



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 25, 2012

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

OR2012-09775

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# 457026.

The Texas Health and Human Services Commission (the "commission") received a request for certain information pertaining to section 380.207 of Title 1 of the Texas Administrative Code.<sup>1</sup> You state you are releasing some responsive information. You also state you "could locate no documents responsive to the first inset paragraph of [the requestor's] request."<sup>2</sup> You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</sup>See 1 TAC § 380.207 (providing for program limitations with respect to the commission's Medical Transportation Program).

<sup>2</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

You seek to withhold the information submitted in Exhibit B and the marked information in Exhibit C 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 Exhibit B and the marked information in Exhibit C consist of communications between commission attorneys and commission employees 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 a party 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 Exhibit B and the marked information in Exhibit C under section 552.107(1) of the Government Code.

You claim the non-privileged e-mail messages in Exhibit B and the marked draft documents in Exhibit C 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 Exhibit B contain advice, opinions, and recommendations pertaining to the commission's policymaking process. The e-mail messages consist of communications between a commission employee and a

representative of a third-party client of the commission. You have not explained how the commission shares a privity of interest or common deliberative process with the third-party client. 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 Exhibit B under section 552.111 of the Government Code.

You contend the marked draft documents submitted in Exhibit C consist of advice, recommendations, and opinions of commission attorneys and employees concerning section 380.207. 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 attorneys and employees regarding the policy issues. 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 marked draft documents in Exhibit C under section 552.111 of the Government Code.

We note some of the remaining information in Exhibit C is subject to section 552.137 of the Government Code.<sup>4</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The remaining information contains e-mail addresses of members of the public. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners consent to their release.

In summary, the commission may generally withhold the e-mail strings and attachments in Exhibit B and the marked information in Exhibit C 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 marked draft documents in Exhibit C under section 552.111 of the Government Code. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners consent to their release. 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.

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

A handwritten signature in cursive script that reads "Sean Opperman".

Sean Opperman  
Assistant Attorney General  
Open Records Division

SO/som

Ref: ID# 457026

Enc. Submitted documents

c: Requestor  
(w/o enclosures)