



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2012

Ms. Lisa D. Hernandez
General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-15599

Dear Ms. Hernandez:

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# 466480 (DSHS File No. 20552/2012).

The Texas Department of State Health Services (the "department") received a request for e-mails and text messages sent or received by three named department employees on department issued telephones from January 1, 2012 to July 10, 2012, containing one of nine specified terms. You state you have released or will release some of the requested information to the requestor. You indicate you have redacted information subject to section 552.117 of the Government Code in accordance with section 552.024 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not contain any of the specified terms. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

²We 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 those records contain substantially different types of information than that submitted to this office.

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). 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). 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, orig. proceeding). 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 the information in Exhibit B consists of confidential communications made in furtherance of professional legal services rendered to the department. You state these communications concern a contract negotiation process and related matters, were exchanged between department attorneys and department employees, and contain the department attorneys’ legal advice and strategies. You further inform this office these communications have not been shared outside the department. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue in Exhibit B. Accordingly, the department may withhold the information in Exhibit B under section 552.107(1) of the Government Code.

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. 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); see also Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, 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 only those internal communications that consist of advice, opinions, recommendations 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. See *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). Further, 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).

You assert the information in Exhibit C consists of "internal communications relating to opinions and recommendations including the decision making process" exchanged among the department's attorneys, employees, and staff. You state the information at issue pertains to the department's enforcement of a contract with Kerrville County and has not previously been released to the public. Based on your representations and our review, we find the department may withhold the information we have marked in Exhibit C under section 552.111 of the Government Code. However, we note that some of the remaining communications consist of general administrative and purely factual information. Thus, we find you have not demonstrated how these communications consist of advice, opinions, or recommendations pertaining to policymaking matters of the department. Accordingly, we conclude the department may not withhold any of the remaining information under section 552.111 of the Government Code.

Next, we address your arguments for Exhibit D. 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 protected by other statutes, such as section 611.002 of the Health and Safety Code, which applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." Health & Safety Code § 611.002; see also *id.* § 611.001

(defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). Upon review, we find none of the information at issue consists of mental health records for purposes of section 611.002. Accordingly, the department may not withhold any of this information under section 552.101 of the Government Code on the basis of section 611.002(a) of the Health and Safety Code.

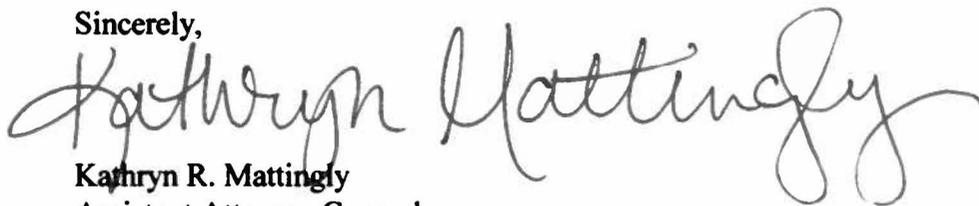
Section 552.101 also encompasses section 576.005 of the Health and Safety Code, which provides "[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law." Health & Safety Code § 576.005. You contend the information in Exhibit D consists of records of a mental health facility that directly or indirectly identify a patient. Upon review, we find you have failed to demonstrate any of the information at issue directly or indirectly identifies a patient of a mental health facility under section 576.005. Accordingly, the department may not withhold any of this information under section 552.101 of the Government Code on the basis of section 576.005 of the Health and Safety Code.

In summary, the department may withhold the information in Exhibit B under section 552.107(1) of the Government Code and the information we have marked in Exhibit C under section 552.111 of the Government Code. The remaining information must be released.

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 466480

Enc. Submitted documents

c: Requestor
(w/o enclosures)