ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2012

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-01846

Dear Mr. Connelly:

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# 444542 (DSHS File: 19593/2012).

The Texas Department of State Health Services (the "department") received a request for specified e-mails, including attachments, sent or copied to the requestor by a named employee during a specified time period. You state some of the requested information has been or will be made available to the requestor. 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 Record Letter No. 2010-18849 (2010).[1] In addition, you state the department will withhold certain information pursuant to the previous determination issued by this office in Open Records Decision No. 684 (2009).[2] You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the

[1]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.

[2]We note Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision.

Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we marked, is not responsive to the request because it was not sent within the specified time period. This decision does not address the public availability of the non-responsive information and that information need not be released in response to the present request.

Next, we note portions of the responsive information, which we have marked, are subject to the previous determination issued by this office in Open Records Letter No. 2012-01709 (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.[3] *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 responsive information not subject to the previous determination.

Section 552.107(1) of the Government Code protects information coming 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. 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 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 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)(A), (B), (C), (D), (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

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[3]As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

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. *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).

You raise section 552.107 for most of the information at issue. You inform us this information consists of communications between department attorneys, department employees in their capacities as clients, and a human resources specialist with the Texas Health and Human Services Commission (the "HHSC"), which provides human resources services to the department pursuant to state law.[4] You state these communications were made for the purpose of soliciting or providing legal advice to the department regarding personnel issues involving the department. You also state these communications were not intended to be and have not been disclosed to third persons. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the department may withhold this information, which you have marked, under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code 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 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

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[4]Section 531.0055 of the Government Code provides the HHSC is responsible for providing human resources services to health and human services agencies, which includes the department. *See* Gov't §§ 531.0055, 521.001(4).

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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

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.

You assert the remaining information at issue contains the advice, opinions, and recommendations of managers of the department's Regulatory Services Environmental Consumer Safety Section regarding broad issues of agency resource allocation and prioritization of responsibilities. We note this information consists of various e-mails without attachments. Upon review, we conclude that none of the information at issue constitutes a draft of a policy document; thus, no portion of the this information may be withheld on that basis. However, based on your representations and our review, we find that you have established that the deliberative process privilege is applicable to some of the remaining information at issue. Therefore, the department may withhold this information, which we have marked, under section 552.111 of the Government Code. We conclude, however, that the remaining information at issue is purely factual in nature. Accordingly, the department may not withhold any of this information under section 552.111. As you raise no other exceptions to disclosure of the remaining information at issue, it must be released.

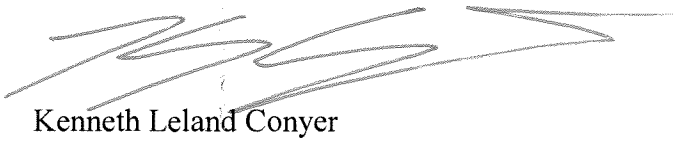
In summary, the department must continue to rely on Open Records Letter No. 2012-01709 as a previous determination and withhold or release any previously ruled upon information

in accordance with this prior ruling. The department may withhold the responsive information you marked under section 552.107(1) of the Government Code. The department also may withhold the responsive information we marked under section 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

Ref: ID# 444542

Enc. Submitted documents

c: Requestor
(w/o enclosures)