



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 22, 2010

Mr. Trent B. Krienke
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For Gainesville Hospital District
d/b/a North Texas Medical Center
P.O. Box 2283
Austin, Texas 78768-2283

OR2010-05766

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# 376824.

The Gainesville Hospital District d/b/a North Texas Medical Center ("NTMC"), which you represent, received a request for (1) three named individuals' e-mails, (2) copies of backups of any e-mail files, and/or administrative documents and/or records of information that have been deleted since a specified date, (3) attorney bills, invoices, and communications received from a specified period of time, (4) a copy of a named individual's contract, and (5) a copy of any recordings, audio or video made by the board or administration for a specified time period.¹ You state that NTMC has made some information available to the requestor, including through earlier public information requests. *See Gov't Code § 552.232* (prescribing procedures for response to repetitious or redundant requests for information). You contend that other information is not subject to the Act. You also claim that certain information is excepted from disclosure under sections 552.101, 552.107, 552.110, 552.111, 552.117, and 552.137 of the Government Code and privileged under Texas Rule of

¹You 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).

Evidence 503.² We have considered your arguments and reviewed the submitted representative sample of information.³

We note that the requestor specifically excluded information subject to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g and/or the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. Therefore, this ruling will not address your arguments with respect to HIPAA.

Additionally, you inform us that information responsive to the request for backups of any e-mail files, and/or administrative documents and/or records that have been deleted did not exist at the time the request was received. We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). In this instance, you state any deleted e-mails are stored only on a tape backup system.

In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

You state the requested deleted e-mails did not exist at the time the request was received, but were only recorded on a tape backup system. We understand that these e-mails are not maintained on the hard drive of the computers at issue. Based on your representations, we determine the locations of the files have been deleted from the FAT system. Accordingly,

²Although you raise section 552.024 of the Government Code, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See Gov't Code § 552.024.* Section 552.117 of the Government Code is instead the proper exception to assert.

³We assume that 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.

we find the deleted information was no longer being "maintained" by NTMC at the time of the request and is not public information subject to disclosure under the Act. *Bustamante* at 266. Thus, we conclude the Act does not require NTMC to release any information that is stored on backup tapes in this instance.

Next, we address your contention that some of the requested information is not public information subject to 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:

- (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). You claim that portions of the personal e-mails in Exhibit A were not "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business' by or for [NTMC.]" You also assert that the computer user names and passwords in Exhibit A are not subject to the Act. Based on your representations and our review of the submitted information, we conclude that the information we have marked in Exhibit A does not constitute public information for the purposes of section 552.002. *See* Open Records 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); *see also* Open Records Decision No. 581 (1990) (certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information that is made public under section 552.021 of the Act). Therefore, the information we have marked in Exhibit A is not subject to the Act, and NTMC need not release that information in response to this request. However, the remaining information in Exhibit A was collected or assembled or is maintained in connection with the transaction of official NTMC business and, thus, constitutes "public information" as defined by section 552.002(a). Because this information is subject to the Act, it must be released unless it falls within the scope of an exception to disclosure. *See* Gov't Code §§ 552.301, .302.

We note that you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See id.* § 552.301(a), (e)(1)(D). Some of the redacted information consists of e-mail addresses, which you are authorized to redact pursuant to Open Records Decision No. 684 (2009). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. However, you do not assert, nor does our review of the records indicate, that you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, the information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of some of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. However, because we are unable to discern the nature of the remaining redacted information, NTMC has failed to comply with section 552.301 of the Government Code. When a governmental body fails to comply with the requirements of section 552.301, the information at issue is presumed public. *See Gov't Code* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See Gov't Code* § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling reason is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to the submitted information.

You claim that portions of the information in Exhibit A are protected by section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Gov't Code* § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 241.152 of the Health and Safety Code, which states in relevant part:

(a) Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

Health & Safety Code § 241.152(a). Section 241.151(2) of the Health and Safety Code defines "health care information" as "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." *Id.* § 241.151(2). Upon review, we find the information we have marked consists of health care information that must be withheld under section 552.101 in conjunction with section 241.152 of the Health and Safety Code. We have marked additional information that may also be confidential under section 241.152 of the Health and Safety Code. However, due to your redactions, we are unable to determine whether this information, which we have marked, contains patients' names, and therefore, identifies patients. Thus, we must rule conditionally with respect to this redacted information. If a patient is identified in the redacted portions of the information we have marked, then NTMC must also withhold this information under section 552.101 of the Government Code in conjunction with section 241.152 of the Health and Safety Code. Otherwise, to the extent the redacted information we have marked does not contain names of patients, the information may not be withheld under section 552.101 of the Government Code on that basis. Additionally, we find you have failed to explain how any of the remaining information at issue relates to the history, diagnosis, treatment, or prognosis of a patient. Therefore, we find you have failed to establish that any of the remaining information is confidential under section 241.152 of the Health and Safety Code. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which makes medical records confidential. *See* Occ. Code § 159.001. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343

(1982). In addition, because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay also constitute protected medical records. *See* Open Decision Nos. 598 (1991), 546 (1990). Upon review, we find that you have failed to demonstrate how any of the remaining information constitutes a medical record for purposes of the MPA. Therefore, none of the remaining information is confidential under the MPA, and no portion of it may be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 also encompasses section 161.032 of the Health and Safety Code, which provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). A “medical committee” is defined as any committee, including a joint committee of a hospital, medical organization, university medical school or health science center, health maintenance organization, or extended care facility. *See id.* § 161.031(a). The term also encompasses “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.” *Id.* § 161.031(b).

The precise scope of section 161.032 has been the subject of a number of judicial decisions. *See, e.g., Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. However, this protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to section 161.032).

You state that, pursuant to NTMC’s Risk Management and Organizational Performance Improvement Plans, NTMC has various medical committees which report to NTMC’s Quality Committee of the Board, which ultimately reports to the Board of Directors. You state that the information you have marked in Exhibit A consists of records created in

connection with NTMC's medical committee deliberative proceedings. You state that these documents form the basis of NTMC's medical committees' investigations, which "are conducted solely for the purpose of reviewing specific reported incidents, and not for the purpose of generating routine records." You state that these documents are "kept separate from other hospital records and patient charts" and are only for NTMC medical committee purposes. Based on these representations and our review, we agree that the information you have marked consists of records and proceedings of a medical committee. Accordingly, NTMC must withhold this information under section 552.101 of the Government Code in conjunction with section 161.032(a) of the Health & Safety Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Based on your representations and our review, we find NTMC must withhold the information we have marked in Exhibit A under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information in Exhibit A is highly intimate or embarrassing information of no legitimate public concern. Thus, it may not be withheld under section 552.101 in conjunction with common-law privacy.

You assert a portion of the remaining information in Exhibit A, which you have marked, is excepted under section 552.110 of the Government Code. However, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address NTMC's arguments under section 552.110 and none of the submitted information may be withheld on that basis. Further, we have not

received arguments from any third party explaining how the submitted information contains the third party's trade secrets or its commercial or financial information. *See* Gov't Code § 552.305(d)(2)(B); *see also id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (party must establish prima facie case that information is trade secret), 542 at 3 (1990).

However, you also state that this same portion of Exhibit A is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990).

Next, you assert a portion of the remaining information in Exhibit A is subject to section 552.111 of the Government Code, which 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. 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, 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, and opinions that reflect 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).

We also have 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.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (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. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You state that some of the remaining information consists of advice, opinion, and recommendation in the deliberative process. You state that other portions of the remaining information consists of draft contracts and/or agreements that are intended for release after the parties' approval. Based on your representations and our review, we agree that NTMC may withhold the information we have marked under section 552.111 of the Government Code. However, you have failed to explain how the remaining information you seek to withhold under section 552.111 constitutes communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of NTMC. Further, some of the information you seek to withhold under section 552.111 consists of communications between NTMC and physicians or an insurance provider with whom NTMC was negotiating. We find that the NTMC has not established privity of interest or common deliberative process with the physicians or the insurance provider. Accordingly, NTMC may not withhold any of the remaining information under section 552.111.

We understand you to assert some of the remaining information is subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, 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. *See Gov't Code* §§ 552.117(a)(1), .024. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988)* (statutory predecessor to section 552.117 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 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. NTMC may only withhold information under section 552.117(a)(1) on behalf of a former or current employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. In this instance, we have marked the information within the submitted documents that is generally subject to section 552.117. Although you state that many of the employees have chosen to make their personal information confidential, you have not provided these employee's names or informed us whether these employees elected to keep their personal information confidential before NTMC received the instant request for information. Therefore, we must rule conditionally. To the extent the individuals whose personal information we have marked are NTMC employees who timely elected to withhold their personal information under section 552.024, the marked information pertaining to those employees must be withheld under section 552.117(a)(1); however, NTMC may only withhold the marked cellular telephone and pager numbers if the employees at issue paid for the cellular telephone or pager service with their own funds. To the extent the individuals at issue are not NTMC employees or did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1).

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). Subsection 552.137(c)(1) states that subsection 552.137(a) does not apply to an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent[.]" *Id.* § 552.137(c)(1). We note that section 552.137 is not applicable to an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked in the remaining information are not specifically excluded by section 552.137(c). Thus,

unless NTMC receives consent for their release, NTMC must withhold the marked e-mail addresses pursuant to section 552.137.⁴ *See id.* § 552.137(b).

You assert that the information in Exhibit B is subject to the attorney client privilege. We note that a portion of Exhibit B consists of attorney's fee bills which are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under "other law." Gov't Code § 552.022(a)(16). Although you seek to withhold the fee bills under section 552.107 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not "other law" that makes information confidential for the purposes of section 552.022(a)(16), and NTMC may not withhold any of the fee bills under that exception. However, you also raise Texas Rule of Evidence 503 for the fee bills. The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the fee bills in Exhibit B. We will also address your claims under section 552.107 for the remaining information in Exhibit B that is not subject to section 552.022.

Texas Rule of Evidence 503 provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

⁴In ORD 684, this office authorized governmental bodies to withhold email addresses of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that portions of the submitted attorney fee bills document communications between NTMC’s attorneys and NTMC employees made in connection with the rendition of professional legal services to NTMC. You indicate that these communications have remained confidential and have not been revealed to any third party. Upon review of the submitted information, we agree that a portion of the attorney fee bills, which we have marked, is protected by the attorney-client privilege and may be withheld from disclosure. However, because you failed to identify all of the parties to the communications, we are unable to determine that the remaining information you have marked is protected by the attorney-client privilege. Therefore, none of the remaining information in the fee bills may be withheld on this basis.

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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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. *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 contend that the remaining information in Exhibit B consists of confidential communications between NTMC's attorneys and NTMC's Board of Directors and staff that were made in furtherance of the rendition of professional legal services to NTMC. You indicate that these communications have remained confidential and have not been revealed to any third party. Upon review of the remaining information, we agree that the information we have marked in Exhibit B is excepted from disclosure under section 552.107 and may be withheld. However, the remaining information in Exhibit B consists of a communication sent to NTMC's Board of Directors from a non-privileged third party and, thus, may not be withheld under section 552.107.

In summary, NTMC need not release the marked information that is not subject to the Act. NTMC must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 241.152 of the Health and Safety Code. To the extent the information you have redacted identifies a patient, NTMC must also withhold the redacted information we have marked under section 552.101 of the Government Code with section 241.152 of the Health and Safety Code. NTMC must withhold the information you have marked under section 552.101 in conjunction with section 161.032(a) of the Health and Safety Code. NTMC must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. NTMC may withhold the information we have marked under section 552.111 of the Government Code. To the extent the employees whose personal information we have marked timely elected to withhold their

personal information under section 552.024, the marked information pertaining to those employees must be withheld under section 552.117(a)(1); however, NTMC may only withhold the marked cellular telephone and pager numbers if the employees at issue paid for the cellular telephone or pager service with their own funds. NTMC must withhold the e-mails addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have consented to their disclosure. NTMC may withhold the information in the attorney-fee bills we have marked under Texas Rule of Evidence 503. NTMC may withhold the information we have marked under section 552.107. The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.

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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/dls

Ref: ID# 376824

Enc. Submitted documents

c: Requestor
(w/o enclosures)