



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 13, 2016

Ms. Susan E. Tennyson
DFPS Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030, Department Mail Code E611
Austin, Texas 78714-9030

OR2016-15863

Dear Ms. Tennyson:

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# 618404 (DPS Ref. No. 04222016N9S).

The Texas Department of Family and Protective Services (the "department") received a request for all e-mails sent to or from named individuals during a specified time period.¹ You state you will release some information. You state the department will withhold information pursuant to the previous determination issued in Open Records Letter No. 2003-5590(2003).² You claim the submitted information is excepted from disclosure under sections 552.101 and

¹You state the department 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).

²Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation, unless the department's rules permit the department to release requested records to a particular requestor.

552.111 of the Government Code.³ We understand you notified the Office of the Governor (the “OOG”) 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 OOG claiming sections 552.101 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.⁴

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 part:

(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 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. In accordance with section 40.005, the department promulgated section 745.8485 of title 40 of the Texas Administrative Code to make child care facility license investigations confidential. Section 745.8485(c) provides as follows:

(c) Completed investigations of child abuse or neglect are confidential and not available to the general public, except as provided under this chapter and applicable federal or state law.

³Although you marked information under section 552.107 of the Government Code, you have provided no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume you no longer assert this exception. *See* Gov’t Code §§ 552.301(e)(1)(A), .302.

⁴We 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.

40 T.A.C. § 745.8485(c). You state the information you have marked is related to investigations of alleged child abuse or neglect at a licensed child care facility, so as to be confidential under section 745.8485(c). We understand the investigations are completed. You also inform us 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 your representations and our review, we find the information you have marked falls within the scope of section 745.8485(c). We understand the requestor is not one of the enumerated persons eligible to receive copies of the information at issue under section 745.8491 of title 40 of the Texas Administrative Code. *Id.* § 745.8491. Therefore, we conclude the department must withhold the information you have marked under section 552.101 in conjunction with section 745.8485(c) of title 40 of the Texas Administrative Code.⁵

The department also promulgated section 711.601 of title 40 of the Texas Administrative Code in accordance with section 40.005 of the Human Resources Code to make confidential records related to department investigations of the Department of Aging and Disability Services ("DADS") facilities. Section 711.601 provides, "The reports, records, and working papers used by or developed in the investigative process, and the resulting investigative report, are confidential and may be disclosed only as allowed by law or this chapter." *Id.* § 711.601. The information at issue relates to a department investigation of abuse or neglect at a facility operated by DADS. Thus, we find the information at issue is subject to section 711.601. Section 711.605 of title 40 of the Texas Administrative Code lists the parties to whom the investigator sends a copy of the confidential investigative report pertaining to an investigation of a DADS facility. *Id.* § 711.605. You inform us the requestor is not one of the entities that is entitled to receive a copy of the investigative report. Upon review, therefore, we find the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 711.601 of title 40 of the Texas Administrative Code.⁶

Section 552.101 of the Government Code also encompasses information made confidential by section 48.101 of the Human Resources Code, which provides, in pertinent part, as follows:

(a) The following information is confidential and not subject to disclosure under [the Act]:

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

⁶As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

...

(d) The executive commissioner [of the Texas Health and Human Services Commission] shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

Hum. Res. Code § 48.101(a), (b), (d). You state the information at issue consists of investigations of elder abuse or neglect conducted by Adult Protective Services ("APS") under chapter 48 of the Human Resources Code. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See id.* § 48.101(b)-(g) (permitting release of confidential information only in certain circumstances). Based on your representations and our review of the records, we agree the information at issue is confidential under section 48.101 of the Human Resources Code. *See id.* § 48.101(b). You inform us the department has promulgated rules concerning the confidentiality of APS records. *See* 40 T.A.C. §§ 705.7107, .7109, .7111. The requestor is not an individual who would have access to the records at issue. *See* Hum. Res. Code § 48.101(d); 40 T.A.C. §§ 705.7107, .7109. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources 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 remaining information is highly intimate or embarrassing and of no legitimate public interest. Therefore, the department may not withhold the remaining information under section 552.101 of the Government Code on this basis.

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, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. *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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body’s request and performing task that is within governmental body’s authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body’s consultants). 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 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 state some of the remaining information consists of advice, opinions, and recommendations relating to the department's policymaking matters. Additionally, the OOG asserts some of the remaining information consists of advice, opinions, and recommendations relating to the OOG's policymaking. We understand some of the information at issue consists of communications between the department and the OOG, who the OOG explains share a privity of interest with respect to the information at issue. You also state some of the information at issue consists of draft policymaking documents that will be released to the public in their final forms. Thus, the department may withhold the submitted draft policymaking documents in their entireties under section 552.111. Upon review of the information at issue, we find the information we have marked consists of advice, opinions, and recommendations pertaining to policymaking matters of the department and the OOG. Thus, the department may withhold the information we have marked under section 552.111. However, 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 department and the OOG have failed to demonstrate the remaining information at issue is excepted under section 552.111, and may not withhold it on that basis.

Section 552.117(a)(1) of the Government Code 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.⁷ Gov't Code § 552.117(a)(1). Section 552.117(a) is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body.

⁷The 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).

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 individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the cellular telephone numbers we have marked must be withheld under section 552.117(a)(1) if the cellular telephone service is not 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 must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 745.8485(c) of title 40 of the Texas Administrative Code. The department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 711.601 of title 40 of the Texas Administrative Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code. The department may withhold the submitted draft policymaking documents in their entirety under section 552.111 of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the cellular telephone numbers we have marked must be withheld under section 552.117(a)(1) of the Government Code if 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 (c) applies. 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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a horizontal line through the middle of the name.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 618404

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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