



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 25, 2010

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

OR2010-04201

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# 373827.

The Gainesville Hospital District d/b/a North Texas Medical Center ("NTMC"), which you represent, received a request for seven categories of information, including all e-mails and attachments in NTMC's possession.¹ You state NTMC does not have information responsive to categories two, three, four, and six of the request.² You also state NTMC has made information responsive to categories five and seven of the request available to the requestor. You claim a portion of the submitted information is not subject to disclosure under the Act. You claim the remaining submitted information is excepted from disclosure

¹You inform us 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); *see also* *City of Dallas v. Abbott*, No. 07-0931, 2010 WL 571972, at *3 (Tex. February 19, 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

under sections 552.107 and 552.111 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information, part of which is a representative sample.⁴

Initially, we note the submitted information contains personal e-mail addresses. The requestor specifically excluded such personal e-mail addresses from his request. Thus, any such information is not responsive to the instant request. This decision does not address the public availability of non-responsive information, and NTMC need not release it.

Next, we address your assertion Exhibit H is not subject to the Act. The Act is applicable only to "public information." See Gov't Code § 552.021. Section 552.002 of the Act defines public information as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(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. 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 Exhibit H constitutes a representative sample of e-mails that were not "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business' by or for [NTMC]" because the e-mails have no connection with NTMC business and represent incidental use of NTMC e-mail by NTMC employees. Based on your representation and our review of the information at issue, we conclude Exhibit H does not constitute public information for the purposes of section 552.002. See Open Records

³Although you also raise Texas Rule of Evidence 503, the information for which you claim this provision is not subject to section 552.022 of the Government Code. See Gov't Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under "other law"). Thus, your attorney-client privilege claim is properly addressed here under section 552.107 of the Government Code, rather than rule 503. Open Records Decision No. 677 at 8-9 (2002).

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.

Decision No. 635 at 4 (1995) (section 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, Exhibit H is not subject to the Act and need not be released in response to this request.

Next, 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 “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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 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).

You state Exhibit F constitutes communications amongst NTMC attorneys and employees that were made for the purpose of providing legal services to NTMC. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find NTMC may generally withhold Exhibit F under section 552.107(1) of the Government Code. However, we note some of the individual e-mails contained in the submitted e-mail strings consist of communications with the requestor, a non-privileged party, and with parties you have not identified. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from

the submitted e-mail strings, they may not be withheld under section 552.107(1), and must be released.

Section 552.111 of the Government Code 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 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) (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). 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 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 e-mails and draft attachment submitted as Exhibit G under section 552.111. You contend the information at issue contains advice, opinion, and

recommendation relating to NTMC's development and adoption of policies. You assert the factual information contained in Exhibit G 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, we find NTMC may withhold the information we have marked in the e-mails in Exhibit G that consists of advice, opinion, or recommendations under section 552.111. Upon review, we find the draft attachment constitutes a draft of a policymaking document. However, you do not inform us if NTMC intends to release this document in its final form. Therefore, if the draft attachment will be released to the public in its final form, then NTMC may withhold it in its entirety under section 552.111. However, we find the remaining information in Exhibit G does not consist of advice, opinion, or recommendations relating to the policymaking processes of NTMC. As you raise no other exceptions against disclosure of the remaining information in Exhibit G, it must be released.

In summary, Exhibit H is not subject to the Act and need not be released. NTMC may generally withhold Exhibit F under section 552.107(1) of the Government Code, but may not withhold the marked communications with the non-privileged parties to the extent those communications exist separate and apart from the e-mail string in which they appear. NTMC may withhold the information we have marked in the e-mails in Exhibit G under section 552.111 of the Government Code. NTMC may also withhold the entire draft attachment in Exhibit G if the draft attachment will be released in its final form under section 552.111 of the Government Code. The remaining information must be released.

Finally, we note the requestor seeks the information at issue in electronic format. Section 552.228 of the Government Code requires a governmental body to provide a requestor 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 do not inform us NTMC lacks the technological capability to provide the information in the requested electronic format. Accordingly, if NTMC has the technological capability to provide the information at issue in the requested electronic format, it must do so; if NTMC does not have the technological capability, it may release the information in the submitted paper format.

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

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 373827

Enc. Submitted documents

c: Requestor
(w/o enclosures)