



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2003

Mr. Steve Aragon
General Counsel
Texas Health and Human Services Commission
P. O. Box 13247
Austin, Texas 78711

OR2003-6719

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188251.

The Texas Health and Human Services Commission (the "commission") received a request for:

- a) any proposed letter or notice sent, or planned to be sent, to any group of Texas Medicaid recipients, informing them (i) that their community care hours of service will be reduced by a certain percentage, or (ii) of any other across-the-board cut in hours, services, or benefits;
- b) documents reflecting any decision to reduce community care hours of service, or to make any other across-the-board cut in services, to Texas Medicaid recipients as a result of funding, fiscal, or financial concerns, constraints, or pressures (including the decision itself, the reasons for the decision, the identities of those involved in the decision, and the nature of the decision-making process);
- c) documents reflecting, and information relied on in making, the decision by the Texas Department of Human Services (DHS) to propose new § 48.2925 in its Community Care for Aged and Disabled

chapter, which allows for a 15% reduction in PAS hours for all but priority clients (including every reason or basis for the decision, any analysis of the effects of the decision on those individuals subject to it, the identities of those involved in making the decision, and the nature of the decision-making process);

- d) documents reflecting how all of the money that Texas has received (or will receive) under Sec. 401(a) of the Job and Growth Tax Relief Reconciliation Act of 2003 will be spent or applied, including but not limited to the specific agency receiving such funds and the line item budget strategy, the identity of those persons involved in the decision, and the nature of the decision-making process;
- e) documents reflecting how much of the money (in dollars and in percent) that Texas has received (or will receive) under Sec. 401(a) of the Job and Growth Tax Relief Reconciliation Act of 2003 will be spent or applied to restore Medicaid provider reimbursement rates and Community Care hours (including the identity of those involved in the decision, and the nature of the decision-making process);
- f) documents reflecting how all of the money that Texas has received (or will receive) under Sec. 401(b) of the Job and Growth Tax Relief Reconciliation Act of 2003 will be spent or applied, including but not limited to the specific agency receiving such funds and the line item budget strategy, the identity of those persons involved in the decision, and the nature of the decision-making process;
- g) documents reflecting how much of the money (in dollars and in percent) that Texas has received (or will receive) under Sec. 401(b) of the Job and Growth Tax Relief Reconciliation Act of 2003 will be spent or applied to restore Medicaid provider reimbursement rates and Community Care hours (including the identity of those persons involved in the decision, and the nature of the decision-making process);
- h) documents reflecting the contents or formulation of any plan (by the Legislative Budget Board, the Governor, or otherwise) that outlines the transfers of State Fiscal Relief Federal Funds as described in Sec. 11.28, Article IX, General Appropriations Act, 2004-05 Biennium (including the plan itself, the identities of those involved in the planning, and the nature of the planning or decision-making process); and

- i) documents reflecting the use or transfer (both actual and planned) of state fiscal relief federal funds to agencies or institutions whose budgets would otherwise have been reduced pursuant to Sec. 11.15, Article IX, General Appropriations Act, 2004-05 Biennium, including but not limited to the specific agency receiving such funds and the line item budget strategy, the identity of those persons involved in the decision, and the nature of the decision-making process.

You claim that the requested information is excepted from disclosure pursuant to sections 552.106, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted representative sample documents.²

Initially, we note that we have marked a portion of the submitted information that was created subsequent to the date of the commission's receipt of this request. Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when it received a request for information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); *see also* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Accordingly, we conclude that the commission need not release this marked information to the requestor in response to this request for information.

We now address your remaining claimed exceptions to disclosure with regard to the rest of the submitted information. Section 552.106 excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Gov’t Code § 552.106(a)-(b). Sections 552.106 and 552.111 are similar in that both of these exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the

¹ Although you claim that the requested information is excepted from disclosure under section 552.107 of the Government Code, we note that you did not submit arguments to us in support of such a claim. Accordingly, we conclude that the commission has waived any claim with regard to this particular exception to disclosure and we do not address it in this ruling. *See* Gov’t Code §§ 552.301, .302; *see also* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Further, we note that you expressly withdrew your claim regarding section 552.101 of the Government Code in the comments that you submitted to this office. Consequently, we also do not address this particular exception to disclosure in this ruling.

² We assume that 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.

legislative process and, thus, is narrower than section 552.111. *See id.* The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and, therefore, it does not except purely factual information from disclosure. *See id.* at 2. Furthermore, section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See id.* at 1.

Section 552.111 excepts from disclosure “an 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. 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, no writ); *see also* Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), 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 that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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. *See id.*; *see also City of Garland v. The 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. *See* Open Records Decision No. 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).

We also have concluded that a preliminary draft of a document that is 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 assert that the remaining submitted information comprises either proposals for consideration by the Legislature or estimates of the potential fiscal impact of certain decisions relating to public policy under deliberation by the Legislature. You, thus, indicate that the remaining submitted information consists of communications that contain advice, recommendations, and opinions relating to policy matters that are protected from disclosure by sections 552.106 and 552.111 of the Government Code. Having reviewed the remaining submitted information and considered your arguments, we conclude that the commission has demonstrated that some of the information is excepted from disclosure pursuant to section 552.106 and that the rest of the information is excepted from disclosure pursuant to section 552.111 of the Government Code. Thus, we have marked this information accordingly for your convenience.

In summary, the commission need not release the information that we have marked as being not responsive to the request. The commission may withhold the remaining submitted information pursuant to sections 552.106 and 552.111 of the Government Code.

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 188251

Enc. Marked documents

c: Ms. Mary S. Faithfull
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(w/o enclosures)