



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 12, 2012

Mr. Timothy C. Shaw  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2012-16371

Dear Mr. Shaw:

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# 466515 (OGC# 144778).

The University of Texas System (the "system") received a request for information related to the Dallas County Indigent Care Corporation ("DCICC") for a specified time period. You state you will release some of the requested information to the requestor. You claim some of the submitted information is not subject to the Act. Additionally, you claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered your submitted arguments and reviewed the submitted information.

Initially, we address your contention that a portion of the submitted information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the

governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

You state a portion of the submitted information consists of “executed agreements between third parties in which [the system] is not a party.” You assert this information was not carried out in connection with the official business of the system. The information that you state is not subject to the Act consists of an executed agreement related to the creation and operation of DCICC. However, the system has a contract with DCICC, in which it provides medical care to hospital patients. Thus, we find the information at issue pertains to the system’s relationship with DCICC and relates to official business of the system. Accordingly, the information at issue was collected or assembled or is maintained in connection with the transaction of official system business; thus, it constitutes “public information” as defined by section 552.002(a). Therefore, the information at issue is subject to the Act and must be released, unless it falls within an exception to public disclosure under the Act. *See* Gov't Code § 552.305(b). As no further arguments are made against the disclosure of this information, it must be released, and we will address your arguments against disclosure under the Act for the entirety of the remaining information.

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 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). 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. *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 information you have marked under section 552.107 consists of communications involving system attorneys, legal staff, and system employees and officials in their capacities as clients, as well as attorneys and staff for various members of the DCICC. You state these communications were made in furtherance of the rendition of professional legal services to the system. You assert these communications were confidential, and you state the system has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have generally demonstrated the applicability of the attorney-client privilege to the marked information.

However, we note some of these e-mail strings include e-mails received from or sent to non-privileged parties, including attorneys and staff for various DCICC participants, as well as the Texas Department of Health and Human Services Commission (the “commission”). With regard to the communications from the commission, we find the commission was acting in its regulatory capacity in its dealings with the DCICC participants and did not share a common-interest with the DCICC or with the system. Additionally, we find you have failed to demonstrate how any of the parties listed in the remaining information at issue, including the DCICC participants, shared a common interest that would allow the attorney-client privilege to apply to the communications. *See TEX. R. EVID. 503(b)(1)(c); In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)).

Accordingly, if the e-mails received from or sent to these non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the instant requests for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the system separate and apart from the otherwise privileged e-mail strings in which they appear, then the system may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. However, the system may withhold the remaining information it has marked under section 552.107(1) of the Government Code.<sup>1</sup>

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<sup>1</sup>As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

Section 552.111 of the Government Code 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. 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); *see also* 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 that section 552.111 excepts only those internal communications that consist of advice, opinions, recommendations 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. *See id.*; *see also City of Garland v. The 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).

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. 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 id.*

You state the information you have marked consists of communications between system attorneys, system employees and officials, and attorneys and employees of DCICC participants. You state these communications relate to policymaking matters. Based on your representations and our review, we find the system may withhold the information we have marked under section 552.111 of the Government Code. However, we note some of the

information at issue contains communications between system employees and DCICC participants and their attorneys, as well as a communication from the commission. As previously noted, we find the system does not share a privity of interest or common deliberative process with regard to this information. Further, you have not demonstrated the remaining information at issue contains advice, opinion, or recommendations pertaining to policymaking. Consequently, the system may not withhold the remaining information at issue under section 552.111 of the Government Code.

Finally, to the extent the communications and attachments we have marked exist separate and apart from the otherwise attorney-client privileged e-mail chains, portions of the non-privileged communications contain e-mail addresses that may subject to section 552.137 of the Government Code.<sup>2</sup> Section 552.137 provides “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Subsection 552.137(c)(1) provides subsection 552.137(a) does not apply to an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent[.]” *Id.* § 552.137(c)(1). Additionally, section 552.137(c)(3) provides an e-mail address “provided to a governmental body in the course of negotiating the terms of a contract or potential contract” may not be withheld under section 552.137. *See* Gov’t Code § 552.137(c)(3). We have marked e-mail addresses that must be withheld under section 552.137, unless the owners consent to their disclosure.<sup>3</sup> However, to the extent the personal e-mail addresses at issue fall under the exceptions listed under subsection 552.137(c), the marked e-mail addresses may not be withheld under section 552.137.

In summary, with the exception of the non-privileged e-mails we have marked for release and to the extent the non-privileged e-mails we have marked do not exist separate and apart from the e-mail strings in which they appear, the system may withhold the information you have marked under section 552.107(1) of the Government Code. The system may withhold the information we have marked under section 552.111 of the Government Code. In the event the non-privileged communications we have marked are maintained by the system separate and apart from the otherwise privileged e-mail strings in which they appear, the system must withhold the marked e-mail addresses under section 552.137 of the Government Code unless

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<sup>2</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).

<sup>3</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

these e-mail addresses are excluded by subsection (c) or the owners consent to their disclosure. 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

VB/dls

Ref: ID# 466515

Enc. Submitted documents

c: Requestor  
(w/o enclosures)