



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2012

Ms. Prema Gregerson
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767

OR2012-19145

Dear Ms. Gregerson:

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# 470868.

The Travis County Healthcare District d/b/a Central Health (the "district") received a request for (1) the names of and amounts paid to consultants and attorneys assisting the district with the 1115 waiver, Senator Kirk Watson's "10 Goals in 10 Years" initiative, the IDS and tax election, and the ratification election and (2) written correspondence between Senator Watson, district board members, and Seton Healthcare Family ("Seton") regarding the proposed medical school, teaching hospital, 1115 waiver, tax election, and Senator Watson's "10 Goals in 10 Years" initiative. You state the district has released some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code.¹ You also state release of this information may implicate the proprietary interests of Seton. Accordingly, you state, and provide documentation showing, you notified Seton of the request for information and of its right to submit arguments to this office as to why the information at issue should

¹Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 (2002), 677 (2002). The proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See id.*

not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You also state release of the remaining requested information may implicate the interests of Senator Watson. Accordingly, you state, and provide documentation showing, you have notified Senator Watson of the request for information and of his right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Seton. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the district's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). In this instance, the district received the instant request on August 24, 2012. Accordingly, the district's fifteen-business-day deadline was September 17, 2012. On September 17, 2012, you provided arguments for your claimed exceptions and submitted information you state is a representative sample. We note the district submitted additional responsive documents on November 26, 2012. The information submitted on September 17, 2012 consists only of internal communications between attorneys for the district, district employees, and district officials. However, the information you submitted on November 26, 2012 consists of communications between the district, Seton, a consultant for the district, and other third parties. We note the arguments you provided on September 17, 2012 did not explain the district's relationship with Seton. Although you state the information submitted on September 17, 2012 is a representative sample, we find the information you timely submitted on September 17, 2012 is not representative of the information you submitted on November 26, 2012. Accordingly, we find the district failed to comply with the requirements of section 552.301 of the Government Code with regard to the information and arguments submitted on November 26, 2012.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make

compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise sections 552.104 and 552.111 of the Government Code for the information submitted on November 26, 2012, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions including section 552.111), 592 (1991) (stating that governmental body may waive section 552.104). Thus, in failing to comply with the procedural requirements of section 552.301, you have waived your claims under sections 552.104 and 552.111 with respect to the information submitted on November 26, 2012, and district may not withhold any of the information submitted on November 26, 2012 under these exceptions. However, because third party interests can provide compelling reasons for non-disclosure under section 552.302, we will address Seton's arguments against disclosure of the information submitted on November 26, 2012. We will also address your arguments under sections 552.104, 552.107, and 552.111 for the information you timely submitted on September 17, 2012.

Next, we note Seton seeks to withhold information the district has not submitted for our review. This ruling does not address information beyond what the district has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the district submitted as responsive to the request for information. *See id.*

The district and Seton claim some of the submitted information is protected by the attorney-client privilege. Section 552.107(1) excepts from disclosure "information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct[.]" *Id.* § 552.107(1). Section 552.107(1), however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 522 (1989) (discretionary exceptions intended to protect only interests of governmental body as distinct from exceptions intended to protect information deemed confidential by law or interests of third parties). As the district does not seek to withhold the memorandum Seton seeks to withhold pursuant to section 552.107(1), we find section 552.107(1) of the Government Code is not applicable to this information, and the district may not withhold any of this information on that basis. *See* ORD 676. However, we will consider the district's arguments against disclosure of the information it seeks to withhold under section 552.107(1). 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. *Id.* at 6-7. 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).

The district explains Exhibits 7 and 10 of the information submitted on September 17, 2012 constitute confidential communications between attorneys for the district, district employees, and district officials that were made in furtherance of the rendition of professional legal services to the district. You inform us these communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Therefore, the district may withhold the information we have marked under section 552.107(1) of the Government Code.²

²As our ruling is dispositive, we do not address the district’s remaining arguments to withhold this information.

Seton seeks to withhold the memorandum it indicated under the work product privilege. We address the work product privilege under section 552.111 of the Government Code, which 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[.]”³ Gov’t Code § 552.111. Section 552.111 is a discretionary exception to public disclosure that protects a governmental body’s interests, and not those of a third party, and may be waived. *See id.* § 552.007; Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived). Therefore, because the district does not raise the work product privilege in conjunction with section 552.111 for the memorandum Seton seeks to withhold, this information may not be withheld under the work-product privilege.

The district seeks to withhold the remaining information submitted on September 17, 2012 under the deliberative process privilege under section 552.111. As previously noted, 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. 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 (1993), 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).

³We note the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See* ORDs 676, 677.

You assert the remaining information submitted on September 17, 2012 consists of the advice, opinions, and recommendations of district staff regarding the district's role in financing a medical school and new teaching hospital and the creation and funding of the new healthcare delivery system. You assert this information represents the policymaking processes that relate to the mission of the district. Upon review, we find you have established the information we have marked consists of the advice, opinion, and recommendation of the district. Thus, the district may withhold the information we have marked under section 552.111 of the Government Code.⁴ However, we find the remaining information submitted on September 17, 2012 consists of general administrative or purely factual information. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the remaining information at issue. Consequently, the district may not withhold any of the remaining information submitted on September 17, 2012 under section 552.111 of the Government Code.

You claim some of the remaining information submitted on September 17, 2012 is excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state, as the owner of University Medical Center Brackenridge in Travis County ("UMCB"), the district has specific marketplace interests, which include a market share of the commercially insured, publically insured, and uninsured. You state the district has a duty to keep these and other elements of its market share in proper balance to maintain economic viability. You explain the creation of a medical school, the expansion of academic medicine, and the rebuilding or remodeling of UMCB are influenced by competitive market forces. You assert that releasing the district's planning, financial, and strategic positions with regard to future changes to current contractual arrangements would risk the district's ability to maintain balance of its market share. You further state the district is playing a role in an

⁴As our ruling is dispositive, we do not address the other arguments to withhold this information.

initiative that examines the role of UMCB and the development of a medical school in Austin. You indicate the information you have marked in the September 17, 2012 information pertains to the district's consideration of its financial commitment, if any, its role in the process, and internal assessments of its strengths and weaknesses relative to other potential participants in the initiative. You state release of this information would take away the district's ability to competitively negotiate, which could potentially put a greater financial burden on Travis County tax payers. However, upon review, we find the district has failed to demonstrate release of the information at issue would cause specific harm to the district's marketplace interests. Consequently, the district may not withhold any of the remaining information submitted on September 17, 2012 under section 552.104 of the Government Code.

Seton asserts the information submitted on November 26, 2012 is excepted from disclosure under section 552.110(b) of the Government Code, which excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm)*. Upon review of the information at issue and Seton's arguments, we find Seton has established some of its financial information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, the district must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Seton has made only conclusory allegations that the release of any of its remaining information would result in substantial damage to the company's competitive position. Thus, Seton has not demonstrated that substantial competitive injury would result from the release of any of its remaining information at issue. *See id.* Therefore, the district may not withhold any of the remaining information submitted on November 26, 2012 pursuant to section 552.110(b).

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code.⁵ 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). *See Gov't Code § 552.137(a)-(c)*. The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have

⁵The 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).

marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.⁶

In summary, the district may withhold the information we have marked under section 552.107(1) and section 552.111 of the Government Code. The district must withhold the information we have marked under section 552.110(b) of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 470868

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note Open Records Decision No. 684 (2009) was issued as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

**The Honorable Kirk Watson
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