



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 2, 2015

Ms. Maureen Franz
Deputy Chief Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2015-18425

Dear Ms. Franz:

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# 578064.

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to a specified dentist.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, we must address the commission's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the stated exceptions apply that would allow the

¹As you have not submitted a copy of the request for information, we take our description from your brief.

²We 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.

information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(A)-(D). In this instance, you state the commission received the request for information on June 12, 2015. You state the commission was closed on June 19, 2015, and July 3, 2015, for holidays. This office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the commission's fifteen-business-day deadline was July 7, 2015. However, as of the date of this letter, you have not submitted a copy of the request for information. Consequently, we find the commission failed to comply with the requirements of section 552.301 with respect to this request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). The commission claims section 552.111 of the Government Code for the submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived: as such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision Nos. 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). Accordingly, no portion of the submitted information may be withheld under section 552.111 of the Government Code. However, because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses sections 306.003 and 306.004 of the Government Code. Section 306.003 of the Government Code provides, in part, as follows:

- (a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the

member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.

...

(c) If a member of the legislature or the lieutenant governor discloses to the Department of Family and Protective Services [(the “department”)] or a governmental unit that is a “covered entity” under Section 181.001(b), Health and Safety Code, all or part of a record to which Subsection (a) applies or communicates to the department or governmental unit a description of the information contained in the record that identifies or would tend to identify the resident of this state who communicated with the member or lieutenant governor, the record or the described information, as applicable, in the possession of the department or governmental unit is subject to and confidential under Subsection (a) and may be disclosed to any other person only to the extent that the member of the legislature or lieutenant governor elects to disclose the record or the described information.

(d) If the department or governmental unit that is a “covered entity” under Section 181.001(b), Health and Safety Code, receives a request for public information under [the Act], and information subject to the request is information described by Subsection (c), the department or governmental unit shall promptly notify, in writing or by electronic means, the member of the legislature or the lieutenant governor, as applicable, that the department or governmental entity received the request. The notification must specify the type of information that is requested and include a copy of the request.

Id. § 306.003(a), (c)-(d). The confidentiality provision in section 306.003(a) applies to the records of a member of the legislature or of the lieutenant governor of two kinds of information: (1) memoranda of communications with Texas residents and (2) personal information about the person communicating with the legislator or lieutenant governor. *Id.* § 306.003(a). Thus, “personal information” about a person communicating with a legislator or the lieutenant governor’s office is within section 306.003(a) even if it is not recorded in a memorandum prepared by the legislator or lieutenant governor. *Id.* Although section 306.003(a) deems confidential the records that are subject to the provision, it gives a member of the legislature or the lieutenant governor the discretion to disclose all or part of such record. *See id.* Section 306.003(c) provides if a legislator or the lieutenant governor discloses a record subject to section 306.003(a), or a description of the record that identifies or tends to identify the resident, to the department or a covered entity under section 181.001(b) of the Health and Safety Code, the record or the described information is confidential under section 306.003(a) and may only be disclosed at the discretion of the legislator or lieutenant governor. *See id.* § 306.003(c).

While section 306.003 applies to records consisting of memoranda of communications and records of a correspondent's personal information, section 306.004 refers to the communications themselves and provides as follows:

(a) To ensure the right of the citizens of this state to petition state government, as guaranteed by Article I, Section 27, of the Texas Constitution, by protecting the confidentiality of communications of citizens with a member of the legislature or the lieutenant governor, the public disclosure of all or part of a written or otherwise recorded communication from a citizen of this state received by a member or the lieutenant governor in his official capacity is prohibited unless:

(1) the citizen expressly or by clear implication authorizes the disclosure;

(2) the communication is of a type that is expressly authorized by statute to be disclosed; or

(3) the official determines that the disclosure does not constitute an unwarranted invasion of personal privacy of the communicator or another person.

(b) This section does not apply to a communication to a member of the legislature or the lieutenant governor from a public official or public employee acting in an official capacity.

(c) A member or the lieutenant governor may elect to disclose all or part of a communication to which this section applies, and that disclosure does not violate the law of this state.

(d) If a member of the legislature or the lieutenant governor discloses to the [department] or a governmental unit that is a "covered entity" under Section 181.001(b), Health and Safety Code, a communication to which this section applies or communicates to the department or governmental unit a description of the information contained in the communication that identifies or would tend to identify the citizen of this state who communicated with the member or lieutenant governor, the communication or the described information, as applicable, in the possession of the department or governmental unit is subject to and confidential under this section and may be disclosed to another person only to the extent that the member of the legislature or lieutenant governor elects to disclose the communication or the described information.

(e) If the department or governmental unit that is a "covered entity" under Section 181.001(b), Health and Safety Code, receives a request for public

information under [the Act], and information subject to the request is information described by Subsection (d), the department or governmental unit shall promptly notify, in writing or by electronic means, the member of the legislature or the lieutenant governor, as applicable, that the department or governmental entity received the request. The notification must specify the type of information that is requested and include a copy of the request.

Id. § 306.004. For purposes of section 306.004, a “communication” includes “conversation, correspondence, and electronic communication.” *Id.* § 306.001. The communication is not subject to public disclosure unless one of the three conditions stated in section 306.004(a) applies. *See id.* § 306.004(a)(1)-(3). However, section 306.004 does not apply to a communication to a legislator or the lieutenant governor from a public official or public employee acting in an official capacity. *Id.* § 306.004(b). As is also true of records subject to section 306.003(a), a legislator or the lieutenant governor has the discretion to disclose all or part of records subject to section 306.004(a). *See id.* §306.004(c). Additionally, section 306.004(d) provides that if a legislator or the lieutenant governor discloses a communication subject to section 306.004(a), or a description of the information in the communication that identifies or tends to identify the resident, to the department or a covered entity under section 181.001(b) of the Health and Safety Code, the communication or the described information is confidential under section 306.004(a) and may only be disclosed at the discretion of the legislator or lieutenant governor. *See id.* § 306.004(d).

You state the commission is a “covered entity” under section 181.001(b) of the Health and Safety Code by virtue of its administration of the Medicaid and CHIP programs.³ *See* Health & Safety Code § 181.001(b) (defining “covered entity”). You contend the information submitted as Exhibit C consists of correspondence between the commission and the Office of Senator Eddie Lucio, Jr. (the “senator’s office”) that pertains to communications between the senator’s office and residents of this state. Accordingly, you contend Exhibit C is made confidential by sections 306.003(c) and 306.004(d) of the Government Code. Further, you state you notified the senator’s office of the request for information pursuant to sections 306.003(d) and 306.004(e) of the Government Code.

We note some of the information at issue in Exhibit C pertains to communications between the senator’s office and public officials acting in their official capacities. Accordingly, we find section 306.004 is not applicable to this information. Upon review, however, we agree some of the remaining information at issue, which we have marked, consists of a communication between the senator’s office and residents of this state, or descriptions of information in such communications that would tend to identify the resident who communicated with the senator’s office, that were disclosed to the commission by the senator’s office. We note this office has not received any correspondence from the senator’s office authorizing release of the information at issue. Accordingly, we find the information

³“CHIP” refers to the Children’s Health Insurance Program, which offers low-cost health coverage for certain qualifying children.

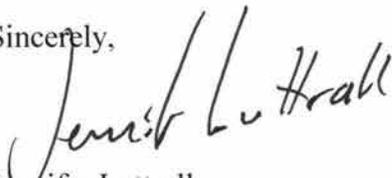
we have marked in Exhibit C is confidential under section 306.004 of the Government Code, and must be withheld under section 552.101 of the Government Code. However, we find you have failed to demonstrate the remaining information at issue consists of communications between the senator's office and residents of this state, or descriptions of information in such communications that would tend to identify the resident who communicated with the senator's office. Additionally, we find you have failed to demonstrate any of the remaining information at issue consists of records of the senator's office or a description of the record that identifies or tends to identify a resident who communicated with the senator's office. Accordingly, we find sections 306.003 and 306.004 are inapplicable to the remaining information in Exhibit C, and the commission may not withhold the remaining information under section 552.101 of the Government Code on those bases.

In summary, the commission must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 306.004 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.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,



Jennifer Luttrall

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 578064

Enc. Submitted documents

c: Requestor
(w/o enclosures)