



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2006

Ms. Sylvia F. Hardman
General Counsel
Texas Department of Assistive and Rehabilitative Services
4800 North Lamar Blvd., Suite 300
Austin, Texas 78756

OR2006-10088

Dear Ms. Hardman:

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# 258312.

The Texas Department of Assistive and Rehabilitative Services (the "department") received a request for:

1. Provider Risk Assessment Instrument for years 2002-2006 used for Hire Places;
2. Provider Risk Assessment procedures for years 2002-2006;
3. Investigative report concerning Hire Places which forms the basis of the final decision regarding Hire Places' questioned payments;
4. All documents, notes, records and other relevant information concerning the investigative report mentioned above in item 3;
5. All documents submitted to or received from BSSPMU;
6. Executive summaries of each site monitoring conducted of Hire Places for years 2002-2006;

7. Fully executed copy of Health and Human Services Enterprise Performance Plan for Larry Pauciello, dated August 31, 2005;
8. Maria Nava's travel records for the month of February, 2006;
9. Rehabilitation Services Manual;
10. Copy of the request for changes to the SPMP from the BSSPMU for monitoring that occurred in February, 2006;
11. 7 Provider Monitoring;
12. All internal memos, emails, and correspondence relating to the monitoring of Hire Places for years 2002-2006.¹

You state that you have released some of the requested information, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information made confidential by other statutes. Section 531.1021 provides in relevant part as follows:

(g) All information and materials subpoenaed or compiled by the office [of inspector general] in connection with an investigation are confidential and not subject to disclosure under Chapter 552, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the office [of inspector general] or its employees or agents involved in the investigation conducted by the office, except that this information may be disclosed to the office of the attorney general and law enforcement agencies.

Gov't Code § 531.1021(g). You explain that the Health and Human Services Commission Office of the Inspector General ("OIG") was created "to prevent, detect and investigate fraud,

¹The department requested clarification regarding items 5, 10, and 11. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). The requestor responded by stating that items 5 and 10 should be limited to Hire Places for the years 2004-2006.

abuse and waste in state health and human service programs.”² You state that the information in Exhibits 4B, 4C, 4D, 7A, 7B, 8A, 8B, and 10 was compiled by the OIG during its investigation of Hire Places. Upon review, we agree that the information in Exhibits 4B, 4C, 4D, 7A, 7B, 8A, 8B, and 10 is confidential under section 531.1021(g) and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 111.018(b) of the Human Resources Code, which provides that:

(b) In carrying out his or her duties under this chapter, the commissioner [of the department] shall, with the approval of the board, implement policies addressing personnel standards, the protection of records and confidential information, the manner and form of filing applications, eligibility, investigation, and determination for rehabilitation and other services, procedures for hearings, and other regulations subject to this section as necessary to carry out the purposes of this chapter.³

Hum. Res. Code § 111.018(b). Under the authority of section 111.018(b), the department has promulgated rules making certain information confidential. Specifically, section 101.4015 of title 40 of the Administrative Code provides in relevant part:

(a) Client records.

(1) All personal information made available to [the department] employees in the course of the administration of rehabilitation services programs, including lists of names, addresses, and records of agency evaluation is confidential.

...

(3) Information is not to be disclosed directly or indirectly, other than in the administration of the rehabilitation programs, unless the consent of the client has been obtained in writing, in compliance with a court order, or in accordance with a federal or state law or regulation. Information containing identifiable personal information

²We note that the Health and Human Services Commission directly oversees the department. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 198 § 1.01, 2003 Tex. Gen. Laws 611.

³The 78th Legislature transferred all powers, duties, functions, programs, and activities of the former Texas Rehabilitation Commission to the department effective March 1, 2004. *See* Act of June 1, 2003, 78th Leg., R.S., ch. 198, §§ 1.01, 1.21, 1.26, 2003 Tex. Gen. Laws 611, 612, 641.

may not be shared with advisory or other bodies that do not have official responsibilities for administration of the program.

40 T.A.C. § 101.4015. You state that the “identities of [the department’s] consumers are protected by federal and state statutory and regulatory law, and thus are excepted from disclosure by section 552.101 of the Act. Documents that reveal consumer identity (names and social security numbers), are included as Exhibit 5.” You state that none of the release provisions in this section apply. Based on your arguments and our review, the client names, addresses, and social security numbers you have marked in Exhibit 5 must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 101.4015(a)(1) of Title 40 of the Administrative Code. We have marked additional addresses in Exhibit 5 that must also be withheld. For the remaining information in Exhibit 5, we will address your arguments under sections 552.103 and 552.111.

You claim that some of the remaining information in Exhibit 5 is excepted under section 552.103 of the Government Code, which provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You contend that some of the information in Exhibit 5 relates to reasonably anticipated litigation. You inform us that the requestor is the attorney for Hire Places, which recently had

its contract with the department terminated. You further inform us that, pursuant to the department's internal appeals process, the requestor has asked for an extension of time in order to file an appeal regarding the termination of the contract. Although you state that the internal appeal is not conducted pursuant to the Administrative Procedures Act (APA), you claim that "Hire Places could also appeal that decision to the State Office of Administrative hearings (SOAH) where hearings on the contract claims issues are conducted pursuant to the APA." Upon review of your comments and the submitted information, we find that the department has not established that litigation regarding the requestor's client was reasonably anticipated when the department received the present request. Consequently, we conclude the department may not withhold any portion of the submitted information pursuant to section 552.103 of the Government Code.

The department also claims that portions of Exhibit 5 are excepted under section 552.111 of the Government Code, which excepts from public 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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); 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 from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect 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. *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). Furthermore, 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.

You claim that portions of Exhibit 5 consist of advice, recommendations, and opinions that reflect the policymaking processes of the department. However, we find that the documents at issue in Exhibit 5 do not contain advice, recommendations, and opinions regarding the policymaking processes of the department. *See* Open Records Decision No. 615 at 5.

Therefore, we find that the department may not withhold any portion of Exhibit 5 under section 552.111 of the Government Code.

You also claim that Exhibit 6A contains information subject to section 552.117 of the Government Code, which excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state, and provide documentation showing, that the employee at issue has made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. Therefore, the department must withhold the personal information you have marked in Exhibit 6A under section 552.117. We have also marked a small amount of additional information in Exhibit 6A that must be withheld under section 552.117.

You also assert that some of the submitted information in Exhibit 6A is subject to section 552.130 of the Government Code, which excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. The department must withhold the Texas motor vehicle record information you have marked in accordance with section 552.130. We have also marked a small amount of additional information in Exhibit 6A that must be withheld under section 552.130.

We note that Exhibits 5 and 6A also contain account and credit card numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The department must, therefore, withhold the account and credit card numbers we have marked in Exhibits 5 and 6A under section 552.136.

In summary, the information in Exhibits 4B, 4C, 4D, 7A, 7B, 8A, 8B, and 10 is confidential under section 531.1021(g) and must be withheld under section 552.101 of the Government Code. The client names, addresses, and social security numbers you have marked in Exhibit 5 must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 101.4015(a)(1) of Title 40 of the Administrative Code. We have marked additional addresses in Exhibit 5 that must also be withheld under section 552.101 in conjunction with section 101.4015(a)(1). The department must withhold the personal information we have marked, in addition to the information you have marked, in Exhibit 6A under section 552.117. The department must withhold the Texas motor vehicle record information we have marked, in addition to the information you have marked, in accordance with section 552.130. The department must withhold the account and credit card numbers we have marked in Exhibits 5 and 6A under section 552.136. The remaining information

must be released. As our ruling on this issue is dispositive, we need not address your remaining argument.

Lastly, you ask this office to issue a previous determination authorizing the department to withhold investigative information subject to section 531.1021 of the Government Code and client identifying information subject section 111.018(b) of the Human Resources Code and section 101.4015(a)(1) of Title 40 of the Administrative Code if requested in the future. We decline to issue such a previous determination at this time. *See* Open Records Decision No. 673 (2001). Therefore, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us. 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).

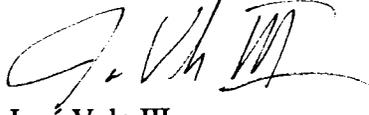
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink, appearing to read "José Vela III". The signature is stylized and cursive.

José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 258312

Enc. Submitted documents

c: Mr. Robert A. Skipworth
Attorney at Law
310 North Mesa, Suite 600
El Paso, Texas 79901
(w/o enclosures)