ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2012

Ms. Jordan Hale
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2012-19868

Dear Ms. Hale:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. This request was originally received by the Open Records Division of this office and assigned ID# 474544 (PIR No. 12-34383). Preparation of the ruling has been assigned to the Opinion Committee of this office.

The Office of the Attorney General (the "OAG") received a request for information related to the Attorney General's decision to no longer accept submissions under the Act to the OAG Open Records Division by fax or email. You state that you will release and make available for inspection some of the information that is responsive to this request upon payment of costs. *See* TEX. GOV'T CODE ANN. § 552.2615 (West 2012). You claim that the remainder of the information is excepted from disclosure under sections 552.106, 552.107, 552.111, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted under the tab marked "Exhibit B."

Because you assert that most of the submitted documents within Exhibit B constitute privileged attorney-client communications under section 552.107 of the Government Code, we address this assertion first. Section 552.107(1) 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. 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. *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 satisfy 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)(A)-(E). 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.* 503(b)(1), 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 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 information within Exhibit B that you have marked under section 552.107 constitutes internal communications between OAG attorneys and personnel made for the purpose of providing professional legal services to the OAG. You also state that the marked communications were not intended to be disclosed to non-privileged parties and have not been disclosed to non-privileged parties. Based on your representations and our review, we find that some of the information you have marked under section 552.107 constitutes attorney-client communications made in furtherance of the rendition of legal services. Therefore, we conclude that the OAG may withhold the information we have marked under section 552.107 of the Government Code. You have asserted additional exceptions to disclosure as to the remaining information, so we next consider whether section 552.111 applies to the information you have marked under that section.

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." TEX. GOV'T CODE ANN. § 552.111 (West 2012). This exception encompasses the deliberative process privilege. Tex. Att'y Gen. ORD-615 (1993) at 2. The purpose of this privilege is to protect advice, opinion, and recommendation in the decisional process and to encourage

open and frank discussion in the deliberative process. *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Tex. Att'y Gen. ORD-538 (1990) at 1–2. In Open Records Decision 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, and opinions that reflect the policymaking processes of the governmental body. Tex. Att'y Gen. ORD-615 (1993) at 5. On the other hand, 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 of the Government Code 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. Tex. Att'y Gen. ORD-631 (1995) at 3. Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. Tex. Att'y Gen. ORD-615 (1993) 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. Tex. Att'y Gen. ORD-313 (1982) at 3. We note that section 552.111 can encompass communications between or among parties who share a privity of interest or common deliberative process. Tex. Att'y Gen. ORD-561 (1990) at 9.

We also have concluded that 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* 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 all of the contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will subsequently be released to the public in its final form. *See id.* at 2.

You have labeled the information that the OAG seeks to withhold under section 552.111. You state that some of the information you have marked constitutes drafts of policymaking documents intended for release in their final form. You explain that the drafts were made in furtherance of the OAG's policy of maintaining uniformity in the application, operation, and interpretation of the Act and that they reflect the deliberative process of OAG policymakers. You state that the information marked as drafts under section 552.111 has been released publicly in its final form. Thus you assert that the documents you have marked as drafts under section 552.111 may be withheld in their entirety. You also state that other information you have marked under section 552.111 reveals the deliberative process of policymakers within the OAG. You explain that such information consists of advice, recommendations, and opinions of OAG attorneys and personnel regarding the OAG's

electronic filing system. You state that all of these deliberations were made in furtherance of the OAG's policy of maintaining uniformity in the application, operation, and interpretation of the Act. Thus you assert that the specific information you have marked under the deliberative process privilege may be withheld from public disclosure under section 552.111. In some instances you have asserted both the draft and the deliberative process aspects of the 552.111 privilege for the same document.

Based on your representations and our review, we find that most of the information you have marked under section 552.111 constitutes advice, opinion, and recommendations of OAG attorneys and staff regarding policymaking matters of the OAG. Therefore, the OAG may withhold the specific information, or documents in their entirety, as the case may be, under section 552.111 of the Government Code in accordance with our notations. However, with respect to a one-page open records ruling tracking sheet, for which you have asserted both the draft and the deliberative process aspects of the section 552.111 privilege, as well as the attorney-client privilege under section 552.107(1), we find that you have not demonstrated how the document constitutes either (1) advice, opinion, and recommendations of OAG attorneys and staff regarding policymaking matters, (2) a draft of a policymaking document intended for release in its final form, or (3) attorney-client communication made in furtherance of the rendition of legal services. Therefore, we conclude that you must release the open records ruling tracking sheet to the requestor.

Next, we address your assertion under section 552.139 of the Government Code. Section 552.139(a) of the Government Code provides:

> (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

TEX. GOV'T CODE ANN. § 552.139(a) (West 2012). You state that the information marked in Exhibit B under section 552.139 relates to computer network security for purposes of section 552.139(a). Pursuant to the provisions in section 552.305 of the Government Code, when a governmental body receives a request that may implicate the proprietary interests of a third party, the governmental body may decline to release the requested information and seek a ruling from the Open Records Division. *Id.* § 552.305. Accordingly, you tell us that you have notified Texas NICUSA, LLC of the request and of its right to submit arguments to this office as to why its information should not be released. As of the date of this letter, we have not received comments from Texas NICUSA, LLC on why the company's submitted information should not be released. However, based on your representations and our review, we find that the information we have marked relates to computer network security and the design, operation, or defense of a computer network. Therefore, we conclude that the OAG may withhold the information we have marked under section 552.139(a) of the Government Code.

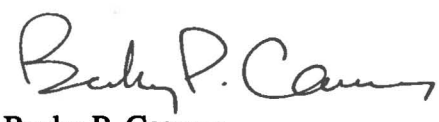
Finally, you assert that some of the documents in Exhibit B are excepted from disclosure under section 552.106 of the Government Code. For each document you marked under section 552.106, you also asserted exceptions to disclosure under sections 552.107 and 552.111. Because we have already ruled that you may withhold those documents from disclosure under either 552.107 or 552.111, we need not address the exception you raise under section 552.106.

In summary, the OAG may withhold the information we have marked under sections 552.107, 552.111, and 552.139 of the Government Code. We have marked a single page (the open records ruling tracking sheet) that does not fall within the exceptions to disclosure you claimed. Accordingly, the OAG must release this page 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,



Becky P. Casares
Assistant Attorney General
Opinion Committee

BPC/sdk

Ref: ID# 474544

Enc: Submitted documents

c: Requestor
(w/o enclosures)