



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 3, 2015

Mr. Robert N. Jones, Jr.
Assistant General Counsel
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2015-15770

Dear Mr. Jones:

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# 572077 (TWC Tracking No. 150430-012).

The Texas Workforce Commission (the "commission") received a request for a specified list, specified written responses, information pertaining to the requestor's complaint for a specified time period, and a list of dates for specified communications. You claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you have marked some information as not responsive to the request for information. Additionally, we note some of the submitted information is not responsive to the present request for information because it was created after the present request for information was

¹Although you do not raise section 552.136 of the Government Code in your brief, we understand you to assert this exception based on your markings.

²This 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).

received.³ This ruling does not address the public availability of any information that is not responsive to the request, and the commission need not release such information in response to this request.⁴

Next, we note some of the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-07484 (2015). In that ruling, we determined the commission (1) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 301.085(e) of the Property Code, (2) must withhold the e-mail address we marked under section 552.137 of the Government Code unless the owner consents to its release, and (3) must release the remaining responsive information. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the commission may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. Although you raise section 552.111 of the Government Code for some of the information at issue, this exception does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Thus, the commission may not now withhold the previously released information under section 552.111. However, you also raise section 552.101 of the Government Code for some of this information, which protects information made confidential by law. Additionally, we note some of this information is subject to section 552.137 of the Government Code, which makes information confidential under law.⁵ Thus, we will address sections 552.101 and 552.137 for the previously released information. With respect to the information in the previous ruling that was not released, we have no indication there has been

³The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

⁴As we are able to make this determination, we need not address your arguments for this non-responsive information.

⁵The 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 (1987).

any change in the law, facts, or circumstances on which the previous ruling was based. Thus, with respect to the information in the previous ruling that was not released, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, we conclude the commission must rely on Open Records Letter No. 2015-07484 as a previous determination and withhold 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). We will address your arguments under sections 552.101, 552.111, and 552.136 for the remaining responsive information that is not encompassed by Open Records Letter No. 2015-07484.

Section 3616 of title 42 of the United States Code authorizes the U.S. Department of Housing and Urban Development (“HUD”) to utilize the services of state and local fair housing agencies to assist in meeting its statutory mandate to enforce laws prohibiting discrimination. *See* 42 U.S.C. § 3616. You state, pursuant to this authorization, the commission’s Civil Rights Division is currently operating under a cooperative agreement with HUD in the investigation and resolution of complaints of housing discrimination. Section 301.063 of the Property Code states the commission shall receive, investigate, seek to conciliate, and act on complaints alleging violations of the Texas Fair Housing Act. *See* Prop. Code § 301.063. Then, upon the filing of a complaint, both federal and state law mirror each other in language and encourage conciliation to the extent feasible. *See* 42 U.S.C. § 3610(b) (providing during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal the Secretary of HUD shall, to the extent feasible, engage in conciliation, to the extent feasible); Prop. Code § 301.085 (providing that the commission shall, during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal by the commission, to the extent feasible, engage in conciliation with respect to the complaint).

You state the submitted information relates to housing discrimination complaints filed with the commission under its cooperative agreement. You claim the responsive information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 301.085 of the Property 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.” Gov’t Code § 552.101. Section 552.101 encompasses section 301.085 of the Property Code, which provides, in pertinent part:

- (e) Statements made or actions taken in the conciliation may not be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned.

(f) After completion of the commission's investigation, the commission shall make available to the aggrieved person and the respondent, at any time, information derived from the investigation and the final investigative report relating to that investigation.

Prop. Code § 301.085(e)-(f). We note section 301.085(f) mandates release of the final investigative report upon request of a party to the complaint. In this instance, you state the investigation of the complaint at issue is still ongoing, and the commission has taken no final action in this case. You assert the responsive information is confidential under section 301.085(f) of the Property Code. However, we find section 301.085(f) does not make information confidential for purposes of the Act; instead, it only provides that the commission must make available certain information to the aggrieved person and the respondent after the commission's investigation is completed. *See id.*; Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, none of the information at issue is confidential under section 301.085(f), and the commission may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 301.085(f). Upon review, however, we find the information we have marked consists of statements made or actions taken during conciliation. You do not indicate you have received the written consent of all concerned persons. Therefore, the commission must withhold the information we have marked under section 552.101 in conjunction with section 301.085(e).

You contend some of the remaining responsive information is protected under common-law privacy. Section 552.101 of the Government Code also 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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Additionally, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989), 373 (1983). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. We note this office has found that names, telephone numbers, and addresses are not excepted from public disclosure under common-law privacy. *See* ORD 455 at 7.

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the commission may not withhold the remaining information at issue under section 552.101 in conjunction with common-law privacy.

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. 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, 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. 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 id.*

In support of your contention portions of the remaining responsive information are protected by the deliberative process privilege under section 552.111, you claim a federal court recognized a similar exception by finding “the [Equal Employment Opportunity Commission] could withhold an investigator’s memorandum as pre-decisional under exemption (b)(5) of the [federal Freedom of Information Act (“FOIA”)] as part of the deliberative process” in “*Mace v. EEO*, 374 F. Supp 1144 (EDMo 1999)[.]” We note this case is correctly cited as *Mace v. U.S. EEOC*, 37 F. Supp. 2d 1144 (E.D. Mo. 1999). However, we note the *Mace* decision addressed an exemption under FOIA, section 552(b)(5) of title 5 of the United States Code, and not the deliberative process privilege under section 552.111 of the Government Code. Thus, we conclude the court’s decision in *Mace* is not applicable here. Upon review, we find some of the information at issue consists of communications with an individual you have not demonstrated shares a privity of interest or common deliberative process with the commission. Additionally, we find the discussions between commission employees consist of either general administrative information that does not relate to policymaking, or information that is purely factual in nature. Thus, you have failed to demonstrate how this information is excepted under section 552.111. Accordingly, we find none of the information at issue may be withheld on this basis.

We note a portion of the remaining information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) applies to records a governmental body holds in an employment capacity and 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 is also applicable to personal 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 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 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 this information was made. Accordingly, if the individual whose information is at issue is a

current or former commission official or employee and timely requested confidentiality pursuant to section 552.024, the commission must withhold the cellular telephone number we have marked under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. The commission may not withhold this information under section 552.117 if the individual is not a current or former commission official or employee, 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 552.136 of the Government Code states, "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(b); *see also id.* § 552.136(a) (defining "access device"). We note, however, because section 552.136 is designed to protect the privacy of individuals, the requestor has a right of access to her own information under section 552.023 of the Government Code. *See id.* § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, the commission may not withhold the requestor's information under section 552.136. Upon review, we find you have not explained how any of the remaining information at issue consists of a credit card, debit card, or charge card number, or is an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find you have failed to demonstrate the applicability of section 552.136 to the information at issue and the commission may not withhold it on this ground.

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). 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). *See id.* § 552.137(c). Accordingly, the commission must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the addresses affirmatively consent to their release.

We note some of the remaining responsive information appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required

to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, with respect to the information in the previous ruling that was not released, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, the commission must rely on Open Records Letter No. 2015-07484 as a previous determination and withhold the identical information in accordance with that ruling. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 301.085(e) of the Property Code. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if (1) the individual whose information is at issue is a current or former commission official or employee, (2) the individual timely requested confidentiality pursuant to section 552.024 of the Government Code, and (3) the cellular telephone service is not paid for by a governmental body. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The commission must release the remaining responsive information; however, any information protected by copyright may only be released in accordance with copyright law.⁶

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/>

⁶We note the requestor has a right of access beyond that of the general public to some of the responsive information being released. See Gov't Code §§ 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests), 137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Accordingly, if the commission receives another request for this information from an individual other than this requestor, the commission must again seek a ruling from this office.

[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,

A handwritten signature in black ink, appearing to read "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/dls

Ref: ID# 572077

Enc. Submitted documents

c: Requestor
(w/o enclosures)