



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 4, 2011

Mr. Ryan S. Henry  
Denton, Navarro, Rocha & Bernal, P.C.  
2517 North Main Avenue  
San Antonio, Texas 78212

OR2011-04617

Dear Mr. Henry:

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# 413443.

The Dallas County Hospital District d/b/a/ Parkland Health and Hospital System (the "district"); which you represent, received a request for copies of all records created or received since a specified date that mention concerns related to sterilization of instruments by surgeons or OB-GYN practitioners. You state some of the requested information will be released upon payment of applicable fees. You claim the information contained in Exhibit C is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code, and privileged under Texas Disciplinary Rule of Professional Conduct 1.05. We have considered the arguments you claim and reviewed the submitted information.

Initially, we note the e-mail on page 2 of Group 2 is not responsive to the request because it was created after the request for information was received. This decision does not address the public availability of the non-responsive information, and that information need not be released in response to the present request.

Next, we must address the district's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to

disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Although the district timely raised sections 552.101, 552.107, and 552.111, the district did not raise its claim under Texas Disciplinary Rule of Professional Conduct 1.05 until after the ten-day deadline. Consequently, we find the district failed to comply with the procedural requirements of section 552.301 with respect to its claim under Texas Disciplinary Rule of Professional Conduct 1.05.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding information from disclosure. *See generally id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also generally* Open Records Decision No. 630 (1994). A compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you timely raised section 552.101 of the Government Code, which can provide a compelling reason for non-disclosure, this section does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). Thus, section 552.101 cannot be raised in conjunction with Texas Disciplinary Rule of Professional Conduct 1.05. Furthermore, Texas Disciplinary Rule of Professional Conduct 1.05 concerns the confidentiality of client information. *See* Tex. Disciplinary R. Prof'l Conduct Rule 1.05(a)(1). This office has concluded, in the open records context, an attorney's duty of confidentiality is limited to attorney-client privileged material. *See* Open Records Decision No. 574 at 2-5 (1990) (discussing rule 1.05(a)(1) in context of predecessor provision of section 552.107(1)). Thus, given its limitation in the open records context, the applicability of rule 1.05 is not a compelling reason for non-disclosure. Consequently, the district may not withhold any of the information contained in Exhibit C pursuant to Texas Disciplinary Rule of Professional Conduct 1.05. We will, however, consider your timely raised arguments under sections 552.101, 552.107, and 552.111 of the Government Code.

You claim the information contained in Groups 1 and 6 is excepted under section 552.107(1) of the Government Code. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 represent that the records in Groups 1 and 6 are communications or document communications between district staff attorneys and members of the Patient Care and Review Committee (the “PCRC”) and the Women & Infants Specialty Health Committee (“WISH Committee”). You state these communications concern the attorneys’ legal representation of the committees. We understand these communications were intended to be confidential and the confidentiality of the communications has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information contained in Groups 1 and 6. Thus, the district may generally withhold this information under section 552.107 of the Government Code.<sup>1</sup> However, we note the release agreements on pages 35-44 of Group 1, and the letters on pages 10, 13, and 34 of Group 6, were communicated to non-privileged parties. These non-privileged communications exist separate and apart from the otherwise privileged communications and, therefore, may not be withheld under section 552.107. However, we will address your arguments for these documents under section 552.101 of the Government Code.

You claim the remaining information is excepted from disclosure under section 552.101 of the Government Code. This section 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 that other statutes make confidential. Section 161.032 of the Health and Safety Code provides, in relevant part:

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<sup>1</sup>Because section 552.107 is dispositive, we need not address your remaining arguments for these documents.

(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, 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].

...

(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, e.g., Mem’l 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. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. 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, among other statutes, statutory predecessor to section 161.032).

You state, and provide the district’s bylaws which show, the district has established the PGRC, WISH Committee, Patient Safety and Risk Committee (the “PSRC”), and Infection Control Committee (the “ICC”) through the district’s bylaws. *See* Health & Safety Code § 161.031(a) (medical committee includes any committee of a hospital district). You also

state the purpose of these committees is to aid the district's board of managers in maintaining and evaluating the quality of medical and health care services at the district. *See id.* § 161.0315(a) (governing body of hospital district may form a medical committee, as defined by section 161.031, to evaluate medical and health care services). Based on your representations and our review, we agree the PCRC, PSRC, ICC, and WISH Committee constitute medical committees as defined by section 161.031.

You state the information contained in Group 2 consists of information and records of the PSRC, and the information contained in Group 5 consists of information and records of the WISH Committee. You also claim the release agreements on pages 35-44 of Group 1, and the letters on pages 10, 13, and 34 of Group 6, consists of information and records of the PCRC. You represent this information was created by these committees or at their direction for the committee purpose of assuring the quality of medical and health care services. *See Jordan*, 701 S.W.2d at 647-48 (confidentiality of section 161.032 extends to documents that have been prepared by or at the direction of medical committee for committee purposes). We note, however, Subchapter A, chapter 160, Occupations Code, does not apply to records made or maintained in the regular course of business by a hospital district. *See Health & Safety Code* § 161.032(f). Records made or maintained in the regular course of business include "record[s] kept in connection with . . . the business and administrative files and papers apart from committee deliberations. *See Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977). The records on pages 76-114, 116, 147-153, and 177-180 of Group 5 pertain to employee grievances and the reasons for low employee morale, while pages 139-143 of Group 5 contain a job description. These records are administrative records apart from WISH Committee deliberations. We note, however, that page 180 contains handwritten notes concerning a patient that appears to be related to the WISH Committee's deliberations. Therefore, with the exception of the handwritten notes concerning a patient on page 180, pages 76-114, 116, 139-143, 147-153, and 177-180 are not confidential under section 161.032(a) of the Health and Safety Code. As you raise no further exceptions for this information, it must be released. However, Group 2, the remaining records in Group 5, including the handwritten notes concerning a patient on page 180, the release agreements on pages 35-44 of Group 1, and the letters on pages 10, 13, and 34 of Group 6, are confidential under section 161.032. Thus, the district must withhold this information pursuant to section 552.101 of the Government Code in conjunction with section 161.032(a) of the Health and Safety Code.

You also claim the records contained in Groups 3 and 4 are confidential under section 161.032 as the records of a medical committee. However, you represent these records are not the records of a medical committee, but the records of two district employees. Because you have not explained how these records are the records of a committee, this information is not confidential pursuant to section 161.032. Accordingly, the information contained in Groups 3 and 4 may not be withheld under section 552.101 of the Government

Code in conjunction with section 161.032(a) of the Health and Safety Code. As you raise no further exceptions for this information, it must be released.

In summary, with the exception of the release agreements on pages 35-44 of Group 1, and the letters on pages 10, 13, and 34 of Group 6, the records contained in Groups 1 and 6 may be withheld under section 552.107 of the Government Code. The remaining information in Groups 1 and 6, and Group 2 in its entirety, must be withheld under section 552.101 of the Government Code in conjunction with 161.032 of the Health and Safety Code. The records on pages 76-114, 116, 139-143, 147-153, 177-180 of Group 5 must be released. However, the handwritten note concerning a patient on page 180 of Group 5, and the remaining information in Group 5, must be withheld under section 552.101 in conjunction with 161.032. Finally, Groups 3 and 4 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](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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/eeg

Ref: ID# 413443

Enc. Submitted documents

c: Requestor  
(w/o enclosures)