other things, the privacy interests of the victims. *See, e.g.*, Family Code § 261.201 (child abuse and neglect); Hum. Res. Code § 48.101 (abuse and neglect of elderly and disabled persons); *see also* Open Records Decision No. 603 (1992) (concluding that section 142.009(d) of Health and Safety Code intended to protect, *inter alia*, privacy interests of individuals named in reports). Similarly, we conclude here that the names of the victims of abuse contained in the documents not made confidential under sections 242.126(g) and 242.127 are protected from public disclosure pursuant to the common-law right of privacy and thus must be withheld pursuant to section 552.101 of the Government Code.⁴

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 “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 Texas 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)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the

⁴Because we resolve this aspect of your request under common-law privacy, we need not address your other arguments for withholding this information.

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 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, no writ). 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).

After reviewing your arguments and the documents you submitted to this office, we conclude that you have demonstrated the applicability of section 552.107(1) to most of the records that you have indicated you believe come within the attorney-client privilege. We have marked the documents that the department may withhold pursuant to section 552.107(1) of the Government Code.

Finally, you contend that some of the documents you submitted to this office constitute attorney work product and, thus, may be withheld from the public pursuant to section 552.111 of the Government Code. *See generally* Open Records Decision No. 677 (2002). Section 552.111 of the Government Code excepts from required public disclosure an “interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This office has stated that to withhold attorney work product under section 552.111, a governmental body must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney’s mental processes, conclusions, and legal theories. *See id.*

When showing that the requested documents were created in anticipation of litigation for the first prong of the work product test, a governmental body’s task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and created documents for the purpose of preparing for such litigation. *See id.* at 5. In this regard, you have informed this office that the information you seek to withhold as work product was created during the course of an administrative hearing regarding the entry of an abuse, neglect, or misappropriation finding in the nurse aide registry. Based on your representations and our review of the information at issue, we conclude that you have met the first prong of the work product test. *See* Open Records

Decision Nos. 588 (1991), 301 (1982) (contested case under Administrative Procedure Act, Government Code chapter 2001, constitutes "litigation"). Furthermore, having reviewed the information at issue, we conclude that the information reveals attorney mental impressions, conclusions, and strategy. We therefore conclude that the department may withhold the information we have marked as attorney work product under section 552.111 of the Government Code.

In summary, the department must withhold all identifying information contained in reports created pursuant to section 242.126(g) of the Health and Safety Code. The department must also withhold in their entirety all other records used or developed in the investigations pursuant to section 242.127. The identities of the victims contained in the other submitted records must be withheld under common-law privacy. The department may withhold the documents we have marked as coming within the protection of section 552.107(1) of the Government Code, as well as the information we have marked as coming within the protection of section 552.111 of the Government Code as work product. The department must release to the requestor the remaining submitted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

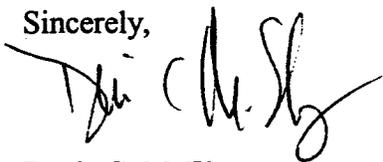
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/RWP/seg

Ref: ID# 178904

Enc: Submitted documents

c: Ms. Roxanne Gibson
P.O. Box 2974
Harker Heights, Texas 76548
(w/o enclosures)