



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2012

Ms. Thao La
Senior Attorney
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2012-14728

Dear Ms. La:

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# 465556.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district") received a request for all e-mails sent or received by a named individual during a specified time period.¹ You inform us the district will redact information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.² You also state the district will redact certain information under sections 552.130(c)

¹You state the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c).

and 552.136(c) of the Government Code.³ You state the district will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴ We have also received and considered comments from a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information protected by other statutes, such as section 161.032 of the Health and Safety Code, which provides, in relevant part,

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

³Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

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

Health & Safety Code § 161.032(a), (c), (f). For purposes of this confidentiality provision, a “medical committee” includes any committee, including a joint committee, of . . . a hospital [or] a medical organization [or] hospital district[.]” *Id.* § 161.031(a). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical organization [or] hospital district . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services[.]” *Id.* § 161.0315(a).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See, e.g., Mem’l Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential. *Mem’l Hosp.*, 927 S.W.2d at 10 (quoting *Jordan*, 701 S.W.2d at 647-48); *Doctor’s Hosp. v. West*, 765 S.W.2d 812, 814 (Tex. App.—Houston [1st Dist.] 1988) (same). This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other statutes, statutory predecessor to section 161.032).

You inform us the district’s board of managers (the “board”) is appointed by the Dallas County Commissioners Court to carry out fiduciary and statutory responsibilities in managing, controlling, and administering the district. You state the board’s duties include “establish[ing] and maintain[ing] the process for credentialing, privileging, and evaluating the medical and allied health professional staff,” as well as “establish[ing], support[ing], and oversee[ing] a system-wide performance improvement program.” You state as part of the district’s Performance Improvement Plan, the board provides authority to hospital administrative leaders and medical staff members to establish and support medical committees necessary to carry out quality and performance improvement activities system-wide. You state the district’s Patient Safety and Risk department (the “department”) was organized under this structure, serves as the administrative agent of the overall quality assurance and improvement system, and carries out the functions of this aspect of the board’s duties. You also inform us the district’s Medical Executive Committee (the “committee”) is responsible for making final recommendations to the board on matters of peer review, credentialing and privileging of physicians, medical staff rules and regulations, changes to medical staff bylaws, and hospital quality and safety. You inform us a number of quality- and safety-related subcommittees report to the committee. Upon review, we find the department and the committee are medical committees within the meaning of section 161.032 of the Health and Safety Code.

You state the information you marked as Exhibit C-4A consists of records of the department and of the committee. You state the information in these documents forms the basis for the deliberative, peer review, and medical committee activities of these committees. You state some of the information reflects the internal and deliberative processes for handling

and investigation of patient complaints, and includes supporting documentation, notes, and e-mails. You also state some of the information at issue consists of records documenting and reflecting the internal and deliberative processes and procedures of the committee. You inform us the committee or its *ad hoc* subcommittee performed an investigation, remediation, and follow-up activities regarding the subject of the information at issue, and you state the documents at issue were reviewed, relied upon, or created by a member of the committee or its subcommittee. Based on your representations and our review, we agree the information you marked as Exhibit C-4A consists of confidential records of medical committees under section 161.032 of the Health and Safety Code. Thus, we conclude the district must withhold the information marked as Exhibit C-4A under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.⁵

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, 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

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

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 as Exhibit C-2 consists of communications involving attorneys for the district and district administration and staff in their capacities as clients, as well as with consultants in collaboration with the University of Texas Southwestern Medical Center, which you state is a collaborative partner of the district, and is a privileged party. You state these communications were made for the purpose of facilitating the rendition of professional legal services or legal guidance to the district. You state these communications were confidential, and you state the district 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 Exhibit C-2. Accordingly, the district may generally withhold Exhibit C-2 under section 552.107(1) of the Government Code.⁶ We note one of the individual e-mails contained in the otherwise privileged e-mail strings is a communication with individuals whom you have not shown to be privileged parties. Thus, to the extent this non-privileged e-mail, which we have marked, exists separate and apart from the e-mail string in which it is submitted, it may not be withheld under section 552.107(1).

Next, you claim section 552.111 of the Government Code for the information you have marked as Exhibit C-3, including the non-privileged e-mail within Exhibit C-2. Section 552.111 excepts from disclosure “[a]n 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. 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 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

⁶As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 631 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority). When determining if an interagency communication is excepted from disclosure under section 552.111, we must consider whether the agencies between which the communication was passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

You state the information at issue consists of internal communications, discussion, analyses, and recommendations among district executive leaders, staff, commissioned consultants, and the University of Texas Southwestern Medical Center, which, as noted above, is a collaborative partner of the district, and thus shares a privity of interest and common deliberative process. You explain this information pertains to quality and improvements of care and operations process design, personnel matters of broad scope, clinical service lines, types and quantities of services, and policy-making events. Thus, you state the information at issue consists of advice, opinions, and recommendations of the district pertaining to its policymaking functions. Based on your representations and our review of the information at issue, we find the district has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the district that may be withheld under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is purely factual information and does not consist of advice, opinion, or recommendation pertaining to policymaking, or has been shared with individuals with whom you have not demonstrated the district shares a privity of interest. Thus, we find you have failed to show how the remaining information

at issue consists of advice, opinions, or recommendations on the policymaking matters of the district. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

In summary, the district must withhold the information marked as Exhibit C-4A under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The district may generally withhold Exhibit C-2 under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mail exists separate and apart from the e-mail string in which it is submitted, it may not be withheld under section 552.107(1). The district may withhold the information we marked within Exhibit C-3 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, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 465556

Enc. Submitted documents

c: Requestor
(w/o enclosures)