



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 16, 2009

Mr. Trent B. Krienke  
Davis & Wilkerson, P.C.  
P.O. Box 2283  
Austin, Texas 78768-2283

OR2009-16252

Dear Mr. Krienke:

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# 361404.

The North Texas Medical Center ("NTMC"), which you represent, received a request for (1) all e-mails and e-mail files involving two named individuals, including all attachments that were responsive to the requestor's previous requests for e-mails involving those individuals, and (2) check registers and reports showing payments made, to whom, and in what amounts for the current and past fiscal years, including salaries, bonuses, and expenses.<sup>1</sup> You state that NTMC has made the information responsive to part two of the request available to the requestor. You contend that other responsive information is not subject to disclosure under the Act. You also claim that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. We have

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<sup>1</sup>You inform us that NTMC sought and received clarification of this request for information. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)).

considered the exceptions you claim and reviewed the information you submitted.<sup>2</sup> We also have considered the comments that we received from the requestor.<sup>3</sup>

We first note that some of the submitted e-mails may be responsive to a previous request by this requestor, in connection with which this office issued Open Records Letter No. 2009-10834 (2009). In that ruling, we noted that NTMC had not submitted to this office any information responsive to requests for information relating to the two named individuals who are the subjects of the present request, including the recycle bins on computers used by the named individuals and the "Inbox, Sent, Trash and any personal folders on any yahoo e-mail accounts" of the named individuals. With respect to that aspect of the previous request, we stated:

[T]o the extent that . . . NTMC either maintained or had access to any information that would be responsive to the requests for the recycle bins on computers used by the two named individuals and the "Inbox, Sent, Trash and any personal folders on any yahoo e-mail accounts" of the two individuals on the date the request for information was received, we assume any such information has been released to the requestor. If you have not released any such information to the requestor, you must do so at this time.

You do not indicate that there has been any change in the law, facts, and circumstances on which Open Records Letter No. 2009-10834 is based. Therefore, to the extent that Open Records Letter No. 2009-10834 encompasses any of the submitted information, NTMC must dispose of any such information in accordance with the prior ruling. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)). To the extent that the previous ruling does not encompass the submitted information, we will address your exceptions to disclosure.

We begin with your claim that some of the submitted information is not subject to disclosure under the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

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<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes NTMC to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>3</sup>*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

*Id.* § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); see Open Records Decision No. 462 at 4 (1987). You contend that all of the information you have submitted as Exhibit B, as well as information you have marked in Exhibit C, was not "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business' by or for [NTMC.]" Based on your representation and our review of the information at issue, we conclude that information in Exhibit B does not constitute public information for the purposes of section 552.002. See Open Records Decision No. 635 at 4 (1995) (Gov't Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, the information in Exhibit B is not subject to the Act and need not be released in response to this request.<sup>4</sup> We also conclude, however, that the marked information in Exhibit C that you contend is not subject to the Act was collected or assembled and is maintained by NTMC in connection with the transaction of official business. Therefore, that information is subject to the Act and must be released, unless it falls within the scope of an exception to disclosure. See Gov't Code §§ 552.002, .006, .021.

We next note that some of the remaining information at issue falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. *Id.* § 552.022(a)(1). In this instance, the information submitted as Exhibit C includes completed reports made of, for, or by NTMC. That information, which we have marked, is subject to section 552.022(a)(1). NTMC does not claim an exception to disclosure under section 552.108. Although you do seek to withhold Exhibit C under 552.111 of the Government Code, that section is a discretionary exception that protects a governmental body's interests and may be waived. See *id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 could be waived). As such, section 552.111 is not other law that

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<sup>4</sup>As we are able to make this determination, we do not address your other argument against disclosure of information in Exhibit B.

makes information confidential for the purposes of section 552.022(a)(1). Therefore, NTMC may not withhold any of the information that is subject to section 552.022 under section 552.111. As you claim no other exception to disclosure of the information in Exhibit C, the marked information that is subject to section 552.022(a)(1) must be released.

Turning to your exceptions to disclosure of the remaining information, we address your claim under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege.<sup>5</sup> 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. *See* 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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).

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<sup>5</sup>Although you also claim the attorney-client privilege under section 552.101 of the Government Code, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002).

You contend that the information submitted as Exhibit D consists of privileged communications between attorneys for and representatives of NTMC. You have identified most of the parties to the communications. You state that the communications were made in furtherance of the rendition of professional legal services to NTMC. You also state that the communications were not intended to be disclosed to third parties. Based on your representations and our review of the information at issue, we conclude that NTMC may generally withhold the information we have marked in Exhibit D under section 552.107(1). We note, however, that one of the e-mail strings we have marked includes communications with a non-privileged party. If the communications with the non-privileged party, which we also have marked, exist separate and apart from the e-mail string in which they appear, then NTMC may not withhold the communications with the non-privileged party under section 552.107(1). We also note that although one of the remaining e-mail strings in Exhibit D includes communications between an attorney for and a representative of NTMC, the e-mail reflects that those communications were subsequently disclosed to a third party. You have not identified the third party involved or otherwise demonstrated that the third party falls within the scope of the attorney-client privilege. We therefore conclude that NTMC has waived the attorney-client privilege with respect to the attorney-client communications in that e-mail string and may not withhold those communications under section 552.107(1). See TEX. R. EVID. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990) ORD 676 at 10. We also find that you have not demonstrated that any of the remaining information in Exhibit D constitutes or documents a privileged attorney-client communication. We therefore conclude that NTMC may not withhold any of the remaining information in Exhibit D under section 552.107(1).

You also raise section 552.111 of the Government Code. This section 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." Gov't Code § 552.111. Section 552.111 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, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), 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 that 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *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).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *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, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You seek to withhold the information submitted as Exhibit C under section 552.111. You contend that the information at issue contains advice, opinion, and recommendation relating to development and adoption of policy and includes draft documents that are subject to release in their final form. You also contend that the factual information contained in Exhibit C is so inextricably intertwined with the advice, opinion, or recommendation that severance of the factual information is impractical. Based on your representations and our review of the information at issue, we conclude that NTMC may withhold the draft documents we have marked under section 552.111. With respect to the remaining information in Exhibit C, we conclude that some of the information at issue is factual. We also conclude that you have not demonstrated that the remaining information at issue consists of advice, opinion, or recommendations relating to the policymaking processes of NTMC. We note that much of the remaining information in Exhibit C consists of communications between representatives of NTMC and those of other entities. Section 552.111 can encompass policy-related information that a governmental body obtains from or provides to other entities with which the governmental body shares a privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990). Likewise, section 552.111 can encompass information shared with a consultant that is acting at the governmental body's request and performing a task that is within the governmental body's authority. *See* ORD 631 at 2; *see also* ORD 462 at 14 (statutory predecessor encompassed memoranda prepared by governmental body's consultants). The governmental body must demonstrate, however, that section 552.111 is applicable to such information by identifying the party with which the information was shared and explaining the nature of the party's relationship with the governmental body. In this instance, you have neither identified the persons with which the information in Exhibit C was shared nor explained the nature of any relationship those persons may have with NTMC. We therefore conclude that NTMC has not demonstrated

that section 552.111 is applicable to any of the remaining information in Exhibit C and may not withhold any of the information at issue on that basis.

We note that section 552.136 of the Government Code is applicable to some of the remaining information.<sup>6</sup> Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked a credit card account number in Exhibit D that NTMC must withhold under section 552.136.

We also note that the remaining information in Exhibits C and D includes personal e-mail addresses. With respect to that information, section 552.137 of the Government Code provides in part:

(a) Except as otherwise provided by this section, 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 under [the Act].

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract;

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<sup>6</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public; or

(5) provided to a governmental body for the purpose of providing public comment on or receiving notices related to an application for a license as defined by section 2001.003(2) of [the Government Code], or receiving orders or decisions from a governmental body.

*Id.* § 552.137(a)-(c). Thus, section 552.137 excepts from disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). We note that section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses in Exhibits C and D that NTMC must withhold under section 552.137, unless the owner of the e-mail address has consented to its disclosure or the e-mail address is encompassed by section 552.137(c). We note that the requestor has a right of access to his own e-mail address under section 552.137(b).

Lastly, we note that some of the submitted information may be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) NTMC must dispose of any submitted information that is encompassed by Open Records Letter No. 2009-10834 in accordance with the prior ruling; (2) the information in Exhibit B is not public information, for the purposes of section 552.002 of the Government Code, and therefore is not subject to the Act and need not be released; (3) NTMC must release the marked information in Exhibit C that is subject to section 552.022(a)(1) of the Government Code; (4) NTMC may generally withhold the attorney-client communications we have marked in Exhibit D under section 552.107(1) of the Government Code, but may not withhold the marked communications with the non-privileged party to the extent that those communications exist separate and apart from the e-mail string in which they appear; (5) NTMC may withhold the draft documents we have marked in Exhibit C under section 552.111 of the Government Code; (6) the marked credit

card account number in Exhibit D must be withheld under section 552.136 of the Government Code; and (7) the marked e-mail addresses in Exhibits C and D must be withheld under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its disclosure or the e-mail address falls within the scope of section 552.137(c). The rest of the submitted information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.

We note that the requestor requested some of the information at issue be provided to him in a .pst file format. Section 552.228 of the Government Code requires a governmental body to provide a copy of the public information in the requested medium if it has the technological ability to do so without the purchase of software or hardware. *See Gov't Code* § 552.228(b)(1)-(2). You inform us, however, that NTMC lacks the technical capabilities to release redacted information in the requested format. Therefore, NTMC may release the remaining information at issue in the submitted paper format or in another medium acceptable to the requestor. *See id.* § 552.228(c).

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](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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/cc

Ref: ID# 361404

Enc: Submitted documents

c: Requestor  
(w/o enclosures)