



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2009

Mr. Trent B. Krienke
Davis & Wilkerson, P.C.
P.O. Box 2283
Austin, Texas 78768-2283

OR2009-10834

Dear Mr. Krienke:

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# 351118.

The Gainesville Hospital District d/b/a North Texas Medical Center (the "NTMC"), which you represent, received a request for the recycle bins on computers used by two named individuals, the "Inbox, Sent, Trash and any personal folders on any yahoo e-mail accounts" of the two named individuals, and any attorney fee bills received by the NTMC for the year 2009. You claim that portions of the submitted attorney fee bills are excepted from disclosure under section 552.101 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted attorney fee bills. We have also considered comments submitted by the requestor. *See Gov't Code* § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note that you have not submitted any information responsive to the requests for the recycle bins on computers used by two named individuals and the "Inbox, Sent, Trash and any personal folders on any yahoo e-mail accounts" of the two individuals. The requestor has informed this office and provided documentation that you have denied those requests by stating "your requests for computer access are denied." The requestor contends that information responsive to those portions of the request could be furnished to the requestor by means other than direct access to the computers of the named individuals. We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Likewise, a governmental body is not required to

produce the responsive information in the format requested. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland 2000, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. See Open Records Decision No. 561 at 8-9 (1990). Thus, while the NTMC need not provide access to the requested information via access to the NTMC's computer terminals, it must nevertheless release information that it in good faith believes to be responsive to the request. Therefore, to the extent that the NTMC either maintained or had access to any information that would be responsive to the requests for the recycle bins on computers used by the two named individuals and the "Inbox, Sent, Trash and any personal folders on any yahoo e-mail accounts" of the two individuals on the date the request for information was received, we assume any such information has been released to the requestor. If you have not released any such information to the requestor, you must do so at this time. See Gov't Code §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you believe any such information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

Next, 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 NTMC's claim regarding this exception. Additionally, the Texas Supreme Court has held that the "Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will also address your arguments under Rule 503 of the Texas Rules of Evidence.

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, 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, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). A “medical committee” is defined as any committee, including a joint committee of a hospital, medical organization, university medical school or health science center, health maintenance organization, or extended care facility. *See id.* § 161.031(a). The term also encompasses “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.” *Id.* § 161.031(b).

The precise scope of section 161.032 has been the subject of a number of judicial decisions. *See, e.g., 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). 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.* at 648. However, this 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).

You contend that pages 12 through 17 in Exhibit B are attorney fee bills that were created in connection with the NTMC’s medical peer review committee’s deliberative proceedings, and, as such, are excepted in their entirety section 161.032. You state that the fee bills “contain references to ongoing peer review committee actions that were taken against staff physicians” and “were presented to the medical committee.” However, you do not explain how pages 12 through 17 of Exhibit B consist of records or proceedings of the medical committee or records, information, or reports of the medical committee or provided by the medical committee to the governing board of the NTMC. Accordingly, we find that you have failed to establish the applicability of section 161.032 of the Health & Safety Code to pages 12 through 17 of Exhibit B. Thus, the NTMC may not withhold that information under section 552.101 of the Government Code based on section 161.032 of the Health & Safety Code.

Next, you claim that the portions of the submitted information you have marked are excepted under Rule 503 of the Texas Rules of Evidence, which encompasses the attorney-client privilege and provides:

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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). We note that the details in the submitted attorney fee bills may only be withheld if they are protected under the attorney-client privilege. *See* Open Records Decisions No. 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice).

You contend that the information you have marked in the remaining attorney fee bills consists of confidential communications between the NTMC's attorneys and an NTMC

employee that were made in furtherance of the rendition of professional legal services to the NTMC. You indicate that these communications have remained confidential and have not been revealed to any third party. Upon review of the remaining attorney fee bills, we agree that some of the information at issue is protected by the attorney-client privilege. We note, however, that you have not specifically identified any of the privileged parties. We are unable to discern who the privileged parties are with the exception of the Davis & Wilkerson attorneys listed as providing legal services in the fee bills and certain NTMC employees we are able to identify from the submitted information. Additionally, some of the information you have marked documents communications with non-privileged parties. Furthermore, while other marked entries indicate that certain documents were prepared, there is no indication that the information was actually communicated to a privileged party. Therefore, we find that the NTMC has failed to demonstrate how the remaining information you have marked documents privileged attorney-client communications. Accordingly, the NTMC may only withhold the information we have marked in the submitted attorney fee bills pursuant to Texas Rule of Evidence 503. As no further exceptions are raised for the remaining information, it must be released to the requestor.

In summary, the NTMC may withhold the information we have marked in the submitted attorney fee bills pursuant to Texas Rule of Evidence 503. The remaining requested information must be released 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 at (512) 475-2497.

Sincerely,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eeg

Ref: ID# 351118

Enc. Submitted documents

c: Requestor
(w/o enclosures)