



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2014

Ms. Elizabeth Hanshaw Winn
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2014-15392

Dear Ms. Winn:

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# 532921 (ORR# 53291).

The Travis County Healthcare District dba Central Health (the "district") received a request for specified information pertaining to Lone Star Circle of Care ("LSCC"). The district states it has released some of the requested information. The district claims the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. The district also states, and provides documentation showing, it notified the following third parties of the district's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released: Austin Travis County Integral Care; Community Care Collaborative ("CCC"); CommUnityCare; COPE Health Solutions ("COPE"); E3Alliance ("E3"); El Buen Samaritano Episcopal Mission; Integrated Care Collaboration; LSCC; Sendero Health Plans ("Sendero"); Seton Health Care Family ("Seton"); and St. David's Foundation. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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). In correspondence to this office, LSCC asserts some of the information at issue is excepted

from release under the Act. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only LSCC has submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any portion of the submitted information constitutes proprietary information of the remaining third parties, and the district may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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 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 only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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. Finally, the attorney-client privilege applies only to a confidential communication, meaning it was "not intended to be disclosed to third persons other than

¹We 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.

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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state portions of the submitted information consist of communications between and among district attorneys and district employees, and reveal client confidences and attorneys’ legal advice. You state these communications were made for the purpose of facilitating the rendition of professional legal services or legal guidance to the district. You also assert the communications were intended to be confidential and their confidentiality has been maintained. Based on these representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue, which we have marked. Therefore, the district may withhold the information we have marked under section 552.107(1) of the Government Code.² However, we conclude the district has not established the remaining information consists of privileged attorney-client communications. Therefore, the district may not withhold any of the remaining information under section 552.107(1).

You assert the remaining information is excepted from disclosure under 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

²As our ruling is dispositive, we do not address your other arguments to withhold this information.

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 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, 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 *id.* at 9.

You assert the remaining information contains communications between and among district staff and representatives of COPE, CommUnityCare, CCC, LSCC, Sendero, Seton, and E3 that consist of advice, opinion, and recommendation regarding the district's role to address the financial and operations shortfalls of LSCC. You explain the third parties at issue are either consultants of or share a privity of interest or common deliberative process with the district. You inform us COPE is a consultant for the district; all employees of CommUnityCare are employees of the district; CCC is a non-profit organization owned by the district and Seton, and has a contract with LSCC to administer health services; Sendero performs the health plan functions for the district; and the district used the services of LSCC to administer a flu vaccination program on behalf of E3, which is a data-driven education collaborative. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to some of the information at issue, which we have marked. Therefore, the district may withhold the information we have marked under section 552.111 of the Government Code.³ However, we find you have not demonstrated how the remaining information consists of advice, opinion or recommendations, or it consists

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

of communications with third parties with whom you have not demonstrated the district shares a privity of interest or common deliberative process. Therefore, the district may not withhold any of the remaining information under section 552.111.

Section 552.104 of the Government Code exempts from required public disclosure “information which, if released, would give advantage to competitors or bidders.” Gov’t Code § 552.104(a). This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The district asserts it has specific marketplace interests in the purchasing of health care services. The district argues release of the remaining information will harm its marketplace interests in purchasing health care services because it would expose “the type of information [the district] examines when identifying possible service providers, determining appropriate budgets to allocate for services, and the duration of the services purchased” and because it would provide “an advantage in knowledge to other sellers of services when negotiating for the purchase of services.” However, we find the district has failed to demonstrate release of any of the remaining information would cause specific harm to any marketplace interests the district may have in a particular competitive situation. Accordingly, the district may not withhold any of the submitted information under section 552.104 of the Government Code.

LSCC raises sections 552.101, 552.102, and 552.118 of the Government Code. Section 552.101 exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an

individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find none of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the remaining information is not confidential under common-law privacy, and the district may not withhold it under section 552.101 on that ground.

Section 552.102(a) of the Government Code excepts 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 LSCC 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 the *Hubert* decision’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 excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the district may not withhold any of it on that basis.

Section 552.118 of the Government Code provides the following:

Information is excepted from the requirements of Section 552.021 if it is:

- (1) information on or derived from an official prescription form or electronic prescription record filed with the director of the Department of Public Safety under Section 481.075, Health and Safety Code; or
- (2) other information collected under Section 481.075 of that code.

Gov’t Code § 552.118. Section 481.075 of the Health and Safety Code enumerates the information a practitioner, who prescribes a controlled substance listed in Schedule II, is required to include in a prescription form. *See* Health & Safety Code § 481.075. “Prescription” is defined as an order by a practitioner to a pharmacist for a controlled substance for a particular patient that specifies among other things, the name and address of the patient and the name and quantity of the controlled substance prescribed. *Id.* § 481.002(41). LSCC states information within an LSCC provider roster, which includes the

names of certain LSCC employees who prescribe drugs and their National Provider Identification numbers, Medicaid Texas Provider Identification numbers, Drug Enforcement Administration numbers, Texas Department of Public Safety numbers, Advanced Practice Registered Nurse Prescription Authority numbers, and Texas license numbers, is excepted from release under section 552.118. Therefore, to the extent any of the remaining information at issue was derived from a prescription for a particular patient or meets the requirements of the Health and Safety Code regarding official prescription forms for Schedule II substances or consists of other information collected under section 481.075 of the Health and Safety Code, then the district must withhold this information under section 552.118 of the Government. *Id.* § 481.075(e). However, the district may not withhold this information under section 552.118 if the district determines the information was not derived from a prescription for a particular patient or does not meet the requirements of the Health and Safety Code regarding official prescription forms for Schedule II substances or does not consist of other information collected under section 481.075.

To the extent section 552.118 is inapplicable, we note the submitted National Provider Identification numbers, Medicaid Texas Provider Identification numbers, Drug Enforcement Administration numbers, Texas Department of Public Safety numbers, and Advanced Practice Registered Nurse Prescription Authority numbers are excepted from disclosure under section 552.136 of the Government Code.⁴ Section 552.136 reads in part as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136(a)-(b). Thus, to the extent this information is not excepted from disclosure under section 552.118, the district must withhold the submitted National Provider Identification numbers, Medicaid Texas Provider Identification numbers, Drug Enforcement Administration numbers, Texas Department of Public Safety numbers, and Advanced

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

Practice Registered Nurse Prescription Authority numbers, which we have marked, under section 552.136 of the Government Code.

Section 552.117 of the Government Code may be applicable to some of the remaining information. Section 552.117(a)(1) 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 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 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The remaining information contains the cellular telephone numbers of CommUnityCare employees, who, as noted above, are employees of the district. Therefore, the district must withhold these cellular telephone numbers under section 552.117(a)(1) if the employees at issue made timely elections to keep the information confidential and if the cellular telephone service was not paid by a governmental body. We have also marked information under section 552.117(a)(1) that the district must withhold if the employee at issue made a timely election to keep the marked information confidential.

The remaining information contains e-mail addresses of members of the public. 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 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). *See id.* § 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. You do not inform us a member of the public has affirmatively consented to the release of any of the submitted e-mail addresses. Thus, we conclude the district must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, to the extent they do not fall under the exceptions listed under subsection 552.137(c). However, to the extent the e-mail addresses at issue are subject to subsection 552.137(c), the district may not withhold this information under section 552.137.

To conclude, the district may withhold the information we have marked under sections 552.107(1) and 552.111 of the Government Code. To the extent any of the

remaining information at issue was derived from a prescription for a particular patient or meets the requirements of the Health and Safety Code regarding official prescription forms for Schedule II substances or consists of other information collected under section 481.075 of the Health and Safety Code, the district must withhold this information under section 552.118 of the Government Code; however, the district may not withhold this information under section 552.118 if the district determines the information was not derived from a prescription for a particular patient or does not meet the requirements of the Health and Safety Code regarding official prescription forms for Schedule II substances or does not consist of other information collected under section 481.075. To the extent this information is not excepted from disclosure under section 552.118, the district must withhold the information we have marked under section 552.136 of the Government Code. The district must withhold the cellular telephone numbers of CommUnityCare employees in the remaining information under section 552.117(a)(1) of the Government Code if the employees at issue made timely elections to keep the information confidential and if the cellular telephone service was not paid by a governmental body. The district must also withhold the information we have marked under section 552.117(a)(1) if the employee at issue made a timely election to keep the marked information confidential. The district must withhold the e-mail addresses of members of the public in the remaining information under section 552.137 of the Government Code, to the extent the e-mail addresses do not fall under the exceptions listed under subsection 552.137(c) of the Government Code. The district 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, 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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 532921

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Jennifer Freeden
Lone Star Circle of Care
Suite 200
205 East University Avenue
Georgetown, Texas 78626
(w/o enclosures)

Mr. Jesus Garza
Seton Health Family
1345 Philomena Street
Austin, Texas 78723
(w/o enclosures)

Ms. Susan Dawson
E3Alliance
Suite 507
5930 Middle Fiskville Road
Austin, Texas 78752
(w/o enclosures)

Ms. Iliana Gilman
El Buen Samaritano Episcopal Mission
7000 Woodhue Drive
Austin, Texas 78745
(w/o enclosures)

Mr. David L. Evans
Austin Travis County Integral Care
1430 Collier Street
Austin, Texas 78704
(w/o enclosures)

Mr. George N. Miller, Jr., MSHA
CommUnity Care
2115 Kramer Lane, Suite 100
Austin, Texas 78758
(w/o enclosures)

Mr. Earl Maxwell
St. David's Foundation
Suite 600
811 Barton Springs Road
Austin, Texas 78704
(w/o enclosures)

Mr. Allen Miller
COPE Health Solutions
315 West Ninth Street, Suite 1001
Los Angeles, California 90015
(w/o enclosures)

Mr. Larry Wallace
Community Care Collaborative
1111 East Cesar Chavez Street
Austin, Texas 78702
(w/o enclosures)

Mr. Carl Angel
Integrated Care Collaboration
8627 North Mopac Expressway, Suite 130
Austin, Texas 78759
(w/o enclosures)

Mr. Wesley Durkalski
Sendora Health Plans
2028 East Ben White Boulevard
Austin, Texas 78741
(w/o enclosures)