ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2012

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

OR2012-18535

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# 469892.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district") received a request for all e-mails that a named individual sent to or received from the district's board of managers (the "board") during a specified time period. 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.[1] You also state the district will redact certain information under sections 552.130(c) and 552.136(c) of the Government Code.[2] You claim the submitted information is excepted from disclosure under

[1]Section 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).

[2]Section 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).

sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

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 district attorneys, district executive leadership, their staff, district consultants, the district's board of managers, representatives of the University of Texas Southwestern Medical Center ("UTSW"), and the Texas Department of State Health Services

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[3]We 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.

(the "department"). You state these communications were made for the purpose of facilitating the rendition of professional legal services or legal guidance to the district. You assert 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 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 and attachments received from or sent to non-privileged parties, including representatives of UTSW and the department. With regard to the communications from the department, we find the department was acting in its regulatory and did not share a common-interest with the district. Additionally, we find you have failed to demonstrate how UTSW representatives listed in the remaining information at issue 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 and attachments 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 and attachments, which we have marked, are maintained by the district separate and apart from the otherwise privileged e mail strings in which they appear, then the district may not withhold these non-privileged e mails and attachments under section 552.107(1) of the Government Code. However, the district may withhold the remaining information it has marked, which consists of communications between district attorneys, district executive leadership, their staff, district consultants, and the district's board of managers, under section 552.107(1) of the Government Code.[4]

Next, we address your argument under section 552.111 of the Government Code for the remaining information at issue, including the communications and attachments we have marked as non-privileged. Section 552.111 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.*

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[4]As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

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).

This office has also concluded that a preliminary draft of a document that is 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* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor of section 552.111). 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 the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

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 "[t]he Dallas County Commissioners Court is a Texas governmental entity, who not only approves the budget for [the district] but also appoints the [district's board]." You explain that "[c]ommunication to and from the Dallas County Judge or any of the Dallas County Commissioners are interagency, if not intraagency communications." You state the information you have marked consists of communications between district attorneys, district executive leadership, their staff, district consultants, the board, representatives of UTSW, Dallas County officials, and the department. You state these communications relate to policymaking matters. You also inform us some of the information you have marked

consists of drafts that have been released in their final form. Based on your representations and our review, we find the district may withhold the communication between district employees and officials and Dallas County officials, which we have marked, and the draft document we have marked under section 552.111 of the Government Code. However, we note the remaining information at issue includes communications between district employees and officials and UTSW and department representatives. As previously noted, we find the district does not share a privity of interest or common deliberative process with regard to this information. Furthermore, we find a portion of the remaining information at issue to be general administrative information or purely factual in nature. You have not demonstrated the remaining information at issue contains advice, opinion, or recommendations pertaining to policymaking. Consequently, the district may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

We now address your argument under section 552.101 of the Government Code for the remaining information at issue, including the communications and attachments we have marked if they exist separate and apart from the otherwise attorney-client privileged e-mail chains. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information other statutes make confidential. Section 160.007 of the Occupations Code provides, in relevant part:

> (a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.
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> . . .
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> (c) A record or proceeding of a medical peer review committee or a written or oral communication made to the committee may be disclosed to:
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> . . .
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> (4) the board; or
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> (5) the state board of registration or licensing of physicians of another state.

Occ. Code § 160.007(a), (c)(4), (c)(5). "Medical peer review" is defined by the Medical Practice Act, subtitle B of title 3 of the Occupations Code, to mean "the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners." *Id.* § 151.002(a)(7). A medical peer review committee is "a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]" *Id.*

§ 151.002(a)(8). Section 161.032 of the Health and Safety Code further provides, in relevant part:

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

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] a university medical school or health science center [or] a hospital district [.]" *Id.* § 161.031(a). Section 161.0315 provides that "[t]he governing body of a hospital, medical organization, university medical school or health science center [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 Memorial 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); *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977); *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977); *McAllen Methodist Hosp. v. Ramirez*, 855 S.W.2d 195 (Tex. App.—Corpus Christi 1993), *overruled on other grounds, Memorial Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Doctor's Hosp. v. West*, 765 S.W.2d 812 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex. App.—Fort Worth 1988, orig. proceeding). These cases establish that "documents generated by the committee in order to conduct open and thorough review" are confidential. *Jordan*, 701 S.W.2d at 647-48. This protection extends "to documents that have been prepared by or at the direction of the committee for committee purposes." *Id.* 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 statutory predecessor to section 161.032 of the

Health and Safety Code). We note that section 161.032 does not make confidential "records made or maintained in the regular course of business by a hospital[.]" Health & Safety Code § 161.032(f); *see Memorial Hosp.—The Woodlands*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business). The phrase "records made or maintained in the regular course of business" has been construed to mean records that are neither created nor obtained in connection with a medical committee's deliberative proceedings. *See McCown*, 927 S.W.2d at 9-10 (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You inform us 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. We understand 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. Upon review, we find the committee is a medical committee within the meaning of section 161.032 of the Health and Safety Code. However, upon review, we find you have failed to demonstrate how the information you have marked was not created in the regular course of business. *See McCown*, 927 S.W.2d at 10 (regular course of business means "records kept in connection with the treatment of . . . individual patients as well as the business and administrative files and papers apart from committee deliberations" and privilege does not prevent discovery of material presented to hospital committee if otherwise available and "offered or proved by means apart from the record of the committee." (quoting *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33 at 35-6 (Tex. 1977)). Therefore, we find you have not established this information is confidential under section 161.032(a) of the Health and Safety Code or section 160.007 of the Occupations Code, and the district may not withhold it under section 552.101 on that basis.

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 be subject to section 552.137 of the Government Code.[5] 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

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[5]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).

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). We have marked e-mail addresses that must be withheld under section 552.137, unless the owners consent to their disclosure.[6] 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, the district may generally withhold the marked information under section 552.107(1) of the Government Code but may not withhold the non-privileged communications and attachments we have marked if they are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear. The district may withhold the information we have marked under section 552.111 of the Government Code. The district must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless 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, 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,

Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

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[6]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.

Ref: ID# 469892

Enc. Submitted documents

c: Requestor
(w/o enclosures)