



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 2, 2012

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

OR2012-01709

Dear Ms. Owens:

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# 444536 (DSHS File 19603/2011).

The Texas Department of State Health Services (the "department") received a request for the following information related to disciplinary action taken against the requestor on a specified date: 1) all related e-mails and witness statements, including e-mails and witness statements from ten named department employees; 2) all investigative reports related to the allegations contained in a specified grievance; 3) all tapes of witness interviews, including audio and video; and 4) an electronic copy of the requestor's Outlook files, including calendar. You state the department has released or will release some of the requested information to the requestor. You state the department will redact certain information pursuant to section Open Records Decision No. 684 (2009).<sup>1</sup> You also state the department will withhold some of the requested information pursuant to the previous determination issued to the department by this office in Open Records Letter No. 2010-18849 (2010).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117,

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<sup>1</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

<sup>2</sup>Open Records Letter No. 2010-18849 serves as a previous determination authorizing the department to withhold information furnished to or created or gathered by the department that is related to cases or suspected cases of diseases or health conditions under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code, unless the release provisions of section 81.046 are applicable or the requestor has a right of access under any other provision of law.

and 552.130 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we note portions of the submitted information, which we have marked, are subject to the previous determination issued by this office in Open Records Letter No. 2012-01589 (2012). As we have no indication that the law, facts, or circumstances on which this prior ruling was based have changed, the department must continue to rely on this ruling as a previous determination and withhold or release any previously ruled upon information in accordance with this prior ruling.<sup>5</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider arguments for the information not subject to the previous determination.

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 exception encompasses information other statutes make confidential. You claim section 552.101 in conjunction with section 88.002 of the Health and Safety Code, which provides in part:

(a) Except as specifically authorized by this chapter, reports, records, and information furnished to a health authority, a regional director, or the department that relate to cases or suspected cases of children with blood lead levels of concern or lead poisoning are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of childhood lead poisoning and children with blood lead levels of concern are not public information under [the Act] and may not be released or made public on subpoena or otherwise except as provided by this chapter.

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<sup>3</sup>We note you have marked some of the information under section 552.117 of the Government Code. Thus, we understand you raise this section as an exception to disclosure of that information.

<sup>4</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

<sup>5</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

(c) Medical, epidemiologic, or toxicologic information may be released:

- (1) for statistical purposes if released in a manner that prevents the identification of any person;
- (2) with the consent of each person identified in the information;
- (3) to medical personnel, appropriate state agencies, health authorities, regional directors, and public officers of counties and municipalities as necessary to comply with this chapter and related rules;
- (4) to appropriate federal agencies, such as the Centers for Disease Control and Prevention of the United States Public Health Service, except that the information must be limited to the information requested by the agency; or
- (5) to medical personnel to the extent necessary in a medical emergency to protect the health or life of the child identified in the information.

Health & Safety Code § 88.002(a)-(c). You contend Exhibit E is confidential under section 88.002. You indicate the information at issue pertains to an investigation by the department of cases or suspected cases of childhood lead poisoning and children with blood lead levels of concern. You do not indicate any release provision of section 88.002(c) is applicable in this instance. Based on your representations and our review of the information at issue, we conclude the department must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 88.002(b) of the Health and Safety Code.

Section 552.107(1) of the Government Code 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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, 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 state the information you marked within Exhibit B, as well as the information you have marked in Exhibit D, consists of communications involving attorneys for the department, legal staff, and department employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the department. You state these communications were confidential, and you state the department has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you marked within Exhibit B and the information you have marked in Exhibit D. However, we note several of the individual e-mails contained in the otherwise privileged e-mail strings are communications with individuals whom you have not shown to be privileged parties. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1).

You claim the information you have marked in Exhibit C is 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). Section 552.111 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. 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). 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).

You state the information you have marked in Exhibit C consists of communications between department employees involving the discussion of policy issues of the department. You assert this information constitutes advice, opinions, or recommendations pertaining to the department's decision-making process. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to the information we have marked. Therefore, the department may withhold the information we have marked in under section 552.111 of the Government Code. However, the remaining information you have marked in Exhibit C consists of factual information that does not constitute advice, opinion, or recommendations. Accordingly, the department may not withhold the remaining information in Exhibit C under section 552.111.

In summary, the department must continue to rely on Open Records Letter No. 2012-01589 as a previous determination and withhold or release any previously ruled upon information in accordance with this prior ruling. The department must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 88.002(b) of the Health and Safety Code. The department may withhold the information you have marked in Exhibit B and the information you have marked in Exhibit D under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1). The department may withhold the information we have marked in Exhibit C under section 552.111 of the Government 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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VEB/dls

Ref: ID# 444536

Enc. Submitted documents

c: Requestor  
(w/o enclosures)