



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2014

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2014-04578

Dear Mr. Connelly:

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# 517205.

The Texas Department of State Health Services (the "department") received a request for documents related to a specified investigation. You state the department has provided or will provide some of the responsive information to the requestor. You claim the remaining requested 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.¹ We have also considered comments from the Texas State Board of Pharmacy (the "board"). *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the department received the request for information. This ruling does not address the public availability of

¹We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

any information that is not responsive to the request and the department is not required to release such information in response to this request.

Next, we address your claim that some of the requested information is excepted from disclosure pursuant to federal law. You state the Food and Drug Administration (the "FDA") has commissioned particular department staff to conduct investigations under the authority of federal law. *See* 21 U.S.C. § 372(a). You inform this office that some of the requested information consists of information the FDA provided to commissioned department staff. You assert any information obtained from the investigative files is confidential pursuant to section 331(j) of title 21 of the United States Code. Further, you indicate some of the requested documents consist of information, compiled by department investigators as FDA commissioned officers, which are confidential under section 20.64 of title 21 of the Code of Federal Regulations. *See* 21 C.F.R. § 20.64 (stating certain records compiled for law enforcement purposes may be withheld from public disclosure). Section 331(j) of title 21 of the United States Code provides that the Federal Food, Drug, and Cosmetic Act prohibits the disclosure of certain confidential information, such as trade secrets acquired in an official capacity. You also refer to section 20.88, title 21, of the Code of Federal Regulations, which states in relevant part:

(c) Communications with State and local government officials who are not commissioned pursuant to 21 U.S.C. 372(a) or under a contract to perform law enforcement activities shall have the same status as communications with any member of the public, except that:

(1) Investigatory records compiled for law enforcement purposes by State and local government officials who perform counterpart functions to the [FDA] at the State and local level, and trade secrets and confidential commercial or financial information obtained by such officials, which are voluntarily disclosed to the [FDA] as part of cooperative law enforcement and regulatory efforts, shall be exempt from public disclosure to the same extent to which the records would be so exempt pursuant to §§ 20.61 and 20.64, as if they had been prepared by or submitted directly to [FDA] employees, except that investigatory records shall be exempt from disclosure for a longer period of time if the State or local government officials so require as a condition of their furnishing the information to the [FDA].

(2) Disclosure of investigatory records compiled for law enforcement purposes by the [FDA] to State and local government officials who perform counterpart functions to the [FDA] at the State and local level as part of cooperative law enforcement efforts does not invoke the rule established in § 20.21 that such records shall be made available for disclosure to all members of the public.

21 C.F.R. § 20.88(c). You assert that because this office is not commissioned by the FDA, section 20.88(c) prohibits you from disclosing the requested investigatory records to this office. Thus, because you have not provided this office with the investigatory documents at issue, we are unable to make any determination regarding such documents. Accordingly, we do not address your argument under section 552.101 of the Government Code for this portion of the requested information.

Section 552.101 encompasses information made confidential by section 565.055 of the Occupations Code. Section 565.055 provides:

(a) The board or the board's authorized representative may investigate and gather evidence concerning any alleged violation of this subtitle or a board rule.

(b) Information or material compiled by the board in connection with an investigation, including an investigative file of the board, is confidential and not subject to:

(1) disclosure under Chapter 552, Government Code; or

(2) any means of legal compulsion for release, including disclosure, discovery, or subpoena, to anyone other than the board or a board employee or board agent involved in discipline of a license holder.

(c) Notwithstanding Subsection (b), information or material compiled by the board in connection with an investigation may be disclosed:

(1) during any proceeding conducted by the State Office of Administrative Hearings, to the board, or a panel of the board, or in a subsequent trial or appeal of a board action or order;

(2) to a person providing a service to the board, including an expert witness, investigator, or employee of an entity that contracts with the board, related to a disciplinary proceeding against an applicant or license holder, or a subsequent trial or appeal, if the information is necessary for preparation for, or a presentation in, the proceeding;

(3) to an entity in another jurisdiction that:

(A) licenses or disciplines pharmacists or pharmacies; or

(B) registers or disciplines pharmacy technicians or pharmacy technician trainees;

- (4) to a pharmaceutical or pharmacy peer review committee as described under Chapter 564;
- (5) to a law enforcement agency;
- (6) to a person engaged in bona fide research, if all information identifying a specific individual has been deleted; or
- (7) to an entity that administers a board-approved pharmacy technician certification examination.

Occ. Code § 565.055. The board states that the department and the board conducted a joint investigation related to the compounding pharmacy. You state the information in Exhibited B consists of information compiled by the board in connection with an investigation. The board also contends that information held by the department regarding the investigation that was received from the board is confidential. You do not inform us the requestor is entitled to this information pursuant to section 565.055(c). Thus, based on your representation and our review, we agree the information in Exhibit B is confidential under section 565.055(b) and must be withheld under section 552.101 of the Government Code. *See* Open Records Decision No. 474 at 2-3 (1987) (construing predecessor statute).

Section 552.107(1) of the Government Code protects information that comes 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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.*, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 claim the information submitted in Exhibit D is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between department attorneys and department employees, in their capacities as clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the department and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may withhold Exhibit D under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n 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, writ ref’d n.r.e.); *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 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. 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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 has also concluded a preliminary draft of a document 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 remaining responsive information under section 552.111 of the Government Code. You state the information you have marked consists of advice, opinions, and recommendations of department employees and officials. You further state the information at issue contains draft documents. However, you do not state whether the draft documents will be released to the public in their final form. Therefore, if the draft documents will be released to the public in their final form, the department may withhold them in their entirety under section 552.111 of the Government Code. If the draft documents will not be released to the public in their final form, then the department may not withhold them in their entirety under section 552.111. In this instance, we note portions of the draft documents consist of advice, opinions, or recommendations relating to policymaking. Further, portions of the remaining information consists of advice, opinions, and recommendations related to policymaking. Accordingly, the department may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information consists of general administrative and purely factual information. Thus, we find you have not demonstrated how this information consists of advice, opinions, or recommendations pertaining to policymaking matters of the department. Accordingly, we conclude the department may not withhold any of the remaining responsive information under section 552.111 of the Government Code.

In summary, the department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 565.055(b) of the Occupations Code. The department may withhold Exhibit D under section 552.107(1) of the Government Code. To the extent the draft documents we have marked will be released in their final form, the department may withhold them in their entirety under section 552.111 of the Government Code. If the draft documents will not be released in their final form, the department may

withhold the information we marked within the draft documents under section 552.111. Additionally, the department may withhold the remaining information we have marked 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lana L. Freeman
Assistant Attorney General
Open Records Division

LLF/bhf

Ref: ID# 517205

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)