



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 23, 2011

Ms. Barbara H. Owens  
Assistant General Counsel  
Texas Department of State Health Services  
PO Box 149347  
Austin, Texas 78714-9347

OR2011-10090A

Dear Ms. Owens:

Our office issued Open Records Letter No. 2011-10090 (2011) on July 15, 2010. In that ruling, we found, in part, that only a portion of the information you sought to withhold under section 552.107 of the Government Code could be withheld on that basis. In subsequent communication with our office, you informed us that, as to the documents in Exhibit C, the markings regarding your asserted exceptions were not consistent with the corresponding written arguments for those documents. You state the written comments represent the proper arguments concerning Exhibit C. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on July 15, 2011. *See id.* § 552.011 (providing Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the “Act”)).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 433215 (DSHS File No. 18877/2011).

The Texas Department of State Health Services (the “department”) received a request for all documents and e-mails regarding the requestor received or sent by six named persons during a specified time. You state some information will be released to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101,

552.103, 552.107, 552.111, and 552.137 of the Government Code.<sup>1</sup> We have considered the claimed exceptions and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note a portion of the information you have submitted is not responsive to the instant request, because the request excludes any e-mails directly to or from the requestor, unless they had been forwarded to another party. We have marked such non-responsive information. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

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.*, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a

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<sup>1</sup>Although you do not explicitly raise section 552.137, you have marked information to be withheld under that exception. Thus, we understand you to raise section 552.137.

<sup>2</sup>We 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 those records contain substantially different types of information than that submitted to this office.

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 assert the marked portion of Exhibit B and all of Exhibit C are privileged under section 552.107. You state the information at issue consists of privileged attorney-client communications between people you identify as attorneys and employees of the department and an employee of the Health and Human Services Commission, which provides human resources services to the department pursuant to state law.<sup>3</sup> You state the communications at issue were made in furtherance of the rendition of legal services, and were intended to be, and have remained, confidential. Accordingly, we conclude the department may withhold the information we have marked in Exhibit B under section 552.107.<sup>4</sup> The department may also withhold under section 552.107 all of Exhibit C, with the exception of the documents we have marked for release. However, you have failed to provide this office with the necessary facts to demonstrate the elements of the attorney-client privilege with respect to the remaining information you seek to withhold. Consequently, the department may not withhold any of the remaining information at issue under section 552.107.

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

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<sup>3</sup>Section 531.0055 of the Government Code provides the Health and Human Services Commission is responsible for providing human resources services to health and human services agencies, which includes the department. *See Gov’t §§ 531.0055, 521.001(4)*.

<sup>4</sup>Because our ruling as to this information is dispositive, we do not address your remaining arguments against disclosure of portions of this information.

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).

This office has also 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 of section 552.111). 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.

We also note section 552.111 can encompass a governmental body's communications with a third party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. See Open Records Decision No. 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). In order 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 state portions of the remaining information you have marked in Exhibit B consist of internal communications among department attorneys and staff containing advice, opinion, and recommendations concerning department procedural and enforcement policy issues. You further state the information at issue contains drafts of documents that were publicly released in their final form. We find the information we have marked pertains to the department's policymaking processes. Therefore, based on your representations and our review of the information at issue, we agree the department may withhold the information we have marked in Exhibit B under section 552.111. However, we find portions of the remaining information you seek to withhold under section 552.111 on the basis of the

deliberative process privilege are purely factual information or were communicated to parties with whom you have not identified a common deliberative process or privity of interest. You have not explained how this information constitutes internal advice, recommendations, or opinions regarding policy issues. Further, we find the remaining portions of the information you seek to withhold relate to internal investigations of violations of the department's policies and resulting disciplinary actions regarding a specific employee. You have not explained how this information pertains to administrative or personnel matters of broad scope that affect the department's policy mission. Therefore, none of the remaining information at issue may be withheld under section 552.111 of the Government Code on the basis of the deliberative process 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 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 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.

You argue the remaining information you have marked under section 552.111 is protected by the attorney work-product privilege. However, upon review, we find you have not demonstrated that any of the remaining information at issue consists of material prepared, mental impressions developed, or communications made in anticipation of litigation or for trial. *See* TEX. R. CIV. P. 192.5. Therefore, the department may not withhold any of the remaining information at issue under section 552.111 of the Government Code on the basis of the attorney work product privilege.

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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You argue the Notice of Deficiency letters you have marked in Exhibit B are protected by section 552.103. You state these letters are related to the public health nuisance lawsuits that are the anticipated result of issuing such letters. However, we note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to

litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this case, the Notice of Deficiency letters were issued to the potential opposing parties. Thus, because the potential opposing parties have already seen the letters at issue, we conclude they may not be withheld under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information you have marked in Exhibit D is highly intimate or embarrassing and of no legitimate public interest. We have marked additional information in Exhibit B on this basis. The department must withhold the information you and we have marked under section 552.101 in conjunction with common-law privacy.

We note a portion of the remaining information in Exhibit B is subject to section 552.117 of the Government Code,<sup>5</sup> which excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential pursuant to section 552.024. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time the governmental body receives the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. We have marked information in Exhibit B that is subject to

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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117. If the employee to whom the marked information pertains timely requested confidentiality under section 552.024, then the department must withhold it under section 552.117(a)(1). If the employee did not timely elect to withhold her personal information, then the department may not withhold the information marked under section 552.117(a)(1) of the Government Code.

We next note you have marked e-mail addresses in the remaining information in Exhibit B to be withheld under section 552.137 of the Government Code. This section 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* Gov’t Code § 552.137(a)-(c). The marked e-mail addresses are not of a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the marked e-mail addresses under section 552.137, unless their owners have affirmatively consented to disclosure.<sup>6</sup>

Finally, we note you have raised section 552.101 of the Government Code in conjunction with section 531.1021 of the Government Code for Exhibit E. However, you did not submit an Exhibit E, nor have you marked any other information you wish to withhold on this basis. Therefore, this ruling does not address that argument.

In summary, the department may withhold the information we have marked in Exhibit B and, with the exception of the documents we marked for release, all information in Exhibit C under section 552.107. The department may also withhold the information we have marked in Exhibit B under section 552.111. The department must withhold the information you and we have marked in Exhibits B and D under section 552.101 in conjunction with common-law privacy. The department must withhold the information we have marked in Exhibit B under section 552.117, if the employee at issue timely elected confidentiality under section 552.024. The department must withhold the e-mail addresses you have marked in Exhibit B under section 552.137. The remaining requested 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

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<sup>6</sup>We note Open Records Decision No. 684 (2009) is 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.

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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/agn

Ref: ID # 425501

Enc. Submitted documents

c: Requestor  
(w/o enclosures)