



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2010

Mr. Trent B. Krienke
Davis & Wilkerson, P.C.
P.O. Box 2283
Austin, Texas 78768

OR2010-19155

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# 403369 (NTMC Request No. 42).

The Gainesville Hospital District d/b/a North Texas Medical Center ("NTMC"), which you represent, received a request for e-mails for two named individuals, as well as nine other categories of information, including certain attorney fee-bills, bylaws, board packets, salary surveys, auditor's reports, electronic recordings, campaign finance filings, and communications.¹ You state NTMC has made or will make some responsive e-mails and all remaining information available to the requestor. You claim a portion of the remaining responsive e-mails, which you submitted for our review, are not subject to the Act. You claim the remaining submitted e-mails are excepted from disclosure under sections 552.107,

¹You inform us that NTMC sought and received clarification of this request for information. *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, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general opinion is measured from the date request is clarified or narrowed).

552.111, 552.136, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

First, we address your assertion Exhibit A is not subject to the Act. The Act is applicable only to "public information." See Gov't Code § 552.021. Section 552.002 of the Act defines public information as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); see Open Records Decision No. 462 at 4 (1987). You contend the e-mails in Exhibit A were not "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business' by or for [NTMC]" because the e-mails have no connection with NTMC business and represent incidental use of NTMC e-mail by NTMC employees. You also assert the computer user names and passwords in Exhibit A are not subject to the Act. This office has determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information that is made public under section 552.021 of the Act. Open Records Decision No. 581 at 5-6 (1990). Based on your representations and our review, we agree most of the information in Exhibit A does not pertain to official NTMC business or is of no significance other than as a tool. Therefore, most of the information in Exhibit A is not subject to the Act, and NTMC need not release that information in response

²Although you also mention section 552.102 of the Government Code, you provide no arguments regarding the applicability of that section; thus, we assume you no longer assert section 552.102. Additionally, although you also raise Texas Rule of Evidence 503, the information for which you claim this provision is not subject to section 552.022 of the Government Code. See Gov't Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under "other law"). Thus, your attorney-client privilege claim is properly addressed here under section 552.107 of the Government Code. Open Records Decision No. 677 at 8-9 (2002).

³We assume the representative sample of records 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 that those records contain substantially different types of information than that submitted to this office.

to this request. However, the remaining information in Exhibit A, which we marked, was collected or assembled or is maintained in connection with the transaction of official NTMC business and, thus, constitutes "public information" as defined by section 552.002(a). Because this information is subject to the Act, it must be released unless it falls within the scope of an exception to disclosure. See Gov't Code §§ 552.301, .302. As you raise no exceptions to disclosure under the Act for the information in Exhibit A, the information we marked must be released.

You raise section 552.107 of the Government Code for Exhibit E. Section 552.107(1) 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 (2002). 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 Exhibit E constitutes communications amongst NTMC attorneys and employees that were made for the purpose of providing legal services to NTMC. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find NTMC may withhold most of the e-mails in Exhibit E under section 552.107(1) of the Government Code. However, we note some of the

individual e-mails contained in the submitted e-mail strings consist of communications with the requestor and other parties you have not identified. Because you have not explained how these parties are privileged with respect to the e-mails at issue, these e-mails are not privileged. Accordingly, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted otherwise privileged e-mail strings, they may not be withheld under section 552.107(1). If these non-privileged e-mails do not exist separate and apart from the e-mail strings in which they are submitted, then NTMC may withhold them along with the privileged e-mails under section 552.107.

You claim the information in Exhibit B is excepted under section 552.111 of the Government Code, which 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. Section 552.111 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. The 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). 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, opinions, or recommendations 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).

This office also has concluded 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 contend the e-mails and draft attachments in Exhibit B contain advice, opinion, and recommendation relating to NTMC's development and adoption of policies. You assert the factual information contained in this exhibit is so inextricably intertwined with the advice, opinion, or recommendation that severance of the factual information is impractical. Based on your representations and our review, we have marked the portions of Exhibit B that consist of advice, opinion, or recommendations, and which NTMC may withhold under section 552.111 of the Government Code. Upon review, we also find the draft attachments constitute drafts of policymaking documents. However, you do not inform us if NTMC intends to release these documents in their final form. Therefore, if the draft attachments will be released to the public in their final form, then NTMC may withhold them in their entirety under section 552.111. However, we find the remaining information in Exhibit B does not consist of advice, opinion, or recommendations, does not relate to the policymaking processes of NTMC, or both. Thus, the remaining portions of Exhibit B may not be withheld under section 552.111 of the Government Code.

Next, you claim the information in Exhibit C is excepted under section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136; *see id.* § 552.136(a) (defining "access device"). Exhibit C contains bank account numbers that are subject to section 552.136. Thus, NTMC must withhold these marked numbers under section 552.136. However, the remaining portions of Exhibit C are not subject to section 552.136, and NTMC may not withhold any of the remaining information on that basis.

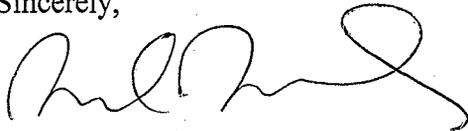
You claim Exhibit D is excepted under section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note the requestor has a right to his own e-mail address under section 552.137(b). *Id.* § 552.137(b). We also note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Upon review, we have marked the e-mail addresses in Exhibit D, as well as the e-mail addresses in Exhibits B, C, and E that are subject to section 552.137 of the Government Code. The e-mail addresses we have marked are not excluded by section 552.137(c). Thus, unless NTMC receives consent for their release, NTMC must withhold the e-mail addresses we have marked pursuant to section 552.137. However, because the remaining portions of Exhibit D are not subject to section 552.137, NTMC may not withhold the remaining information on that basis.

In summary, with the exception of the information we marked, Exhibit A is not subject to the Act and need not be released. NTMC may generally withhold Exhibit E under section 552.107(1) of the Government Code, but may not withhold the marked communications with the non-privileged parties to the extent those communications exist separate and apart from the e-mail string in which they appear. NTMC may withhold the information we marked in Exhibit B under section 552.111 of the Government Code, as well as any of the marked draft attachments that will be released in their final form. NTMC must withhold the information we marked in Exhibit C under section 552.136 of the Government Code. NTMC must also withhold the e-mail addresses we marked in Exhibits B, C, and E under section 552.137 of the Government Code, unless NTMC receives consent for their release.⁴ The remaining information must be released.⁵

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

⁴We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers under section 552.136 of the Government Code and 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.

⁵As noted above, the information being released includes the requestor's e-mail address, to which this requestor has a right of access under section 552.137(b) of the Government Code. If NTMC receives another request for this information from a requestor without such a right of access, it is authorized to withhold this e-mail address under section 552.137, without the necessity of requesting an attorney general decision, pursuant to Open Records Decision No. 684.

Ref: ID# 403369

Enc. Submitted documents

c: Requestor
(w/o enclosures)