



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2014

Ms. Kathlyn Wilson
Director, Office of Agency Counsel
Texas Department of Insurance
Legal Section, Mail Code 110-1A
P.O. Box 149104
Austin, Texas 78714-9104

OR2014-08337

Dear Ms. Wilson:

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# 522855 (TDI # 147350).

The Texas Department of Insurance (the "department") received a request for documents and communications pertaining to AARP Medicare Supplement Insurance insured by a specified insurance company.¹ You state the department will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records

¹We note the department sought and received clarification of the request. *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*, 304 S.W.3d 380, 387 (Tex. 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 received or narrowed). Further, you inform us the department sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the department received the required deposit on February 26, 2014. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

Decision No. 684 (2009).² You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence. Further, you state release of the remaining information may implicate the proprietary interests of UnitedHealthcare Insurance Company (“UnitedHealthcare”). Accordingly, you state, and provide documentation showing, you notified UnitedHealthcare of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions in the Act in certain circumstances). We have received comments from UnitedHealthcare. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address UnitedHealthcare’s comments regarding its information at issue. UnitedHealthcare has informed this office it has no objection to the disclosure of its information. Therefore, we have no basis to conclude UnitedHealthcare has a protected interest in the information at issue, and the department may not withhold any of this information on the basis of any interest UnitedHealthcare may have in it.

Next, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record,” unless the information is made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). Thus, the submitted court-filed documents are subject to section 552.022(a)(17). Although you assert this information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the court-filed documents under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also consider your arguments under sections 552.107 and 552.111 of the Government Code for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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;

(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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 at 9-10 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503, provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information subject to section 552.022 of the Government Code was communicated between department attorneys and department employees in their capacity as clients for the purpose of facilitating the rendition of professional legal services to the department. Further, you state the communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the department may

withhold the information at issue, which we have marked, under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above in rule 503. 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. ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that a governmental body has demonstrated as being 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 remaining information consists of communications between department attorneys and department employees in their capacity as clients that were made for the purpose of providing legal services to the department. Further, you state these communications were intended to be confidential and have remained confidential. However, we find some of the communications at issue have been shared with an individual you have not demonstrated is a privileged party. Therefore, the department may not withhold these communications under section 552.107(1). Based on your representations and our review of the remaining information, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the department may generally withhold the information we have marked under section 552.107(1) of the Government Code. We note, however, some of the privileged e-mail strings include attachments received from or sent to non-privileged parties. If these attachments are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged attachments we have marked are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged attachments 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 a governmental body. *See* Open Records Decision No. 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 may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You claim the remaining information at issue consists of communications between department employees and reflects advice, opinion, and recommendations pertaining to the department's policies. However, upon review, we find you have failed to demonstrate how this information constitutes internal advice, opinion, or recommendations related to the policymaking matters of the department. Therefore, the department may not withhold any of the remaining information under section 552.111 of the Government Code.

In summary, the department may withhold the information we have marked under Texas Rule of Evidence 503. The department may withhold the information we have marked under section 552.107(1) of the Government Code; however, the department may not withhold the non-privileged attachments we have marked if they are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear. The department must release the remaining information.

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,



Miriam A. Khalifa
Assistant Attorney General
Open Records Division

MAK/akg

Ref: ID# 522855

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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