



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2009

Mr. Trent B. Krienke
Davis & Wilkerson, P.C.
Attorney for North Texas Medical Center
P.O. Box 2283
Austin, Texas 78768-2283

OR2009-15409

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# 359676.

The Gainesville Hospital District d/b/a North Texas Medical Center ("NTMC"), which you represent, received a request for: (1) the recycle bins on computers used by two named individuals; (2) the "Inbox, Sent, Trash and any personal folders on any yahoo e-mail accounts" of the same two named individuals; (3) attorney fee bills and attorney communications for 2008-2009; (4) Outlook PST files from a named individual's computer; (5) budget documents for 2009-2010; (6) information related to payments made to attorneys; (7) information related to executive bonuses; and (8) a named individual's contract and information related to his compensation. You inform us that NTMC sought and received clarification of the information requested. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You state that NTMC has made information responsive to categories (1), (2), (7), and (8) available to the requestor. You also state that NTMC does not maintain any information responsive to certain portions of the request, including category (4).¹ You claim

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.111 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence. Based on your arguments, we also understand you to raise the attorney-client privilege as encompassed by section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, as you note, portions of the submitted attorney fee bills were responsive to a previous request, as a result of which this office issued Open Records Letter No. 2009-10834 (2009). In that ruling, we determined that NTMC may withhold the information we marked in the submitted attorney fee bills pursuant to Rule 503. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude that NTMC may rely on Open Records Letter No. 2009-10834 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (outlining elements of first type of previous determination). We will consider your arguments against disclosure of the remainder of the submitted information, which is not subject to the previous determination.

As you acknowledge, the remainder of the submitted attorney fee bills are subject to section 552.022 of the Government Code, which provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Therefore, the remaining attorney fee bills must be released under section 552.022(a)(16) unless they are confidential under "other law." Because section 552.101 of the Government Code does constitute "other law" for purposes of section 552.022, we will address your arguments under this exception. Additionally, the Texas Supreme Court has held that the "Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will also address your arguments under Rule 503 of the Texas Rules of Evidence.

For the information at issue that is subject to section 552.022, we consider your claims under Rule 503, which encompasses the attorney-client privilege and 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;
- (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). We note that the details in attorney fee bills may be withheld only if they are protected under the attorney-client privilege. *See* Open Records Decisions No. 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice).

You contend that the information you have marked in the remaining attorney fee bills consists of confidential communications between NTMC's attorneys and NTMC employees 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 attorney fee bills, we agree that some of the information at issue is protected by the attorney-client privilege.

We note, however, that you have not specifically identified all of the parties to the communications you claim are privileged. Additionally, some of the information you have marked documents communications with non-privileged parties. Furthermore, while other marked entries indicate that certain documents were prepared, there is no indication that the information was actually communicated to a privileged party. Therefore, we find that you have failed to demonstrate how the remaining information you have marked documents privileged attorney-client communications.

We next address the e-mails that you have marked as Exhibit E. For information that is not subject to section 552.022, the attorney-client privilege is correctly raised under section 552.107 of the Government Code. Accordingly, we will consider your attorney-client privilege arguments for Exhibit E under this section. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above.

You state that the e-mails in Exhibit E document communications between NTMC employees and attorneys for NTMC that were made in connection with the rendition of professional legal services. You indicate that these communications were intended to be confidential, and you do not indicate that their confidentiality has been waived. You have identified the parties to these communications. Based on your representations and our review, we conclude that NTMC may withhold Exhibit E under section 552.107 of the Government Code.²

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, recommendations, and opinions 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, 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. 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

²As this ruling is dispositive with regard to Exhibit E, we need not address your argument under section 552.101 in conjunction with section 161.032 of the Health & Safety Code.

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.

You state that the information you have marked as Exhibit F consists of a draft budget that is intended for public release in its final form. Based on this representation and our review, we agree that NTMC may withhold Exhibit F under section 552.111 of the Government Code.

Finally, you raise section 552.101 in conjunction with section 551.104 of the Government Code, which provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Gov't Code § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 at 4 (1988). Accordingly, NTMC must withhold the submitted certified agenda of a closed meeting, which you have marked as Exhibit I, under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.³

In summary, NTMC: (1) may rely on Open Records Letter No. 2009-10834 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling; (2) may withhold the portions of Exhibit D and Exhibit G that we have marked under Rule 503 of the Texas Rules of Evidence; (3) may withhold Exhibit E under section 552.107 of the Government Code; (4) may withhold Exhibit F under section 552.111

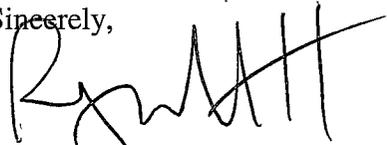
³We note that a governmental body is not required to submit a certified agenda or tape recording of a closed meeting to this office for review. *See* ORD 495 at 4 (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101 of the Government Code).

of the Government Code; (5) must withhold Exhibit I under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code; and (6) must release the remainder of 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.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,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 359676

Enc. Submitted documents

cc: Requestor
(w/o enclosures)