



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 1, 2014

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

OR2014-05390

Dear Mr. Aragon:

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# 518209.

The Texas Health and Human Services Commission (the "commission") received a request for ten categories of information relating to request for proposals number 529-11-0004. You state the commission will release some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Medical Transportation Management, Inc. ("MTM") and LogistiCare Solutions, Inc. ("LogistiCare"). Accordingly, you state, and provide documentation showing, you notified MTM and LogistiCare of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from MTM and LogistiCare. We

have considered the submitted arguments and reviewed the submitted information, some of which consists of representative samples.<sup>1</sup>

We note the information we have marked is not responsive to the instant request for information because it was created after the request for information was received. This ruling does not address the public availability of non-responsive information, and the commission is not required to release non-responsive information in response to this request.

Next, we note MTM seeks only to withhold information the commission has not submitted to this office for review. This ruling does not address information that was not submitted by the commission and is limited to the information submitted as responsive by the commission. *See Gov't Code § 552.301(e)(1)(D)* (governmental body requesting decision from Attorney General must submit copy of specific information requested). Thus, as MTM does not seek to withhold any portion of the submitted information, we will not address its argument under section 552.110 of the Government Code.

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. This section encompasses sections 12.003 and 21.012 of the Human Resources Code. Section 12.003 of the Human Resources Code provides in relevant part:

(a) Except for purposes directly connected with the administration of the [commission's]<sup>2</sup> assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [commission] or acquired by employees of the [commission] in the performance of their official duties.

Hum. Res. Code § 12.003(a) (footnote added); *see also id.* § 21.012 (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs). The term “assistance” in sections 12.003 and 21.012 includes “all forms of assistance and services for needy persons authorized by Subtitle C” of title 2 of the Human

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>*See* Act of June 10, 2003, 78th Leg., R.S., ch. 198, 2003 Tex. Gen. Laws 611, 641 (abolished Texas Department of Human Services).

Resources Code. *Id.* § 11.001(4); *see also id.* §§ 31.001 *et seq.* (Hum. Res. Code tit. 2, subtit. C, Assistance Programs).

In Open Records Decision No. 584 (1991), this office concluded “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of [commission] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” ORD 584 at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See also* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. §§ 431.300 *et seq.*; Hum. Res. Code § 21.012(a); Open Records Decision No. 166 (1977).

You contend the information in Exhibit B consists of Medicaid recipient information that is protected from disclosure under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code. You state the release of this information would not be for purposes directly connected with the administration of the Medicaid program. Based on your representations and our review, with the exception of the information we have marked, we agree section 12.003 is applicable in this instance and conclude the commission must withhold the information in Exhibit B under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code. However, we find the information we have marked is not confidential under section 12.003 of the Human Resources Code, and the commission may not withhold any of this information under section 552.101 of the Government Code on that basis.

LogistiCare claims some of its information in Exhibit D is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

LogistiCare argues some of its information in Exhibit D consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find LogistiCare has demonstrated portions of its information in Exhibit D constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold this

information, which we have marked, under section 552.110(b) of the Government Code. However, we find LogistiCare has made only conclusory allegations the release of any of the remaining information at issue would result in substantial harm to its competitive position. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence substantial competitive injury would result from release of particular information at issue). Accordingly, none of LogistiCare's remaining information at issue may be withheld under section 552.110(b).

Section 552.111 of the Government Code excepts 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, writ ref'd n.r.e.); 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 excepts 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

This office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from

disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

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* Open Records Decision No. 561 at 9 (1990) (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* ORD 561.

You state the information in Exhibit C consists of advice, opinions, and recommendations relating to the commission's policy. We note the information in Exhibit C contains draft documents. You do not state whether the draft documents will be released to the public in final form. Thus, to the extent the draft documents will be released to the public in their final form, the commission may withhold them in their entireties under section 552.111. If the draft documents will not be released to the public in their final form, then the commission may not withhold them in their entireties under section 552.111. Further, we find the information we have marked, including information within the draft documents if it will not be released in final form, consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the commission may withhold the information we have marked in Exhibit C under section 552.111. However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find you have failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the remaining information in Exhibit C may not be withheld under section 552.111.

In summary, with the exception of the information we have marked for release, the commission must withhold the information in Exhibit B under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code. The commission must withhold the information we have marked in Exhibit D under section 552.110(b) of the Government Code. The commission may withhold the draft documents in their entireties to the extent the draft documents will be released to the public in their final form under section 552.111 of the Government Code. The commission may withhold the information we have marked in Exhibit C under section 552.111. The commission 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



David L. Wheelus  
Assistant Attorney General  
Open Records Division

DLW/akg

Ref: ID# 518209

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Etta J. Jackson  
Medical Transportation Management, Inc.  
16 Hawk Ridge Drive  
Lake Saint Louis, Missouri 63367  
(w/o enclosures)

Kirk J. Gonzales  
Associate General Counsel  
LogistiCare  
1275 Peachtree Street, 6<sup>th</sup> Floor  
Atlanta, Georgia 30309  
(w/o enclosures)