



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 24, 2016

Mr. Jonathan Miles  
Open Records Attorney  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2016-14469

Dear Mr. Miles:

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# 615600.

The Texas Health and Human Services Commission (the "commission") received a request for (1) all child fatality investigations by the commission's Office of Inspector General during a specified time period; (2) all reports, data, or statistics related to delinquency rates of social workers responding to reports of any kind of child abuse or neglect during a specified time period; and (3) all correspondence between anyone with a specified e-mail suffix and three named employees during a specified time period.<sup>1</sup> You state you will release some information. You state you do not have some of the requested information.<sup>2</sup> You also

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<sup>1</sup>We note commission sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

state you will redact information protected by section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code, information pursuant to section 552.136 of the Government Code, and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>3</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code. You inform us you notified the Texas Department of Family and Protective Services (the “department”) of the request for information pursuant to section 552.304 of the Government Code. *See Gov’t Code* § 552.304 (interested third party may submit comments stating why information should or should not be released). We have received comments from the department claiming sections 552.101, 552.107, 552.111, and 552.116 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.<sup>4</sup>

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. This section encompasses information protected by other statutes. Section 40.005 of the Human Resources Code authorizes the department to adopt rules for the purpose of preserving the confidentiality of information and provides, in relevant part, as follows:

(a) The executive commissioner [of the department] shall establish and the department shall enforce rules governing the custody, use, and preservation of the department’s records, papers, files, and communications.

(b) The executive commissioner [of the department] shall prescribe safeguards to govern the use or disclosure of information relating to a recipient of a department service or to an investigation the department

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<sup>3</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See Gov’t Code* § 552.024(c)(2). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

<sup>4</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.

conducts in performing its duties and responsibilities. The safeguards must be consistent with the purposes of the department's programs and must comply with applicable state and federal law and department rules.

Hum. Res. Code § 40.005(a)-(b). Rules governing the confidentiality of department investigation and facility monitoring records are found at chapter 745 of title 40 of the Texas Administrative Code. The department promulgated section 745.8485 of title 40 of the Texas Administrative Code to make confidential certain child care facility license investigations and records. Section 745.8485(a) provides "all investigations are confidential until [the department] complete[s] the investigation and make[s] a finding." 40 T.A.C. § 745.8485(a). The commission and the department explain the information at issue consists of files, reports, records, or working papers concerning investigations by the department of alleged child abuse or neglect at licensed child care facilities that were ongoing at the time the commission received the request, and are confidential under section 745.8485(a). We understand the information at issue is not information that must be maintained in the department's monitoring files. *See id.* §§ 745.8481(a) (information in monitoring file is for most part available to general public), .8487(a) (department may release to public only those portions of abuse or neglect investigation record that must be filed in monitoring file), .8489 (except for certain specified information, department will maintain all records of abuse or neglect investigation separate from monitoring file). Based on these representations and our review, we find the information you have marked falls within the scope of section 745.8485(a). Accordingly, the commission must withhold the marked information under section 552.101 of the Government Code in conjunction with section 40.005 of the Human Resources Code and section 745.8485(a) of title 40 of the Texas Administrative Code.<sup>5</sup>

Section 552.101 of the Government Code also encompasses information made confidential by section 261.201 of the Family Code, which provides, in relevant part, as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

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<sup>5</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Fam. Code § 261.201(a). You inform us the information at issue was used or developed in investigations by the department, which is an agency authorized to conduct investigations under chapter 261, of alleged or suspected child abuse or neglect under chapter 261 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201). Thus, the information at issue is within the scope of section 261.201(a). We understand the department has not adopted a rule that governs the release of this type of information. Accordingly, the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

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 and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find none of the information at issue is highly intimate or embarrassing and of no legitimate public interest. Therefore, the commission may not withhold the information at issue under section 552.101 on this basis.

Section 552.101 of the Government Code also encompasses information made confidential by judicial decision and the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, LLC.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this standard, the court noted “deference must be afforded” law-enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. Upon review we find you have provided no arguments to demonstrate release of the information at issue would create a substantial threat of physical harm. Therefore, the commission may not withhold the information at issue under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. 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. *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 a 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 that 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 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 the information at issue consists of communications involving commission attorneys, commission employees, as well as employees and attorneys from the department.<sup>6</sup> You inform us the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Therefore, the commission may generally withhold the information you have marked under section 552.107(1) of the Government Code.<sup>7</sup> However, we note some of the otherwise privileged e-mail strings include e-mails sent to or received from non-privileged parties. Furthermore, if the e-mails are removed from the e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the commission maintains the non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold the non-privileged e-mails under section 552.107(1) and this information must be released.

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<sup>6</sup>You explain section 531.0055 of the Government Code creates a privileged relationship between the commission and other health care agencies, including the department. *See Gov't Code* § 531.0055.

<sup>7</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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.

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily

represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. *See id.* at 2.

You assert the information at issue consists of advice, opinions, and recommendations reflecting the policymaking processes of commission attorneys, commission employees, and department staff in relation to the provision of department services. You explain the department and the commission share a privity interest with regards to the provision of department services. You also state the information at issue contains draft documents. However, you do not state whether the draft documents will be released to the public in their final forms. Thus, to the extent the commission will release the draft documents at issue to the public in their final forms, the commission may withhold the submitted draft documents in their entireties under section 552.111 of the Government Code.<sup>8</sup> To the extent the commission will not release the draft documents to the public in their final forms, the commission may not withhold the submitted draft documents in their entireties under section 552.111. In this case, we find portions of the draft documents constitute advice, opinions, or recommendations relating to the commission's policymaking. Thus, to the extent the draft documents will not be released in their final forms, the commission may withhold the information we have marked under section 552.111 within the submitted draft documents.<sup>9</sup> Further, we find the information we have marked consists of advice, opinions, and recommendations pertaining to policymaking matters. Thus, the commission may withhold this information under section 552.111 of the Government Code.<sup>10</sup> However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the commission has failed to demonstrate the remaining information is excepted under section 552.111, and none of this information may be withheld on this basis.

Section 552.116 of the Government Code provides:

(a) An audit, working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003

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<sup>8</sup>As our ruling is dispositive, we need not address the department's argument against disclosure of this information.

<sup>9</sup>As our ruling is dispositive, we need not address the department's argument against disclosure of this information.

<sup>10</sup>As our ruling is dispositive, we need not address the department's argument against disclosure of this information.

Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074 Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public-disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. We understand the commission and the department to assert the marked information consists of audit working papers that were created or used by the federal government's Office of the Inspector General (the "inspector general's office") in conducting an audit. We note, however, section 552.116 of the Government Code is intended to protect the auditor's interests. The information at issue pertains to an audit of the commission by the inspector general's office. In this instance, the commission, as the auditee, cannot assert section 552.116 in order to protect the information at issue under section 552.116. Accordingly, the commission may not withhold the information at issue under section 552.116.

In summary, the commission must withhold the marked information under section 552.101 of the Government Code in conjunction with section 40.005 of the Human Resources Code and section 745.8485(a) of title 40 of the Texas Administrative Code. The commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The commission may generally withhold the information you have marked under section 552.107(1) of the Government

Code. However, if the commission maintains the non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold the non-privileged e-mails under section 552.107(1) and this information must be released. To the extent the commission will release the draft documents at issue to the public in their final forms, the commission may withhold the submitted draft documents in their entireties under section 552.111 of the Government Code. To the extent the draft documents will not be released in their final forms, the commission may withhold the information we have marked with the submitted draft documents under section 552.111 of the Government Code. The commission may withhold the additional information we have marked under section 552.111 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](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,

A handwritten signature in black ink, appearing to read "Cole Hutchison", with a long horizontal line extending to the right.

Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/akg

Ref: ID# 615600

Enc. Submitted documents

c: Requestor  
(w/o enclosures)