



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2010

Mr. Scott Parker
Acting Executive Director
Texas Board of Chiropractic Examiners
333 Guadalupe, Suite 3-825
Austin, Texas 78701-3942

OR2010-09891

Dear Mr. Parker:

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# 385352.

The Texas Board of Chiropractic Examiners (the "board") received a request for information pertaining to seven specified investigation files; specified communications involving named individuals; and lists of open and closed cases for specified periods of time. You state you have released some of the requested information to the requestor. 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 information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note a portion of submitted information, which we have marked, is not responsive to the instant request as it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the board is not required to release non-responsive information in response to this request.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Id. § 552.101. This section encompasses information made confidential by other statutes including section 201.206 of the Occupations Code. Section 201.206 provides in part:

(a) The board's investigation files are confidential, privileged, and not subject to discovery, subpoena, or any other means of legal compulsion for release other than to the board or an employee or agent of the board.

...

(d) Notwithstanding Subsection (a), the board may:

(1) disclose a complaint to the affected license holder; and

(2) provide to a complainant the license holder's response to the complaint, if providing the response is considered by the board to be necessary to investigate the complaint.

Occ. Code § 201.206(a), (d). You inform us section 201.206 applies to "all investigations pending or opened on or after September 1, 2003." You indicate Attachments B through I consist of or are contained in investigation files of complaints about chiropractors licensed by the board that are maintained by the board pursuant to section 201.204 of the Occupations Code. *See id.* § 201.204 (setting forth the board's record keeping requirements with respect to complaints filed with the board). You assert the information at issue is confidential under section 201.206. You do not inform us the requestor is entitled to any of the information at issue pursuant to section 201.206(d)(2). Thus, based on your representations and our review, we agree the board must withhold the investigation files in Attachments B through H under section 552.101 of the Government Code in conjunction with section 201.206 of the Occupations Code. Additionally, based upon your arguments and our review, we find the information in Attachment I is a part of the board's investigation files. Accordingly, we determine the board must also withhold Attachment I in its entirety under section 552.101 in conjunction with section 201.206 of the Occupations Code.

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. ORD 676 at 6-7. 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). 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, no pet.). 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 e-mails submitted as Attachment J consist of communications between and among individuals identified as board employees, attorneys who represent the board, and representatives of those employees and attorneys. You represent these e-mails were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we find that most of the information within Attachment J consists of attorney-client privileged communications. However, some of the submitted communications were sent to non-privileged or unidentified parties. Therefore, we find that these communications, which we have marked for release, do not constitute privileged attorney-client communications and may not be withheld under section 552.107 of the Government Code. In addition, we note that some of the individual e-mails contained in the submitted e-mail strings consist of communications with a non-privileged party or unidentified parties. To the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107. Accordingly, with the exception of the communications marked for release and the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings, the board may withhold Attachment J under section 552.107 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); *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 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).

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You assert Attachment K consists of interagency and intraagency communications involving the discussion of policy issues of the board. Upon review, we agree some of the information at issue reveals advice, opinions, or recommendations that pertain to policymaking. The board may withhold these portions of the information at issue, which we have marked, under section 552.111 of the Government Code. However, we find the remaining information at issue consists either of general administrative information that does not relate to policymaking or information that is purely factual in nature. Further, we find portions of the remaining information were communicated with individuals with whom you have failed to

demonstrate how the board shares a privity of interest or common deliberative process. Accordingly, you have failed to demonstrate the applicability of section 552.111 to the remaining information in Attachment K, and none of it may not be withheld on that basis.

You assert the information in Attachment L is excepted from public disclosure based on the attorney work product privilege. Section 552.111 also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). 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 governmental body seeking to withhold information under this exception bears the burden of demonstrating that 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 surrounding the investigation 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 attorney work product privilege applies to materials prepared in preparation for an administrative hearing. *See* Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of predecessor to section 552.103); *see also* Gov't Code § 2001.083 ("In a contested case [subject to the APA] a state agency shall give effect to the rules of privilege recognized by law.").

You state the information at issue consists of hand-written notes and communications made by board representatives and a board attorney in anticipation of a contested case before the State Office of Administrative Hearings. You also indicate that this information contains the individuals' mental impressions concerning the board's position in the proceeding. Based on your representations and our review, we conclude the board may withhold Attachment L as attorney work product under section 552.111 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked in the remaining information do not appear to be of types specifically excluded by section 552.137(c) of the Government Code. Further, you inform us that the owners of the e-mail addresses at issue have not consented to the release of their e-mail addresses. Therefore, the board must withhold the marked e-mail addresses under section 552.137 of the Government Code.¹

In summary, the board must withhold Attachments B through I under section 552.101 of the Government Code in conjunction with section 201.206 of the Occupations Code. With the exception of the communications marked for release and the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings, the board may withhold Attachment J under section 552.107 of the Government Code. The board may withhold the information we marked in Attachment K under section 552.111 of the Government Code pursuant to the deliberative process privilege and may withhold Attachment L pursuant to the work product privilege. The board must withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining responsive 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

¹We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of 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.

Mr. Scott Parker - Page 7

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,

A handwritten signature in cursive script that reads "Paige Lay".

Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 385352

Enc. Submitted documents

cc: Requestor
(w/o enclosures)