



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 29, 2010

Mr. Ryan S. Henry  
Denton, Navarro, Rocha & Bernal, P.C.  
2517 North Main Avenue  
San Antonio, Texas 78212

OR2010-17777

Dear Mr. Henry:

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# 401787.

The Dallas County Hospital District (the "district") received a request for all communications in 2010 between Dr. Ron Anderson and Dr. Lauren McDonald. You indicate you will redact e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the information at issue may be the subject of a prior request for a ruling made to this office by the district. In letters dated September 22, 2010 and September 28, 2010, you withdrew your request for an open records decision, ID# 400358, regarding a request for information since 2000 pertaining to the plans of succession for

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<sup>1</sup>This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>2</sup>We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

Dr. Ron Anderson. Based on your representation that you wished to withdraw your request because you would release all of the requested information to the requestor, this office considered the matter closed. However, information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Therefore, if any of the information subject to the instant request was released by the district in response to the previous request, that information must be released to the requestor.

Next, we note some of the submitted information, which we have marked, was created after the date of the request. Thus, this information is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release that information.

Section 552.103 of the Government Code provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim

that litigation may ensue is more than mere conjecture.” See Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4. Concrete evidence may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”).

In this instance, you state each exhibit indicates that litigation is forthcoming or pending. Upon review, we find you have not adequately demonstrated anyone intends to file litigation or has otherwise taken concrete steps towards litigation on the date the request was received. Accordingly, the district may not withhold any of the information at issue you have marked under section 552.103 of the Government 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. Open Records Decision No. 676 at 6-7. 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. 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 information at issue in exhibits C and D consist of communications between and among individuals identified as district board members, district executives, attorneys who represent the district, and representatives of those board members, executives, 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. First, we note none of the information in exhibit C constitutes a communication between an attorney or attorney's representative and a district board member, executive, or representative. Accordingly, none of the information in exhibit C can be withheld under section 552.107 of the Government Code. However, based on your representations and our review, we find the information within exhibit D consists of attorney-client privileged communications. Therefore, we find exhibit D may be withheld under section 552.107 of the Government Code.<sup>3</sup>

You assert the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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).

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

You state the submitted information in exhibit C consists of intragency memoranda dealing with policy making issues. However, we note the information in exhibit C consists of information pertaining to internal administrative or personnel matters not covered by section 552.111 of the Government Code, factual information, and a communication with a member of the public. Therefore, we find exhibit C does not consist of advice, recommendations, opinions, or other material reflecting the policymaking processes of the district. Accordingly, the district may not withhold exhibit C under section 552.111. As you raise no other exceptions for the remaining information, it must be released to the requestor.

In summary, the district may withhold exhibit D under section 552.107 of the Government Code. The remaining information must be released to the requestor.

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](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,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/eeg

Ref: ID# 401878

Enc. Submitted documents

c: Requestor  
(w/o enclosures)