KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 23, 2012

Mr. Thomas D. McClure
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2012-04341

Dear Mr. McClure:

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# 448517 (DSHS File No. 19843-2012).

The Texas Department of State Health Services (the "department") received a request for e-mails to and from three named individuals that include any of nine words and phrases for a specified time period. You state you will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.137 of the Government Code. You also state you have notified the Texas Department of Family and Protective Services, the Texas Health and Human Services Commission's Office of the Inspector General, and the Texas Medical Board (the "board") of the request. We have received comments from the City of Austin (the "city") on behalf of the Austin Police Department and from the board. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.[1]

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[1]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Thus, section 552.101 encompasses information other statutes make confidential. For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. You contend the information in Exhibit D is protected under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. Therefore, we held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

We next address the city's argument under section 552.101 of the Government Code. Section 552.101 also encompasses section 261.201 of the Family Code, which provides, in relevant part:

> (a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

> (1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and
>
> (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also id.* §§ 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1) (defining "abuse" for purposes of chapter 261 of the Family Code). The city states the information it indicates consists of records of the investigation of child abuse that the city's police department is currently conducting pursuant to chapter 261 and, thus, this information is confidential under section 261.201(a). On this basis, we agree the information the city indicates, which we have marked, is confidential under section 261.201(a). We have no indication that the city's police department has adopted a rule that governs the release of this type of information, we assume that no such regulation exists. Given that assumption, and based on our review, we determine the information we have marked is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the department must withhold the information we have marked in Exhibits D and E from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.[2]

Section 552.101 of the Government Code also encompasses section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

> (a) The following information is confidential and not subject to disclosure under [the Act]:
>
> (1) a report of abuse, neglect, or exploitation made under this chapter;
>
> (2) the identity of the person making the report; and
>
> (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an

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[2]As our ruling is dispositive, we need not address the city's remaining argument under section 552.108 of the Government Code, or the department's remaining arguments for this information.

> investigation made under this chapter or in providing services as a result of an investigation.
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> (b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.
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> . . .
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> (d) The executive commissioner [of the Texas Health and Human Services Commission] shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

Hum. Res. Code § 48.101(a), (b), (d). You state, and the submitted information indicates, some of the remaining information was used or developed in investigations, or in providing services as a result of investigations, conducted under chapter 48 of the Human Resources Code. *See id.* § 48.252(a)(1), 40 T.A.C. § 711.1. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See* Hum. Res. Code § 48.101(b)-(g) (permitting release of confidential information only in certain circumstances). You do not indicate, nor does it appear, that an exception to confidentiality applies in this instance. Accordingly, we conclude the department must withhold the information we have marked in Exhibits D and E under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.[3]

Section 552.101 of the Government Code also encompasses section 576.005 of the Health and Safety Code, which provides, "[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law." Health & Safety Code § 576.005. You explain the Austin State Hospital (the "hospital") is a mental health facility as defined by chapter 571. *See id.* § 576.003(12). Based on your representation and our review, we agree the confidentiality provision applies to the information we have marked in Exhibits C, D, and E, and the department must withhold the marked information under section 552.101 of the Government Code on this basis. However, we find you have failed to demonstrate how any of the remaining information you seek to withhold on this basis identifies a patient of a mental

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[3]As our ruling is dispositive for the information we have marked in Exhibit E, we need not address your remaining arguments for this information.

health facility under section 576.005. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses section 611.002(a) of the Health and Safety Code, which provides "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." *Id.* § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. Upon review, we find none of the remaining information you seek to withhold on this basis consists of communications between a patient and a professional or records of the identity, diagnosis, evaluation, or treatment of a patient that were created or maintained by a professional. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

You and the board each claim sections 160.005(a) and 160.006(a) of the Occupations Code for some of the remaining information, which also are encompassed by section 552.101 of the Government Code. Section 160.003(b) of the Occupations Code provides, in part:

> (a) This section applies to:
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> . . .
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> (1) a medical peer review committee in this state; [and]
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> (2) a physician licensed in this state or otherwise lawfully practicing medicine in this state[.]
>
> . . .
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> (b) A person or committee subject to this section shall report relevant information to the board relating to the acts of a physician in this state if, in the opinion of the person or committee, that physician poses a continuing threat to the public welfare through the practice of medicine.

Occ. Code § 160.003(a)(2), (b). Section 160.005(a) provides a report made under subchapter A of chapter 160 of the Occupations Code is confidential. *See id.* § 160.005. Upon review, we find neither you nor the board have demonstrated any of the remaining information constitutes a report to the board that is subject to the confidentiality provision of section 160.005. As such, none of the remaining information is confidential under section 160.005(a) and it may not be withheld under section 552.101 of the Government Code on this basis.

Section 160.006 provides, in relevant part:

> (a) A record, report, or other information received and maintained by the board under [Subchapter A] or Subchapter B, including any material received or developed by the board during an investigation or hearing and the identity of, and reports made by, a physician performing or supervising compliance monitoring for the board, is confidential.

Id. § 160.006(a). By its terms, section 160.006(a) makes information confidential if it is maintained by the board. The board argues some of the remaining information was developed by the board and is contained in its investigative files. However, we note, and the board acknowledges, the department may maintain duplicate copies of this information. In this instance, the information at issue is maintained by the department. Accordingly, we conclude none of the remaining information is confidential under section 160.006(a); thus, the department may not withhold any of the remaining information under section 552.101 of the Government Code on this basis.

You also raise section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code. Section 160.007 provides, in part:

> (a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Id. § 160.007(a). "Medical peer review" is defined by the Medical Practice Act, subtitle B of title 3 of the Occupations Code, to mean "the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners." *Id.* § 151.002(a)(7). A medical peer review committee is "a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians].]" *Id.* § 151.002(a)(8). Upon review, we find you have not demonstrated the information you seek to withhold in Exhibit E under section 160.007 consists of records of a medical peer review committee. Accordingly, the department may not withhold the

information at issue in Exhibit E under section 552.101 of the Government Code on that basis.

The board also asserts some of the remaining information is confidential under section 164.007 of the Occupations Code, which is encompassed by section 552.101 of the Government Code. Section 164.007(c) provides:

> Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Id. § 164.007(c). By its terms, section 164.007(c) makes information confidential when in the possession of the board, its employees, or agents. The board argues the information at issue is part of a specified investigative file. However, we note, and the board acknowledges, the department may maintain duplicate copies of this information. In this instance, the information at issue is in the possession of the department. Furthermore, the department is not acting as an employee or agent of the board in maintaining this record. Accordingly, we conclude none of the remaining information is confidential under section 164.007 of the Occupations Code, and the department may not withhold it under section 552.101 of the Government Code on this basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 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 a 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 to only 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 to only a confidential communication, *id.*, 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 pet.). 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).

You state the information in Exhibit B and some of the information in Exhibit E are communications between department attorneys, department staff, and program management staff for the hospital. You explain the department attorneys advise the hospital's program management staff in their capacity as clients, and these communications were made for the purpose of providing legal services to the department and the hospital's program management staff. We understand the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information in Exhibit B and the information we have marked in Exhibit E consists of privileged attorney-client communications that the department may generally withhold under section 552.107(1) of the Government Code.[4] However, we note one of the submitted e-mail strings in Exhibit E includes a communication with a non-privileged party you have not identified. If the communication with this non-privileged party exists separate and apart from the otherwise privileged e-mail string in which it appears, then the department may not withhold the portion of the e-mail string we have marked under section 552.107(1).

We next address your argument under section 552.108(a)(1) of the Government Code for the remaining information you have marked in Exhibit E.[5] Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would

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[4]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

[5]Based on the substance of your arguments, we understand you to raise subsection 552.108(a)(1) of the Government Code for the information you have marked under section 552.108.

interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The department is not a law enforcement agency. *See* Open Records Decision No. 199 (1978) (agency whose function is essentially regulatory in nature is not "law enforcement agency" for purposes of statutory predecessor to section 552.108). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has determined, however, where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates the information relates to the pending case and provides this office with a representation from the law enforcement entity the law enforcement entity wishes to withhold the information. You state the remaining information you have marked in Exhibit E relates to pending investigations by the Austin Police Department, the Health and Human Services Commission's Office of the Inspector General, and the Texas Department of Family and Protective Services. However, you have not provided any representation from a law enforcement entity asking the department, as proper custodian of information relating to alleged criminal conduct, to withhold any of the remaining information at issue because its release would interfere with a pending investigation or prosecution.[6] Therefore, we find the department may not withhold any of the remaining information at issue in Exhibit E under section 552.108 of the Government Code.

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. Section 552.111 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).

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[6]We note, in its brief to our office, the city does not object under section 552.108 of the Government Code to any of the remaining information at issue. As discussed above, the information for which the city submits arguments under section 552.108 is confidential under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

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 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

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* ORD 561 at 9 (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 id.*

You explain the information at issue in Exhibit C and the information you have marked in Exhibit E consists of advice, opinions, and recommendations within communications between the department and the hospital's program management staff "regarding policies and procedures to improve current agency processes for handling reports of abuse and neglect[.]" Based on your representations and upon our review, we find the information we have marked constitutes policymaking advice, opinion, and recommendation. As such, the department may withhold the information we have marked in Exhibits C and E under section 552.111

of the Government Code on the basis of the deliberative process privilege. We note one of the communications at issue in Exhibit C is with a representative of a non-profit organization. You have not explained how this individual is involved in the department's policymaking process or has policymaking authority regarding department matters. Therefore, we find you have failed to demonstrate how the department shares a privity of interest or common deliberative process with this individual with respect to the communication at issue. Additionally, we find the remaining information you seek to withhold on this basis does not consist of advice, opinion, or recommendation, but rather consists of general administrative or purely factual information, or does not pertain to policymaking. Thus, you have failed to demonstrate how this information is excepted under section 552.111. Accordingly, we find none of the remaining information in Exhibits C or E may be withheld on this basis.

We note some of the remaining information in Exhibit E is subject to section 552.117 of the Government Code.[7] Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024 and pay for the cellular service with personal funds, the department must withhold the cellular telephone numbers we have marked in Exhibit E under section 552.117 of the Government Code. The department may not withhold this information under section 552.117 if the employees did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with

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[7]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked in Exhibits C and E under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.[8]

In summary, the department: (1) must withhold the information we have marked in Exhibits D and E from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (2) must withhold the information we have marked in Exhibits D and E under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code; (3) must withhold the information we have marked in Exhibits C, D, and E under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code; (4) may withhold the information in Exhibit B and the information we have marked in Exhibit E under section 552.107(1) of the Government Code, except to the extent the non-privileged portion of the e-mail string we have marked in Exhibit E exists separate and apart from the otherwise privileged e-mail string in which it appears; (5) may withhold the information we have marked in Exhibits C and E under section 552.111 of the Government Code; (6) must withhold the cellular telephone numbers we have marked in Exhibit E under section 552.117 of the Government Code if the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024 and pay for the cellular service with personal funds; and (7) must withhold the e-mail addresses we have marked in Exhibits C and E under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to disclosure. The department 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 http://www.oag.state.tx.us/open/index_orl.php,

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[8]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 44[illegible]517

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Cause No. D-1-GN-12-001206

DEPARTMENT OF STATE HEALTH SERVICES AND TEXAS MEDICAL BOARD, *Plaintiffs,*	§	IN THE DISTRICT COURT OF
v.	§	353rd JUDICIAL DISTRICT
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, *Defendant.*	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which the Department of State Health Services and the Texas Medical Board (DSHS and TMB), sought to withhold certain information from public disclosure. All matters in controversy between Plaintiff, DSHS and TMB, and Defendant, Ken Paxton[1], Attorney General of Texas (Attorney General), arising out if this lawsuit have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent a certified letter to the requestor, Ms. Andrea Ball of the Austin American Statesman, on November 23, 2015, informing her of the setting of this matter on the uncontested docket. The requestor was informed of the parties' agreement that DSHS may withhold some of the information at issue. The

[1] Because Greg Abbott was sued solely in his official capacity, Ken Paxton is now the proper defendant in this lawsuit.

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requestor was also informed of her right to intervene in the suit to contest the withholding of this information. A copy of the certified mail receipt is attached to this motion. The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. DSHS and TMB and the Attorney General have agreed that in accordance with the PIA and under the facts presented, some of the information at issue is excepted from disclosure pursuant to Texas Government Code section 552.107. The information that may be redacted from the information at issue consists of attorney-client communications, and the information may be redacted in accordance with the chart contained in Thomas McClure's affidavit of November 5, 2015. DSHS agrees to release the remainder of the responsive information not already released and not excepted from disclosure by letter ruling OR2012-04340 or OR2012-04341 or the settlement agreement in this case; and

2. All court cost and attorney fees are taxed against the parties incurring the same;

3. All relief not expressly granted is denied; and

4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between the DSHS and TMB and the Attorney General and is a final judgment.

SIGNED the 9 day of December, 2015.

PRESIDING JUDGE

AGREED:

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Attorney for the Department of State Health Services and the Texas Medical Board

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Cause No. D-1-GN-12-001206

DEPARTMENT OF STATE HEALTH SERVICES AND TEXAS MEDICAL BOARD, *Plaintiffs,*	§	IN THE DISTRICT COURT OF
	§	353rd JUDICIAL DISTRICT
v.	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, *Defendant.*	§	TRAVIS COUNTY, TEXAS

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between the Department of State Health Services(DSHS) and the Texas Medical Board (TMB) and Ken Paxton,[1] Attorney General of Texas ("the Attorney General"), in his official capacity. This Agreement is made on the terms set forth below.

Background

On January 2, 2012, DSHS received a request for information under the Public Information Act ("PIA") from Andrea Ball for e-mail communications in which named persons were either the sender or a recipient. DSHS asked for an open records ruling from the Attorney General, pursuant to the PIA, Texas Government Code section 552.301.

In Letter Rulings OR2012-04340 and OR2012-04341, the Open Records Division of the Attorney General (ORD) allowed DSHS to withhold some of the information but required it to release some of the information.

DSHS released some of the requested information but disputed portions of the ruling and filed the above styled and captioned lawsuit to preserve its rights under the

[1] Because Greg Abbott was sued in his official capacity only, Ken Paxton is now the proper defendant.

PIA. After the suit was filed, TMB intervened.

DSHS submitted additional briefing to the Attorney General showing that some of the remaining information is excepted from disclosure under Texas Government Code section 552.107 because it consists of attorney-client communications. DSHS has also agreed to release some additional information. TMB, DSHS, and the Attorney General all agree to this settlement.

Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

Terms

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. DSHS, TMB, and the Attorney General have agreed that in accordance with the PIA and under the facts presented, some of the information at issue is excepted from disclosure pursuant to Texas Government Code section 552.107. The information that may be redacted from the information at issue consists of attorney-client communications, and the information may be redacted in accordance with the chart contained in Thomas McClure's affidavit of November 5, 2015. DSHS agrees to release the remainder of the responsive information not already released and not excepted from disclosure by letter ruling OR2012-04340 or OR2012-04341 or this settlement agreement; and

2. DSHS, TMB, and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The agreed final

judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor.

3. The Attorney General agrees that he will also notify the requestor, as required by TEX. GOV'T CODE § 552.325(c), of the proposed settlement and of her right to intervene to contest DSHS's right to withhold the information.

4. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

5. Each party to this Agreement will bear its own costs, including attorney fees relating to this litigation.

6. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

7. DSHS warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that DSHS has against the Attorney General or TMB arising out of the matters described in this Agreement.

8. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against DSHS or TMB arising out of the matters described in this Agreement.

9. TMB warrants that its undersigned representative is duly authorized to execute this Agreement on behalf of TMB and its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that TMB has against DSHS or the Attorney General arising out of the matters described in this Agreement.

10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

DEPARTMENT OF STATE HEALTH SERVICES AND TEXAS MEDICAL BOARD

By: _____
Name: ANN HARTLEY
Title: Assistant Attorney General
Financial Litigation and
Charitable Trusts Division

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

By: _____
Name: KIMBERLY L. FUCHS
Title: Assistant Attorney General
Administrative Law Division