



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2011

Ms. Jameene Y. Banks
Denton, Navarro, Rocha, & Bernal
2517 North Main Avenue
San Antonio, Texas 78212-4685

OR2011-13588

Dear Ms. Banks:

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# 430587.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district"), which you represent, received a request for correspondence for a specified period of time pertaining to the cessation and phase out of the practice of paying certain medical students to perform administrative tasks.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered arguments submitted by an attorney for the requestor. *See Gov't Code § 552.304* (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note the requestor excludes e-mail to which he was a party and private cellular telephone numbers from his request for information. Accordingly, these types of information are not responsive to the instant request. Additionally, we note you have marked portions

¹You provide documentation showing the district sought and received clarification from the requestor regarding the request. *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 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

of the submitted information as not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release non-responsive information in response to the request.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 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. 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 Texas 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. 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 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). We note communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985). However, a governmental body does not share a privity of interest with a third party when it is involved in contract negotiations, as the parties’ interest are adverse.

You generally assert the submitted information consists of e-mail correspondence between district officials, employees, and attorneys. You represent these e-mails were communicated for the purpose of facilitating the rendition of legal services to the district. You also state

these e-mails were intended as confidential communications, and we understand they have remained confidential. Therefore, based on your representations and our review of the documents, we conclude the information we have marked falls within the protection of the attorney-client privilege and may be withheld under section 552.107(1) of the Government Code.² With respect to the remaining information for which you claim section 552.107(1), we find you have failed to demonstrate that the communications were made for the purpose of the rendition of legal services. As you have failed to establish the remaining responsive information is privileged under section 552.107(1) of the Government Code, it may not be withheld on that basis.

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. 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 reexamined 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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

²As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

We understand you to contend the remaining information contains advice, opinion, and recommendations relating to the district's policy matters. Upon our review, we find some of the remaining information constitutes advice, opinion, and recommendation between district staff reflecting the district's policymaking processes. Thus, the district may withhold this information, which we have marked, under section 552.111 of the Government Code. We find the remaining information at issue does not constitute advice, opinion, or recommendation, or reflects it pertains to administrative and personnel issues involving individual district employees, and you have not explained how this information pertains to administrative or personnel matters of a broad scope that affect the district's policy mission. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the remaining information and none may be withheld under section 552.111 on this basis. 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 the 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.

Upon review, we find the district has not demonstrated the remaining information at issue constitutes material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial. *See* TEX. R. CIV. P. 192.5. Accordingly, the district may not withhold any of the remaining information under section 552.111 of the Government Code.

In summary, the district may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code. The remaining responsive 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/akg

Ref: ID# 430587

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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