ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 22, 2011

Mr. James Downes
Assistant County Attorney
Harris County
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2011-10635

Dear Mr. Downes:

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# 424885 (C.A. File No. 11HSP0425).

The Harris County Hospital District (the "district") received a request for (1) correspondence between a named law firm, a named consulting firm, two named attorneys, or a named individual and the district regarding the Medicaid Upper Payment Limit ("UPL") program or Medicare or Medicaid reimbursement issues from February 1, 2009 to the date of the request; (2) correspondence related to the UPL program between executives and/or staff of the district and executives and/or staff of private hospitals participating in the UPL program from February 1, 2009 to the date of the request; and (3) all correspondence with two named individuals. You claim the submitted information is excepted from disclosure under sections552.107 and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. You also state release of the submitted information may implicate the interests of the named law and consulting firms, Gjerset & Lorenz, L.L.P. ("G&L") and Spivey Harris. Accordingly, you notified both law firms of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from hospital systems that,

along with the district, are joint clients of G&L. We have considered the submitted arguments and reviewed the submitted representative sample of information.[1]

Initially, as you acknowledge, some of the submitted information is subject to section 552.022 of the Government Code. This section provides, in part, the following:

> (a) 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). In this instance, the submitted information includes an attorney fee bill. Thus, the district must release this information pursuant to section 552.022(a)(16) unless it is expressly confidential under other law. Although you seek to withhold this information under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions and do not make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022 under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also consider your claims under sections 552.107 and 552.111 for the information not subject to section 552.022(a)(16).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

> 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;

[1]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.

> (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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

We understand you to claim the submitted fee bill is confidential in its entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information contained in a bill for attorney's fees is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16). This office has found only information specifically demonstrated to be protected by the attorney-client privilege or made confidential by other law may be withheld from fee bills. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in rule 503); *see generally* Open Records Decision No. 150 (1977) (predecessor to Act places burden on governmental body to establish why and how exception applies to requested information); *Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim.

App. 1989) (burden of establishing attorney-client privilege is on party asserting it). Thus, the district may withhold under rule 503 only the parts of the submitted attorney fee bill you specifically demonstrate consist of privileged communications.

You state the submitted attorney fee bill documents confidential communications between an attorney for the district and district staff. You further state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. Additionally, you state the communications were intended to be, and have remained, confidential. Accordingly, the district may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, we find you have failed to demonstrate the remaining information documents confidential communications between privileged parties. Therefore, we conclude Texas Rule of Evidence 503 is not applicable to the remaining information, and it may not be withheld on this basis.

Next, we consider your argument under section 552.107 of the Government Code for the information not subject to section 552.022(a)(16) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. *See* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above. We note communications with third party consultants with which a governmental body shares a privity of interest are protected under the privilege. Open Records Decision Nos. 464 (1987), 429 (1985).

You explain the district, along with other hospital systems, as joint clients, engaged G&L to represent you and the other hospital systems in connection with the development of the UPL program. You state the remaining information consists of communications between G&L, the district and other hospital systems as joint clients, and consultants hired by the district to advise the district on policy matters regarding the UPL program. You state the communications were intended to be and remain confidential. Therefore, based on your representations and our review, we conclude the district may generally withhold most of the remaining information under section 552.107(1) of the Government Code. We note, however, one of the otherwise privileged e-mail strings at issue includes a communication with a non-privileged party. If the communication with this non-privileged party, which we have marked, exists separate and apart from the e-mail string in which it appears, then the district may not withhold the communication with the non-privileged party under section 552.107(1).

In the event the communication with the non-privileged party exists separate and apart from the e-mail string in which it appears, then we address your argument against its release under section 552.111 of the Government Code. 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 consisting 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). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

As noted above, the e-mail at issue was communicated with a non-privileged party. You have failed to demonstrate how the district shares a privity of interest or common deliberative process with this party. Accordingly, you have failed to demonstrate the applicability of section 552.111 to the e-mail at issue, and it may not be withheld on that basis.

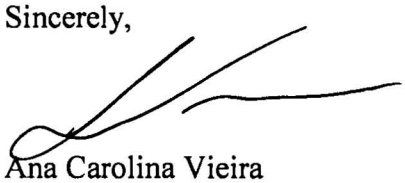
In summary, the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The district may withhold the remaining information not subject to section 552.022(a)(16) of the Government Code under section 552.107 of the Government Code; however, to the extent the non-privileged e-mail we have marked exists separate and apart from the submitted e-mail string, it may not be withheld under section 552.107. The remaining 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 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 424885

Enc. Submitted documents

c: Requestor
(w/o enclosures)