



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 1, 2011

Ms. Robin J. Chapman  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2011-11034

Dear Ms. Chapman:

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# 425605 (DSHS File No. 18939/2011).

The Texas Department of State Health Services (the "department") received a request for a copy of the complete file for the Northshore Treatment Center and Center for Behavioral Health. You inform us the department has released, or will release, some of the requested information with some of the information withheld pursuant to the previous determination issued by this office in Open Records Decision No. 684 (2009).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

You have marked most of the submitted information under section 552.107(1) of the Government Code. This section protects information that comes 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

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision.

<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.

withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). 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. *See* 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. *See 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 capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* Tex. R. Evid. 503(b)(1)(A)-(E). 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. *See 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 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 inform us the marked information consists of communications involving a department program attorney and department staff which were made for the purpose of facilitating professional legal services to the department. You also inform us the communications were not intended to be disclosed beyond department staff and have not been disclosed outside the department. Based on your representations and our review, we find the department has demonstrated the applicability of the attorney-client privilege to the information you marked under section 552.107(1) of the Government Code and it may be withheld under that section.<sup>3</sup>

You raise section 552.111 of the Government Code for portions of the remaining information. Section 552.111 excepts from disclosure “an interagency or intra-agency 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

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

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 Open Records Decision No. 615 at 5 (1993). 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); see Open Records Decision No. 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). 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.

Upon review, we marked a small portion of an e-mail string that contains advice, recommendations, and opinions of department staff concerning a policy issue. We note you have also marked a draft letter regarding a policy issue. Furthermore, you indicate this information will be released to the public in its final form. Accordingly, the department may withhold the portion of the e-mail string and the draft letter we marked under section 552.111 of the Government Code. However, we find the remaining information you marked consists of facts which are severable from the advice, opinion, or recommendations. Accordingly, no portion of the remaining information may be withheld under section 552.111.

Lastly, you marked a portion of the remaining information under section 552.101 of the Government Code, which 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 information other statutes make confidential. You raise section 552.101 in conjunction with sections 12.003 and 21.012 of the Human Resources Code. Section 12.003 of the Human Resources Code provides in relevant part:

(a) Except for purposes directly connected with the administration of the [Texas Health and Human Services Commission (“HHSC”)]’s assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of [HHSC] or acquired by employees of [HHSC] in the performance of their official duties.

Hum. Res. Code § 12.003(a); *see also id.* § 21.012 (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs). The term “assistance” in sections 12.003 and 21.012 includes “all forms of assistance and services for needy persons authorized by Subtitle C” of title 2 of the Human Resources Code. *Id.* § 11.001(4); *see also id.* § 31.001 *et seq.* (Hum. Res. Code tit. 2, subtit. C, Assistance Programs).

In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of [HHSC’s] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” Open Records Decision No. 584 at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See also* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. §§ 431.300 *et seq.*; Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977).

You assert the information you marked identifies a Medicaid recipient. You inform us, in this instance, release of this information would not be for purposes directly connected with the administration of a health and human services program. Based on your representations and our review, we conclude the information you marked under section 12.003 of the Human Resources Code is confidential under that section and must be withheld pursuant to

section 552.101 of the Government Code.<sup>4</sup> As you raise no other exceptions for the remaining information, it must be released.

In summary, the department may withhold the information marked under section 552.107(1) of the Government Code. The department may withhold the information we marked under section 552.111 of the Government Code. Finally, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code. 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](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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/eb

Ref: ID# 425605

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.