



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2012

Mr. Reg Hargrove
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2012-03344

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Texas Government Code. Your request was assigned ID# 449733 (PIR No. 12-32573).

The Office of the Attorney General (the "OAG") received a request for "emails, faxes, notes, or other correspondences received by, send [sic] from, or retained by the [OAG] regarding the matter: *ML-439094-11*, Complaint of Overcharges[.]" You state that most of the information that is responsive to this request has been made available to the requestor. You claim that some of the remaining responsive information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Texas Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right to privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would

¹We assume this representative sample is truly representative of the requested records as a whole. 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.

be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure under common-law privacy. *See, e.g.*, Tex. Att’y Gen. ORD-455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find that the information at issue is highly intimate or embarrassing and of no legitimate concern to the public. Therefore, the OAG must withhold the information you have marked under section 552.101 of the Texas Government Code in conjunction with the common-law right to privacy.

Next, you assert that some of the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. The purpose of section 552.111 is to protect advice, opinions, and recommendations 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); Tex. Att’y Gen. ORD-538 (1990) at 1-2.

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 that 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* Tex. Att’y Gen. ORD-615 (1993) 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.*; *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* Tex. Att’y Gen. ORD-631 (1995) at 3. Additionally, section 552.111 does not generally except from disclosure purely factual information that is 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.); Tex. Att’y Gen. ORD-615 at 4-5.

This office has also concluded that 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* Tex. Att’y Gen. ORD-559 (1990) at 2 (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 state that some of the remaining information consists of letter drafts pertaining to the “OAG’s policy of reviewing, investigating, and making determinations on complaints of PIA overcharges uniformly and consistently.” You also state that the letter has been publically released in its final form. Based upon your representations and our review, we conclude that the letter drafts, which you have marked, may be withheld under section 552.111 of the Government Code.

Finally, you assert that some of the remaining information is excepted from disclosure under section 552.107(1) of the Government Code, which 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. *Tex. Att’y Gen. ORD-676 (2002)* at 6-7. 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, pet. denied) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). 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, 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, no pet.). 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 state that the remaining information includes a tracking sheet that was transmitted between OAG attorneys and another OAG employee “for the purpose of legal review and analysis” and “for the purpose of providing professional legal services to the OAG.” You

also state that the tracking sheet was not intended to be, nor has it been, disclosed to non-privileged parties. Based on your representations, we conclude that the tracking sheet is subject to the attorney-client privilege and may be withheld under section 552.107 of the Government Code.

In summary, the OAG must withhold the information you have marked under section 552.101 of the Texas Government Code in conjunction with the common-law right to privacy. The OAG may withhold the information you have marked under sections 552.107 and 552.111. The remainder of the submitted information must be released to the requestor.

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,



James A. Person III
Assistant Attorney General
General Counsel Division

JAP/sdk

Ref: ID# 449733

Enc. Submitted documents

c: Requestor
(w/o enclosures)