



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2013

Mr. James E. Cousar
For the Central Texas Community Health Centers
Thompson & Knight L.L.P.
98 San Jacinto Boulevard, Suite 1900
Austin, Texas 78701

OR2013-14913

Dear Mr. Cousar:

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# 497637.

The Central Texas Community Health Centers ("CommUnityCare"), which you represent, received a request for (1) specified resignation letters; (2) contact information of CommUnityCare board members; (3) specified motions and resolutions approved by CommUnityCare board members; and (4) any documents, e-mails, reports, recommendations, or correspondence regarding the hiring of a CEO. You state you have released information responsive to items one, two, and three of the request and some information responsive to item four. You further state you will redact e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also state release of a portion of the submitted information may implicate the proprietary interests of Premier Purchasing Partners, L.P. ("Premier"). Accordingly, you notified Premier of the request and of its right to submit arguments to this office explaining why the information should not be released. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney

¹Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Premier. We have considered the submitted arguments and reviewed the submitted information, some of which you state is a representative sample.²

Initially, Premier contends its information is not responsive to the present request for information. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, CommUnityCare has reviewed its records and determined the documents at issue are responsive to the request. Thus, we find CommUnityCare has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether CommUnityCare must release the submitted information to the requestor under the Act.

A portion of the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. *See* Gov't Code § 552.022(a)(1). A portion of the submitted information, which we have marked, consists of a completed report and is subject to section 552.022(a)(1). Although you raise section 552.111 of the Government Code for this information, that section is a discretionary exception to disclosure that protects a governmental body's interests and does not make information confidential under the Act. *See* Open Records Decision Nos. 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the completed report may not be withheld under section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022(a)(1), and the other exceptions you raise for the information that is not subject to section 552.022(a)(1).

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under

²We 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 that those records contain substantially different types of information than that submitted to this office.

rule 192.5 only to the extent it implicates the core work product aspect of the work product privilege. See ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. See TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. See *Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorneys or an attorney's representative. See TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). See *Pittsburgh Corning Corp.v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You generally claim the completed report subject to section 552.022(a)(1) is protected by the attorney work product privilege. Upon review, we find you have failed to demonstrate how the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Accordingly, CommUnityCare may not withhold the completed report under Texas Rule of Civil Procedure 192.5.

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 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 contend the information you have marked under section 552.107 consists of attorney-client privileged communications between CommUnityCare’s general counsel, board of directors, and a consultant hired by CommUnityCare. You explain the consultant, Exeter Group, is an external executive search firm that was hired to assist CommUnityCare regarding the hiring of a new CEO. You state these communications were made to provide legal advice or guidance to CommUnityCare officials within the course and scope of their official duties or employment. You further state the communications have been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, CommUnityCare may withhold the information you have marked under section 552.107(1) of the Government Code.

Section 552.111 encompasses the attorney work product privilege. *See* Gov’t Code § 552.111. Section 552.111, 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[,]” encompasses the attorney work product privilege in rule 192.5. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD No. 677 at 4-8. Section 552.111 protects work product as defined in rule 192.5(a) as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under the work product aspect of section 552.111 bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You generally claim the attorney work product privilege of section 552.111 of the Government Code for some of the remaining information not subject to section 552.022. Upon review, we find you have failed to demonstrate how any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of a party or a party's attorneys representative created for trial or in anticipation of litigation. Accordingly, CommUnityCare may not withhold any of the information at issue under the work product privilege of section 552.111 of the Government Code.

Section 552.111 of the Government Code also 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*, 22 S.W.3d 351 (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).

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 (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 at 9.

You assert some of the remaining information is protected by the deliberative process privilege under section 552.111. You contend the information you have marked consists of communications of CommUnityCare's directors and its consultant containing advice, opinions, and recommendations regarding the evaluation and selection of CommUnityCare's CEO. We note most of the information at issue includes communications with the Exeter Group, which as previously noted, is an external executive search firm that was retained by CommUnityCare to assist in the hiring of a CEO. You further state the information at issue pertains to policymaking matters and personnel matters of broad scope that affect CommUnityCare's policy. Based on your representations and our review, we find you have demonstrated the applicability of the deliberative process privilege to some of the information at issue. Thus, CommUnityCare may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information is purely factual in nature. Accordingly, CommUnityCare may not withhold any of the remaining information under section 552.111 of the Government Code.

Next, Premier informs us its information is the subject of confidentiality agreements with its members, such as CommUnityCare. We note information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Premier asserts its information consists of commercial or financial information, the release of which would cause the company substantial competitive harm. Section 552.110(b) protects “[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). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Premier contends release of its information would cause the company substantial competitive harm. Premier explains the information at issue consists of confidential contracts, prices, and other terms negotiated by Premier for its members, such as CommUnityCare, to engage the services of third-party executive recruiting firms. Upon review, we conclude Premier has established the release of the information at issue, which we have marked, would cause the company substantial competitive injury. Therefore, CommUnityCare must withhold the information we have marked under section 552.110(b).³

We note a portion of the remaining information may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, CommUnityCare must withhold the marked information under section 552.117(a)(1) of the Government Code.

In summary, CommUnityCare may withhold the information you have marked under section 552.107(1) of the Government Code and the information we have marked under

³As our ruling is dispositive, we need not address Premier’s remaining arguments against disclosure.

⁴The 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).

section 552.111 of the Government Code. CommUnityCare must withhold the information we have marked under section 552.110(b) of the Government Code. To the extent the individual whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, CommUnityCare must withhold the marked information under section 552.117(a)(1) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 497637

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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