



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 5, 2013

Ms. Ashley R. Allen  
Staff Attorney - Administrative Law Section  
Texas General Land Office  
P.O. Box 12873  
Austin, Texas 78711-2873

OR2013-03726

Dear Ms. Allen:

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# 480647.

The Texas General Land Office (the "GLO") received two requests from the same requestor for all e-mails between the GLO and (1) employees and officials of two named entities and (2) Sears Methodist Retirement System, Inc. ("Sears Methodist") regarding veterans nursing homes during a specified time period.<sup>1</sup> You state the GLO will release some information to the requestor with redactions agreed upon by the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102,

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<sup>1</sup>You inform us, and provide documentation showing, the GLO sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

552.111, and 552.117 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-11747 (2012). In that ruling, we concluded the GLO must (1) withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy, (2) withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information was at issue timely elected to keep his personal information confidential pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, and (3) release the remaining information. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, to the extent any of the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the GLO must continue to rely on Open Records Letter No. 2012-11747 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address your arguments against the release of portions of 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.” Gov’t Code § 552.101. This exception encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under

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<sup>2</sup>Although we understand you to also raise sections 552.104 and 552.105 of the Government Code based on your markings in the submitted information, you have provided no arguments explaining how these exceptions are applicable. *See* Gov’t Code § 552.301(e) (governmental body must provide comments stating why exceptions raised should apply to information requested). Accordingly, we do not address your assertion of either section 552.104 or section 552.105 for the submitted information.

common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find some of the information at issue, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Thus, the GLO must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information at issue is highly intimate or embarrassing. Therefore, the GLO may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.102(a) of the Government Code exempts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*’s interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Accordingly, the GLO must withhold the information we have marked under section 552.102(a) of the Government Code. However, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the GLO may not withhold any of the remaining information on that basis.

Section 552.111 of the Government Code exempts from disclosure “[a]n 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 section 552.111 exempts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting 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. 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* 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).

Section 552.111 can also 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, 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* ORD 561 at 9.

You explain that, pursuant to the authority granted by section 164.005 of the Natural Resources Code to the Veterans' Land Board of the GLO (the "board"), the GLO entered into an agreement with Sears Methodist to manage certain veterans nursing homes. *See* Nat. Res. Code §§ 164.005, .002(a)(1) (authorizing board to enter into agreement with any person for management or operation of veterans home). Accordingly, you state the GLO and Sears Methodist share a privity of interest and a common deliberative process in relation to the management of veterans nursing homes. You claim the deliberative process privilege under section 552.111 for portions of the remaining information, which you state constitute policymaking discussions of a broad scope among GLO employees, officials, and Sears Methodist. Upon review, we find the information we have marked consists of internal communications that constitute advice, opinions, or recommendations regarding the policymaking processes of the GLO. Thus, the GLO may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue is either factual in nature or pertains to administrative and personnel

matters that do not rise to the level of policy-making for purposes of section 552.111. Accordingly, the GLO may not withhold the remaining information at issue on the basis of the deliberative process privilege under section 552.111 of the Government Code.

Section 552.117 of the Government Code 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 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 cellular telephone numbers, provided the cellular telephone 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 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 individuals whose information is at issue timely elected to keep the information at issue confidential pursuant to section 552.024 and the cellular telephone services are not paid for by a governmental body, the GLO must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The GLO may not withhold this information under section 552.117(a)(1) if the individuals did not make timely elections to keep the information confidential or if the cellular telephone services are paid for by a governmental body.

In summary, to the extent any of the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the GLO must continue to rely on Open Records Letter No. 2012-11747 as a previous determination and withhold or release the identical information in accordance with that ruling. The GLO must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The GLO may withhold the information we have marked under section 552.111 of the Government Code. The GLO must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individuals whose information is at issue timely elected to keep the information at issue confidential pursuant to section 552.024 of the Government Code and the cellular services are not paid for by a governmental body. The remaining information must be released.

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](http://www.oag.state.tx.us/open/index_orl.php), 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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/ag

Ref: ID# 480647

Enc. Submitted documents

c: Requestor  
(w/o enclosures)