



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 9, 2011

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2011-16510

Dear Mr. Smith:

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# 435937.

The Health and Human Services Commission (the "commission") received requests from nine different requestors for bid proposals, evaluation records, contracts, correspondence, and other documents pertaining to Request for Proposals ("RFP") No. 529-12-0003 for Medicaid Dental Services. You state the commission will provide most of the requested information to the requestors. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Although you indicate the commission takes no position with respect to the public availability of the remaining submitted information, you state its release may implicate the proprietary interests of MCNA Insurance Company ("MCNA"). Accordingly, you state, and provide documentation showing, the commission notified MCNA of the request and of the company's right to submit arguments to this office as to why its submitted bid proposal information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why

information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from MCNA explaining why its submitted bid proposal information should not be released. Therefore, we have no basis to conclude MCNA has protected proprietary interests in its information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Consequently, the commission may not withhold any of MCNA's submitted information on the basis of any proprietary interest MCNA may have in the information. As no exceptions have been claimed for MCNA's information, the commission must release it.

You seek to withhold the information submitted in the September 28, 2011, Exhibit B under section 552.107(1) of the Government Code, which 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 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). 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. *See* 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. *See 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 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 the e-mail strings and attachments in the September 28, 2011, Exhibit B consist of communications between a commission attorney and commission officials that were made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and indicate confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have generally demonstrated the applicability of the attorney-client privilege to most of the information at issue. We note, however, some of the individual e-mail messages in the privileged e-mail strings consist of communications with parties you have not shown to be privileged. Thus, if the individual e-mail messages, which we have marked, exist separate and apart from the otherwise privileged e-mail strings to which they are attached, the commission may not withhold the marked individual e-mail messages under section 552.107(1) of the Government Code. If the marked individual e-mail messages do not exist separate and apart from the privileged e-mail strings, the commission may withhold them under section 552.107(1) of the Government Code. Regardless, the commission may withhold the remaining privileged e-mail information in the September 28, 2011, Exhibit B under section 552.107(1) of the Government Code.

You claim the non-privileged e-mail messages in the September 28, 2011, Exhibit B and the draft documents in the October 5, 2011, Exhibit B are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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.

This office also has concluded a preliminary draft of a document 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 generally assert the non-privileged e-mail messages in the September 28, 2011, Exhibit B contain advice, opinions, and recommendations pertaining to the commission's policymaking process. You have not, however, explained how this information pertains to the policymaking processes of the commission. Additionally, the e-mail messages consist of communications between a commission official and representatives of third-party companies seeking to contract with the commission in relation to the RFP at issue. You have not explained how these e-mail messages constitute internal commission communications or how the commission shares a privity of interest or common deliberative process with those third-party companies. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the e-mail messages you seek to withhold. Consequently, the commission may not withhold any portion of the non-privileged e-mail messages in the September 28, 2011, Exhibit B under section 552.111 of the Government Code. As you have not claimed any other exceptions to disclosure, the commission must release this information.

You contend the draft documents submitted in the October 5, 2011, Exhibit B consist of advice, recommendations, and opinions of commission officials regarding policy issues pertaining to the dissemination of information to the public and proper enrollment procedures regarding the Medicaid dental program at issue. Based on your arguments and our review, we find you have sufficiently demonstrated how this information pertains to the commission's policymaking processes. We also find this information contains the advice, recommendations, and opinions of commission officials regarding the policy issues. Furthermore, you state the draft documents will be released to the public in their final forms. Based on your arguments and our review, we find you have established the deliberative process privilege is applicable to the information at issue. Accordingly, the commission may withhold the draft documents in the October 5, 2011, Exhibit B under section 552.111 of the Government Code.

In summary, the commission may generally withhold the e-mail strings and attachments in the September 28, 2011, Exhibit B under section 552.107(1) of the Government Code, but may not withhold the non-privileged individual e-mail messages we have marked, if the messages exist separate and apart from the otherwise privileged e-mail strings to which they are attached. The commission may withhold the draft documents in the October 5, 2011, Exhibit B under section 552.111 of the Government Code. The commission must release the remaining information.

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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 435937

Enc. Submitted documents

c: 9 Requestors  
(w/o enclosures)

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