



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

December 7, 2005

Mr. Alex J. Fuller, Jr.  
Davis & Davis, P.C.  
P.O. Box 1588  
Austin, Texas 78767

OR2005-11003

Dear Mr. Fuller:

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# 237466.

The Sabine County Hospital District (the "district"), which you represent, received requests for the following information:

- (1) Information concerning retirement benefits, parties, presents, and packages for former district employees who have retired since January 1, 2004.
- (2) Information relating to the cash reserves, savings, and interest bearing instruments held by the district as of August 1, 2005.
- (3) Information relating to travel expenses incurred by the district, or any division thereof, from 2003 through 2005.
- (4) A copy of the minutes for district meetings held on September 12<sup>th</sup> and 15<sup>th</sup> of 2005.
- (5) Invoices, itemized bills along with any payments made on those bills, records, documentation, reports and any other information relating to expenses incurred by the district, or any division thereof,

for legal services performed by a named attorney and law firm for 2003 through 2005.

(6) Invoices, itemized bills along with any payments made on those bills, records, documentation, reports and any other information relating to travel expenses incurred by the district, or any division thereof, for a named attorney and any other attorney or staff member from 2003 through 2005.

You state that the information responsive to request numbers 1, 2, 3, and 4 has been or will be released to the requestor. You also state that you have released all attorney fee bills responsive to request numbers 5 and 6, redacting certain information that you believe is excepted from disclosure under section 552.101 of the Government Code, as well as rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note, and you acknowledge, that the submitted attorney fee bills are subject to section 552.022 of the Government Code, which provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Therefore, the submitted attorney fee bills must be released under section 552.022(a)(16) unless they are confidential under "other law." Because section 552.101 of the Government Code does constitute "other law" for purposes of section 552.022, we will address the district's claim regarding this exception. Additionally, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for the submitted attorney fee bills.

You claim that some of the submitted information is not subject to release pursuant to the Privacy Rule adopted by the United States Department of Health and Human Services, Office

for Civil Rights, to implement the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

You assert that rule 503 of the Texas Rules of Evidence protects some of the submitted information, including some of the same information which you claim is protected under HIPAA. Rule 503(b)(1) of the Texas Rules of Evidence enacts the attorney-client privilege and provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert that some of the information in the submitted attorney fee bills reveals privileged communications from the district's attorney to various district employees made in the furtherance of the rendition of professional legal services. Furthermore, you assert that these communications were intended to be confidential and their confidentiality has been maintained. Based on your representations and our review, we find that some of the information you have marked in the submitted attorney fee bills is protected by the attorney-client privilege. The district may withhold this information, which we have marked, pursuant to rule 503 of the Texas Rules of Evidence. We conclude, however, that the remaining information in these attorney fee bills does not constitute or reveal privileged communications. Therefore, the remaining information is not protected by the attorney-client privilege, and it may not be withheld under rule 503.

Next, you claim that rule 192.5 of the Texas Rules of Civil Procedure protects some of the remaining information, including some of the same information which you claim is protected under HIPAA. Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5

only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). 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 that 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 that (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 that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's 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 that 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, no writ).

You assert that the submitted attorney fee bills contain information that constitutes attorney work product. You state that this information was either prepared by the district's attorney or his representative in anticipation of litigation, and that the information contains the mental impressions, opinions, conclusions, or legal theories of the attorney or his representative. However, we have reviewed the remaining information and find that none of it constitutes or reveals the mental impressions, opinions, conclusions, or legal theories of the district's attorney or the attorney's representative. Therefore, none of the remaining information may be withheld under Texas Rule of Civil Procedure 192.5.

Next, you claim that section 552.101 of the Government Code protects some of the remaining information, including some of the same information which you claim is protected under HIPAA. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section

encompasses information protected by other statutes, such as section 161.032 of the Health and Safety Code, which provides in part:

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

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code §§ 161.032(a),(c). Section 161.031(a) defines a “medical committee” as “any committee . . . of (3) a university medical school or health science center . . . .” Section 161.031(b) provides that the ‘term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.’ Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical organization [or] university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services . . . .” Health & Safety Code § 161.0315(a). Section 161.032 also provides, however, that “[t]his section [does] not apply to records made or maintained in the regular course of business by a hospital.” *See id.* § 161.032(f). 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 Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 9-10 (Tex. 1996) (discussing *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988), and *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1985)).

You state that the submitted attorney fee bills contain “references to peer review committee actions that were taken against staff physicians[,]” and that the submitted information which identifies these staff physicians is confidential under section 161.032. We note, however, that you do not explain how information contained in the submitted attorney fee bills qualifies as a record of a medical committee that was established for the purpose of evaluating medical and health care services. We therefore conclude that you have failed to establish that the information at issue constitutes a record of a medical committee, and it may not be withheld under section 552.101 on that basis. *See Gov’t Code* § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception).

Section 552.101 also encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to

the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have reviewed the submitted information and find that none of it is highly intimate or embarrassing. Therefore, none of the remaining information may be withheld under section 552.101 in conjunction with common law privacy.

In summary, the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'JAP', written over a horizontal line.

James A. Person III  
Assistant Attorney General  
Open Records Division

JAP/sdk

Ref: ID# 237466

Enc. Submitted documents

c: Mr. E.M. Ferrell  
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(w/o enclosures)