



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 31, 2009

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2009-10652

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 350720 (PIR 09-25050).

The Office of the Attorney General (the "OAG") received a request for information concerning the granting or denial of crime victim compensation claims. The OAG will release some information but asserts the remainder is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample of information.¹

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

¹We 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.

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 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 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).

The OAG states the information it marked consists of communications between the OAG attorneys and OAG staff. Furthermore, the OAG states the communications were intended to be confidential, and the confidentiality of the communications has been maintained. Upon review, we find the OAG may withhold the information it marked under section 552.107 of the Government Code.²

Next, the OAG asserts the information it marked is excepted from disclosure under the deliberative process privilege of section 552.111. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held section 552.111 excepts only those internal communications consisting of

²Because section 552.107 is dispositive, we do not address the OAG’s other arguments for this information.

advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no pet.). Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). The OAG may withhold the draft documents and information it marked under section 552.111 because they constitute the opinions and recommendations OAG staff made in their policymaking process.

Next, the OAG contends some of the records are confidential under the Medical Practice Act (the "MPA"), found in chapter 159 of the Occupations Code. Section 552.101 of the Government Code excepts from disclosure information made confidential by statutes or judicial decision. Gov't Code § 552.101. Section 159.002 of the of the Occupations Code provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. Because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay constitute protected MPA records. Open Records Decision No. 546 (1990). Section 159.002(c) provides any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *Id.*; Open Records Decision No. 565 at 7 (1990). We agree the OAG must withhold the medical records it marked, and they may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Section 552.101 also encompasses common-law privacy. The OAG asserts a crime victim's name and claim number are protected by the common-law privacy doctrine. Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976).

However, we note the confidentiality of a crime victim's identifying information maintained by the OAG's Crime Victim Services Division is governed by section 552.132 of the Government Code. Section 552.132 provides in pertinent part as follows:

(a) . . . , in this section, "crime victim or claimant" means a victim or claimant under Subchapter B, Chapter 56, Code of Criminal Procedure, who has filed an application for compensation under that subchapter.

(b) The following information held by the crime victim's compensation division of the attorney general's office is confidential:

- (1) the name, social security number, address, or telephone number of a crime victim or claimant; or
- (2) any other information the disclosure of which would identify or tend to identify the crime victim or claimant.

Gov't Code § 552.132. We agree the OAG must withhold the crime victim's name under section 552.132. As for the claim number, the OAG failed to explain how it identifies or tends to identify the crime victim. Thus, the OAG may not withhold the claim number it marked under section 552.132.

Lastly, section 552.137 of the Government Code provides an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure. *Id.* § 552.137(a). However, a private e-mail address may be disclosed if the member of the public affirmatively consents to its release. *Id.* § 552.137(b). The OAG states the owner of the private e-mail address it marked has not affirmatively consented to its release. Thus, the OAG must withhold the private e-mail address it marked under section 552.137.

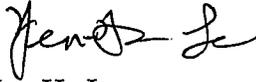
In summary, the OAG may withhold the information it marked under sections 552.107 and 552.111. In addition, the OAG must withhold the medical records it marked under the MPA, the private e-mail address it marked under section 552.137, and the crime victim's name it marked under section 552.132. The OAG must release the remainder.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 350720

Enc: Submitted documents

c: Requestor
(w/o enclosures)