



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2007

Mr. Charles K. Eldred
Attorney for Public Information
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2007-14698

Dear Mr. Eldred:

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# 294137.

The Texas Youth Commission (the "commission") received a request for "electronic copies of any and all documents . . . during the time period of March 2007 to August 2007, that relate to or reflect any communications between" two named individuals. You state that some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note that you have redacted portions of the submitted information. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision 673 (2000). In this instance, we can discern the nature of some of the information that has been redacted; thus, being deprived of this

¹We 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.

information does not inhibit our ability to make a ruling in this instance. However, we are unable to discern the nature of the remaining redacted information. Therefore, we find that the commission has failed to comply with the procedural requirements of section 552.301 of the Government Code with respect to the remaining redacted information and it is presumed to be public. *See* Gov't Code §§ 552.301(e) (within fifteen business days of receiving written request for information, governmental body must submit to this office copies of specific information at issue, or representative samples), .302. The presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.111 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests and may be waived. *See* Open Records Decision No. 677 at 10 (2002); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. In failing to comply with section 552.301, the commission has waived its claim under section 552.111; therefore, the commission may not withhold any of the redacted information at issue under this section. As we are unable to review the redacted information at issue, we have no basis for finding it confidential. Thus, we conclude that the commission must release the redacted information at issue, which we have marked, to the requestor. If you believe that the redacted information at issue is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below.

We next address your section 552.111 claim for the remaining information. Section 552.111 of the Government Code 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. *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, no writ); 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 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* 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *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).

Further, section 552.111 can encompass communications between a governmental body and a third party consultant. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply in such instances, 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* Open Records Decision No. 561 at 9.

You contend that the remaining submitted information is protected by the deliberative process privilege and excepted from disclosure under section 552.111. Upon review, we find that the commission may withhold the information we have marked under section 552.111 of the Government Code. However, you have failed to demonstrate that some of the remaining information constitutes communications made between parties in privity of interest for section 552.111 purposes. *See* Gov't Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). You have also failed to demonstrate that the remaining documents constitute internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the commission. Thus, the remaining documents may not be withheld under section 552.111 of the Government Code.

We note that section 552.101 of the Government Code is applicable to some of the submitted information. This section excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate

²The Office of the Attorney General will raise certain confidentiality statutes on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

The submitted records contain identifying information of youths in the custody of the commission. Upon review, we find that this information is protected under common-law privacy. See Open Records Decision No. 394 at 4-5 (1983); *cf.* Fam. Code § 58.007. We therefore conclude that the commission must withhold the identifying information of youths in the custody of the commission pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

We next note that section 552.117(a)(1) of the Government Code 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 of the Government Code. See Gov't Code § 552.117(a)(1); *see also* Open Records Decision No. 670 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). In this case, you do not inform us, nor provide documentation showing, whether or when any employee or official whose information is at issue elected confidentiality under section 552.024. Thus, if the employee or official whose information is at issue timely elected to keep his or her personal information confidential, you must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The commission may not withhold this information under section 552.117(a)(1) if the employee or official at issue did not make a timely election.

Finally, we note that section 552.137 of the Government Code is applicable to some of the remaining information. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. These e-mail addresses do not appear to be of a type specifically excluded by section 552.137(c). You also do not inform us that

the relevant members of the public have consented to the release of these e-mail addresses. We have marked the e-mail addresses that the commission must withhold under section 552.137 of the Government Code.

In summary, the commission may withhold the information we have marked under section 552.111 of the Government Code. The commission must withhold identifying information of youths in the custody of the commission pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. We have marked the information that must be withheld under section 552.117(a)(1), provided that the official or employee whose information is at issue made a timely request for confidentiality under section 552.024. We have marked the e-mail addresses that the commission must withhold under section 552.137 of the Government Code. The remaining information must be released to the requestor.

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, 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 294137

Enc. Submitted documents

c: Ms. Connie Hansen
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(w/o enclosures)