



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 25, 2003

Mr. Jeffrey S. Young  
Associate General Counsel  
Texas Tech University Health Sciences Center  
3601 4th Street, Stop 6246, Ste. 2B141  
Lubbock, Texas 79430-6246

OR2003-8519

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191609.

The Texas Tech University Health Sciences Center ("TTUHSC") received a request for information regarding the decision to non-renew the contract of a named individual and information "regarding the response to a Public Information Act request sent to [a named individual] on August 9, 2003." You state that you have released some information to the requestor and claim that other requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed 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" and encompasses information that is under other statutes. You contend that portions of Exhibit E are confidential under the medical committee and medical peer review committee privileges.

TTUHSC is authorized to form a medical peer review committee, as defined by section 151.002 of the Occupations Code, or a medical committee, as defined by section 161.032 of the Health and Safety Code, to evaluate medical and health care services. *See* Health and Safety Code § 161.0315. A "medical committee" is defined as any committee, including a joint committee, of a university medical school or health science center, as well as a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution. *See id.* § 161.031(a)-(b). A medical peer review committee is "a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care

entity and is authorized to evaluate the quality of medical and health care services[.] . . .” Occ. Code § 151.002(a)(8).

Section 161.032 of the Health and Safety Code makes confidential the “records and proceedings of a medical committee.” Health & Safety Code § 161.032(a). Similarly, section 160.007 of the Occupations Code states that, “[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” Occ. Code § 160.007.

The information that you seek to withhold is a portion of a brief that TTUHSC submitted to this office in conjunction with a previous request for a ruling. This information is not a “record[ or] proceeding[ ] of a medical committee.” Furthermore, the information is neither a “proceeding or record of a medical peer review committee,” nor is it a “communication made to a medical peer review committee.” We therefore conclude that the information at issue does not come within the scope of confidentiality created by either section 161.032 of the Health and Safety Code or section 160.007 of the Occupations Code, and it may not be withheld under section 552.101 on either of these bases. *See generally* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied from overall statutory structure), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

We turn now to your arguments regarding section 552.107, which 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 “for the purpose of facilitating 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 Texas 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 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 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).

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, no writ). 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). Having considered your representations and reviewed the information at issue, we find that you have established that Exhibit F consists of privileged attorney-client communications and may be withheld pursuant to section 552.107.

You also contend that a portion of Exhibit E is protected under the attorney-client privilege. As noted above, Exhibit E is TTUHSC’s brief to this office in conjunction with a previous request for a ruling. Because this office does not share an attorney-client relationship with TTUHSC and this office is not “another party in a pending action [that shares a] common interest” with TTUHSC, we find that this brief is not protected by the attorney-client privilege. *See* Tex. R. Evid. 503(b)(1) (defining parties to whose communication privilege can attach), 511(1) (person waives privilege if person, while holder of privilege, voluntarily discloses any significant part of privileged matter); *see also Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.—El Paso 1990, no writ); Open Records Decision No. 630 at 4 (1994) (discussing waiver of attorney-client and work product privileges). Thus, none of the information in Exhibit E may be withheld pursuant to section 552.107.

In summary, Exhibit F may be withheld pursuant to section 552.107 of the Government Code. Exhibit E must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

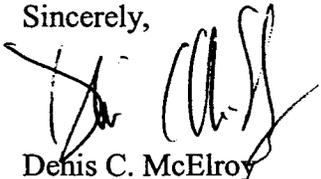
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 191609

Enc. Submitted documents

c: Mr. Robert H. Jackson, Ph.D.  
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(w/o enclosures)