



January 21, 2015

Mr. Charles Homer, III  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2015-01159

Dear Mr. Homer:

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# 550654 (DSHS File No. 23638/2015).

The Texas Department of State Health Services (the "department") received a request for information regarding Riverside General Hospital or its operators during a specified time period. You state the department will release some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-20545 (2014). We have no indication the law, facts, or circumstances on which Open Records Letter No. 2014-20545 was based have changed. Accordingly, with regard to the requested information that is identical to the information previously requested and ruled upon by this office in the prior ruling, we conclude the department may continue to rely on Open Records

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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 that those records contain substantially different types of information than that submitted to this office.

Letter No. 2014-20545 as a previous determination and withhold or release the previously ruled upon 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 information is or is not excepted from disclosure). To the extent the information at issue is not encompassed by the previous ruling, we will address your arguments against its release.

Next, we understand you to claim portions of the submitted information are subject to Open Records Letter No. 2005-04917 (2005). Open Records Letter No. 2005-04917 is a previous determination issued to the department authorizing it to withhold information and materials obtained or compiled by the department in connection with a complaint and investigation concerning a hospital under section 552.101 of the Government Code in conjunction with section 241.051 of the Health and Safety Code without the need of requesting a ruling from this office, unless the release provisions of section 241.051(d) or section 241.051(e) apply. *See* Health & Safety Code § 241.051(d), (e); *see also* ORD 673 (listing elements of second type of previous determination under Gov't Code § 552.301(a)). In this instance, we have no indication section 241.051(d) or section 241.051(e) applies. Accordingly, the department must withhold the information you have marked in accordance with the previous determination issued to the department in Open Records Letter No. 2005-04917.<sup>2</sup>

Next, we note the remaining information includes a completed report subject to section 552.022(a)(1) of the Government Code. This section provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). The department must release the completed report pursuant to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise sections 552.107 and 552.111 of the Government Code for the information subject to section 552.022, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8-10 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (governmental body may waive attorney-client privilege under section 552.107(1)), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the department may not withhold any of the information subject to

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<sup>2</sup>In this instance, as our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

section 552.022, which we have marked, under section 552.107 or 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(1). We will also address your arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the

communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the information subject to section 552.022(a)(1) was in an attachment to a communication between an attorney of the department, employees of the department, and an employee of the Texas Health and Human Services Commission (the “commission”).<sup>3</sup> You state the communication was made for the purpose of facilitating the rendition of professional legal services to the department and the confidentiality of this communication has been maintained. Based on these representations and our review, we find the department has established the attorney-client privilege is applicable to the information at issue. Accordingly, the department may withhold the information subject to section 552.022(a)(1) of the Government Code under rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code excepts from public 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 Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded

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<sup>3</sup>We note the commission directly oversees the department.

by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Upon review, we find the information you have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient’s medical records. Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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* ORD 676 at 6-7. 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 some of the remaining information consists of attorney-client privileged communications involving department attorneys, department program management staff, and department employees, made for the purpose of effectuating legal representation. You further state the communications have been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may generally withhold the information you have marked under section 552.107(1) of the Government Code.<sup>4</sup> We note, however, one of the e-mail strings at issue includes an e-mail that was received from a non-privileged party. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the e-mail we have marked is maintained by the department separate and apart from the otherwise privileged e-mail string in which it appears, then the department may not withhold this information under section 552.107(1).

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

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

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, orig. proceeding); 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, orig. proceeding). 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).

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 at 9.

This office has also concluded a preliminary draft of a document that is 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.

You state the remaining information consists of advice, opinions, and recommendations of department employees and commission employees relating to the department's policy. Additionally, to the extent the non-privileged e-mail we marked exists separate and apart from the otherwise privileged e-mail string, you also seek to withhold that e-mail under section 552.111 of the Government Code. Based on your representations and our review, we find the department may withhold the information we have marked under section 552.111. We note one of the e-mail attachments at issue contains a draft document. You do not state whether the draft document will be released to the public in its final form. Therefore, if the draft document, which we have marked, will be released to the public in its final form, then the department may withhold it in its entirety under section 552.111 of the Government Code. If the draft document will not be released to the public in its final form, then the department may not withhold it 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. Further, some of the remaining information at issue, including the non-privileged e-mail we marked, was communicated with individuals with whom you have not demonstrated the department shares a privity of interest or common deliberative process. Accordingly, the remaining information may not be withheld under section 552.111 of the Government Code.

Section 552.117(a)(1) 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 request that this information be kept confidential under section 552.024 of the Government Code.<sup>5</sup> 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 must be determined at the time the request for the information is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Accordingly, the department must withhold the cellular telephone numbers we have marked under

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<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470.*

section 552.117(a)(1) of the Government Code if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body. The department may not withhold this information if the individuals whose information is at issue did not make a timely election to keep the information confidential or 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 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 Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail 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, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. See *id.* § 552.137(c). Upon review, we find the department must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

In summary, the department may continue to rely on Open Records Letter No. 2014-20545 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. The department must withhold the information you have marked in accordance with the previous determination issued to the department in Open Records Letter No. 2005-04917. The department may withhold the information subject to section 552.022(a)(1) of the Government Code under rule 503 of the Texas Rules of Evidence. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the MPA. The department may generally withhold the information you have marked under section 552.107(1) of the Government Code; however, if the e-mail we have marked is maintained by the department separate and apart from the otherwise privileged e-mail string in which it appears, then the department must release the marked e-mail. The department may withhold the information we have marked under section 552.111 of the Government Code; however, the marked draft document may only be withheld under section 552.111 if it will be released to the public in its final form. The department must withhold the information we have marked under section 552.117 of the Government Code if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body. The department must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection 552.137(c) of the Government Code applies. 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.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,



Britni Fabian  
Assistant Attorney General  
Open Records Division

BF/bhf

Ref: ID# 550654

Enc. Submitted documents

c: Requestor  
(w/o enclosures)