ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2014

Ms. Laurel E. Huston
Assistant County Attorney
El Paso County Hospital District Legal Unit
University Medical Center of El Paso
4815 Alameda Avenue, 8th Floor, Suite B
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OR2014-15841

Dear Ms. Huston:

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# 536306 (UMC File No. HM-14-123).

The University Medical Center of El Paso (the "center") received a request for a specified proposal sent to El Paso Children's Hospital ("EPCH").[1] You claim the submitted information is excepted from disclosure under sections 552.107, 552.110, and 552.111 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary and privacy interests of EPCH. Accordingly, you state, and provide documentation showing, you notified EPCH of the request for information and of its right to submit arguments to this office as to why the submitted information 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 exception in the Act in certain circumstances). We have received comments from an attorney for EPCH. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note EPCH seeks to withhold information that the center has not submitted for our review. This ruling does not address information beyond what the center has submitted

[1]You state the center sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *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 over-broad 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).

to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the center submitted as responsive to the request for information. *See id.*

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Id. § 552.101. This section encompasses information that is made confidential by statute. EPCH claims the submitted information is confidential under section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code. Section 154.073 provides in relevant part the following:

> (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
>
> (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Similarly, section 2009.054 provides as follows:

> (a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the impartial third party and the parties.
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> (b) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:
>
> > (1) a communication relevant to the dispute, and a record of the communication, made between an impartial third party and the parties to the dispute or between the parties to the dispute during the course of an alternative dispute resolution procedure are confidential and

> may not be disclosed unless all parties to the dispute consent to the disclosure; and
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> (2) the notes of an impartial third party are confidential except to the extent that the notes consist of a record of a communication with a party and all parties have consented to disclosure in accordance with Subdivision (1).

Gov't Code § 2009.054. Further, this office has found that communications during a formal settlement process were intended to be confidential. Open Records Decision No. 658 at 4 (1998); *see also* Gov't Code § 2009.054(c). Sections 154.073 and 2009.054 pertain only to communications made during an alternative dispute resolution ("ADR") procedure. EPCH states the submitted information is "part of an imminent mediation" between the center and EPCH. EPCH explains it and the center plan to engage in a formal mediation procedure if the parties are not able to resolve their dispute through informal mediation. EPCH further states the submitted information was exchanged with the center "for the purpose of, and in furtherance of, a planned mediation of their dispute." However, EPCH has not demonstrated, and the submitted information does not indicate, how the information at issue consists of a communication from a formal ADR procedure. Because the center and EPCH did not participate in a formal ADR procedure under either chapter 154 or chapter 2009, neither provision applies. Therefore, the center may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code or section 2009.054 of the Government Code.

EPCH also raises section 552.103 of the Government Code. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties, we do not address EPCH's argument under section 552.103. *See* Open Records Decision Nos. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception), 542 (statutory predecessor to section 552.103 does not implicate rights of third party). Accordingly, the center may not withhold any of the submitted information on the basis of EPCH's arguments under section 552.103.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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. Finally, the attorney-client privilege applies only to a confidential communication, 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The center states the submitted information consists of a communication between the center's legal counsel and EPCH's legal counsel. The center states the communication was made for the purpose of facilitating the rendition of professional legal services to the center and the communication has remained confidential. However, because the submitted information consists of a proposal for the resolution of a dispute between the center and EPCH, we find the center and EPCH's interests were adverse at the time of the communication at issue. Accordingly, at the time the communication at issue was made, the parties did not share a common interest that would allow the attorney-client privilege to apply. Therefore, the center has failed to establish the submitted information consists of a

privileged attorney-client communication, and the center may not withhold it under section 552.107(1) of the Government Code.

The center also raises section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. We note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. EPCH did not provide any arguments under section 552.110. Thus, we do not address the center's arguments under section 552.110 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" *Id.* § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). Rule 192.5 defines work product as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

> a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there

> was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

The center claims the attorney work product privilege of section 552.111 of the Government Code for the submitted information. However, as noted above, the center communicated the submitted information to EPCH's legal counsel, and the center has not demonstrated EPCH's legal counsel constitutes a privileged party. Accordingly, the center may not withhold any of the submitted information as attorney work product under section 552.111 of the Government Code. As no further exceptions to disclosure have been raised, the center must release the submitted 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,

Kristi L. Godden
Assistant Attorney General
Open Records Division

KLG/cz

Ref: ID# 536306

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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