



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 21, 2011

Mr. Ryan S. Henry and Ms. Erin A. Higginbotham  
Denton, Navarro, Rocha & Bernal  
2500 West William Cannon, Suite 609  
Austin, Texas 78745

OR2011-18835

Dear Mr. Henry and Ms. Higginbotham:

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# 438192.

The Dallas County Hospital District d/b/a Parkland Health and Hospital System (the "district"), which you represent, received a request for the following information pertaining to a named district employee: (1) resume and curriculum vitae; (2) application and letters of reference; (3) chronological employment record; (4) all of the named employee's performance reviews and related documents; (5) all self evaluations; (6) all conflict of interest disclosure forms; (7) all employment contracts and related documents; (8) all complaints about the named employee; (9) all of the named employee's responses to any complaints and all related documents; and (10) all e-mails, memos, and letters in the named employee's personnel file. The district received a second request for records pertaining to the named employee's "processing of complaints by other employees about other employees" referenced in a specified letter to this office from the district. You state the district has released some of the information responsive to the second request. You state the district will withhold some of the submitted information pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim that the remaining requested information is excepted from disclosure

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<sup>1</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including: a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; and an e-mail address of a member of the public under section 552.137 of the Government Code.

under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.139, and 552.150 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments submitted by a representative of the requestor. See Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note pages 362-366 in Exhibit C submitted for the first request ("Exhibit C") were created after the date the district received the first request for information. As such, this information is not responsive to the first request. We note the Act does not require a governmental body to release information that did not exist when it received a request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You also contend some of the information you submitted for the first request is not responsive to the first request because it merely relates to the processing of complaints by other employees about other employees, and does not pertain to a complaint about the named employee. In addition to pages 362-366 of Exhibit C, we agree a majority of the information you have marked in Exhibit C and Exhibit C-1 is not responsive to the first request for information. However, we note the second request for information seeks the precise information that you submitted and argue is not responsive to the first request. Thus, the information at issue in Exhibit C is responsive to the second request and we will address your arguments against its disclosure. Further, the first request also seeks all e-mails, memos, and letters in the named employee's personnel file. Pages 27, 28, 37-40, 44-49, 165-166, and 370 in Exhibit C consist of e-mails, memos, and letters that you state are located within the named employee's personnel file. As such, this information is responsive to the first request for information and we will address your arguments for these pages.

Next, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. See Gov't

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<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Code § 552.301(e)(1)(A)-(D). You state the district received the first request for information on September 16, 2011; thus, the fifteen-business-day deadline for the first request was October 7, 2011. Although you timely submitted Exhibit C to our office, you later submitted Exhibit C-1 in an envelope postmarked October 14, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the district failed to comply with the requirements of section 552.301 with respect to the responsive information in Exhibit C-1.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *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); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, in failing to comply with section 552.301, the district has waived its argument under section 552.103, and may not withhold the information on that basis. You also raise section 552.101 of the Government Code for this information, which can provide a compelling reason to withhold information. Thus, we will consider the applicability of section 552.101 to the responsive information in Exhibit C-1.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). The information on pages 53, 55-62, 111-116, 119-124, 129-134,

147-164, 176-178, 183, 186-187, 201, 204-211, 227-231, 269-326, and 353-356 of Exhibit C and the information on pages 38, 48-51, 53-124 of the information submitted for the second request (“Exhibit C-2”) consists of completed evaluations and reports; the information on page 59 of Exhibit C-2 constitutes a completed report you state pertains to a concluded investigation by the district; and the information on page 52 of Exhibit C-2 pertains to a completed investigation conducted by the district. This information falls within the purview of section 552.022(a)(1). The district may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under the Act or other law. *See id.* You raise section 552.103 of the Government Code for all of the information at issue in Exhibit C and for page 59 of Exhibit C-2, and you raise the attorney-client privilege found in section 552.107 of the Government Code for the completed report on pages 204-211 of Exhibit C. However, these sections are discretionary in nature and do not make information confidential under the Act. *Id.* §§ 3-21, 23-26 (providing for “confidentiality” of information under specified exceptions); *see Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the district may not withhold any of the information subject to section 552.022 under section 552.103 or section 552.107. You also raise section 552.101 of the Government Code for some of the information. In addition, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the applicability of section 552.101 to pages 183, 204-211, and 353-356 of Exhibit C and pages 52 and 59 of Exhibit C-2, as well as the applicability of section 552.108 to pages 52 and 59 of Exhibit C-2, and the applicability of the attorney-client privilege under Texas Rule of Evidence 503 to pages 204-211 of Exhibit C.

We next address your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022, as it is potentially the most encompassing exception you raise. Section 552.103 provides, in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be exempted from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>3</sup> Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). This office has also concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the “EEOC”). *See* Open Records Decision No. 336 (1982). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state the responsive information in Exhibit C that is not subject to section 552.022 and the information on page 6 of Exhibit C-2 is related to an EEOC Notice of Charge of Discrimination filed against the district. You state, and provide a copy of the EEOC notice demonstrating, the district received the EEOC notice on October 5, 2011. As previously noted, you state the district received the first request for information on September 16, 2011. As such, you have failed to demonstrate the district reasonably anticipated litigation when it received the first request for information, and the district may not withhold the responsive information at issue in Exhibit C under section 552.103. You state the district received the second request for information on October 12, 2011. Based on your representation, we agree

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<sup>3</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336; hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

the district reasonably anticipated litigation with respect to the information on page 6 of Exhibit C-2. Accordingly, we conclude the district may withhold the information on page 6 of Exhibit C-2 under section 552.103 of the Government Code.

We note that once the information has been obtained by all parties to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

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. Section 552.101 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, 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] hospital district[.]” *Id.* § 161.031(a). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical organization [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., 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. 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). We note section 161.032 does not make confidential “records made or maintained in the regular course of business by a . . . university medical center or health science center[.]” Health & Safety Code § 161.032(f); *see McCown*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to Occ. Code § 160.007 in Health and Safety Code § 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 explain the district’s board of managers (the “board”) is appointed by the Dallas County Commissioners Court with the responsibility of managing, controlling, and administering the district. You state the board is required to “establish, support, and oversee a system-wide performance improvement program” according to the district’s bylaws. You further state “[i]n furtherance of this duty, the [b]oard maintains overall responsibility for the implementation and maintenance of risk identification procedure.” You explain the information you have marked “reflect[s] the internal investigations of incidents that put patients at risk[.]” You assert this information constitutes documents that were “internally prepared in the course of the [b]oard’s investigation and fact-gathering function in furtherance of its overall quality assurance duties.” Based on your representations and our review, we find most of the information you have marked consists of confidential records of a medical review committee under section 161.032. However, we note the information on pages 206-211 and 353-356 of Exhibit C pertain to complaints concerning the named employee and are found within the employee’s personnel file. You also state the information on pages 206-211 was created by the district for the district’s Department of Legal Affairs. Therefore, we find you have failed to demonstrate how this information 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.*, 551 S.W.2d at 35-6)). Therefore, we find you have not established the information on pages 206-211 and 353-356 of Exhibit C is confidential under section 161.032, and the district may not withhold it under section 552.101 on that basis. Accordingly, we conclude, with the exception of pages 206-211 and 353-356 of Exhibit C,

the district must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.<sup>4</sup>

Section 552.101 also encompasses chapter 611 of the Health and Safety Code. Section 611.002 provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; *see also* Open Records Decision No. 565 (1990). In this instance, there is no indication of such a right of access. Upon review, we find page 206 of Exhibit C and the information you have marked on page 183 of Exhibit C-2 consist of mental health records that are subject to chapter 611 of the Health and Safety Code. Accordingly, the district must withhold this information under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.<sup>5</sup>

Section 552.101 also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs the public availability of medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in pertinent part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the

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<sup>4</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

<sup>5</sup>As our ruling for this information is dispositive, we need not address your remaining argument against its release.

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the district must withhold pages 93, 185, and 199 of Exhibit C and the information we have marked on page 52 of Exhibit C-2 under section 552.101 in conjunction with the MPA unless the district receives consent for release of the information that complies with section 159.004 and 159.005 of the MPA. *See* Occ. Code §§ 159.004, .005. However, none of the remaining information consists of medical records for the purposes of the MPA. Thus, none of the remaining information may be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 301.466 of the Occupations Code, which provides:

(a) A complaint and investigation concerning a nurse under this subchapter and all information and material compiled by the [Texas Board of Nursing (the “board of nursing”)] in connection with the complaint and investigation are:

(1) confidential and not subject to disclosure under Chapter 552, Government Code; and

(2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or board employee or agent involved in license holder discipline.

(b) Notwithstanding Subsection (a), information regarding a complaint and an investigation may be disclosed to:

(1) a person involved with the board in a disciplinary action against the nurse;

(2) a nursing licensing or disciplinary board in another jurisdiction;

(3) a peer assistance program approved by the board under Chapter 467, Health and Safety Code;

(4) a law enforcement agency; or

(5) a person engaged in bona fide research, if all information identifying a specific individual has been deleted.

(c) The filing of formal charges against a nurse by the board, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code.

Occ. Code § 301.466. Section 301.466 only applies to information created or compiled by the board of nursing as part of an investigation by the board of nursing. You contend that portions of Exhibit C-2 are subject to section 301.466. However, we note the present request was received by the district, and not the board of nursing. Therefore, we find section 301.466 of the Occupations Code is not applicable to the information at issue, and none of it may be withheld under section 552.101 on that basis.

You assert the attorney-client privilege for the information you have marked in red on pages 207-211 of Exhibit C. Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) 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).

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). 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. *Id.* Upon a demonstration of all three factors, the entire communication is 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You explain the information you have marked in red on pages 207-211 of Exhibit C constitutes a report completed by the district in order to communicate with the district's Department of Legal Affairs regarding a certain incident. You state the report was exchanged between the district and its attorneys and was made for the purpose of providing legal services to the district. Further, you state the report at issue was intended to be confidential and has remained confidential. Based on your representations and our review, we find the district may withhold the information you have marked in red on pages 207-211 of Exhibit C under Texas Rule of Evidence 503.

Section 552.101 also encompasses the common-law right of 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate or 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. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally

intimate or embarrassing. *See generally* Open Records Decision Nos. 600 at 9-10 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD Nos. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Additionally, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private). Furthermore, we note names, addresses, and telephone numbers of individuals are not highly intimate or embarrassing. *See* ORD 455 at 7 (names and addresses not protected by privacy).

You state you will withhold page 96 of Exhibit C under section 552.101 in conjunction with common-law privacy pursuant to Open Records Decision No. 684. However, we note page 96 does not constitute a direct deposit authorization form; thus, the district may not withhold page 96 pursuant to Open Records Decision No. 684 without asking for an attorney general decision. Upon review, we find that the information we have marked on pages 44, 49, 91 and 96 of Exhibit C and on pages 2, 5, 7-12, 14, 18-20, and 26 of Exhibit C-2 is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate that any of the remaining information you seek to withhold is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district may not withhold any of the remaining information under section 552.101 of the Government Code on this basis.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v.*

*Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we conclude you must withhold the information you have marked, as well as the additional information we mark on page 137 of Exhibit C, under section 552.102(a) of the Government Code.

Section 552.108 of the Government Code provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2). We note the protections offered by sections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Section 552.108(a)(1) generally applies to information that pertains to criminal investigations or prosecutions that are currently pending, while section 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudications. A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See Gov't Code* §§ 552.108(a)(2), .301(e)(1)(A).

Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. In this instance, you state, and provide documentation from the chief medical examiner of the Southwestern Institute of Forensic Sciences (the "institute") stating, the information on page 52 of Exhibit C-2 pertains to an ongoing death investigation being conducted by the institute. However, we note the institute is not a law enforcement agency for the purposes of section 552.108. Further, you have not provided us with a representation from any law enforcement agency that it seeks to withhold this information under section 552.108. Accordingly, we conclude you have failed to show section 552.108(a)(1)

applies to page 52 of Exhibit C-2. Additionally, you cite to sections 552.108(a)(1) and (a)(2) for pages 27-34 of Exhibit C-2. However, you have not provided any arguments to support either of these exceptions. As such, we conclude you have failed to demonstrate the applicability of either section 552.108(a)(1) or section 552.108(a)(2) to pages 27-34 of Exhibit C-2. Therefore, the district may not withhold any of the remaining information at issue under section 552.108(a)(1) or section 552.108(a)(2).

You state the district will redact the information you have marked under section 552.117 of the Government Code pursuant to section 552.024 of the Government Code.<sup>6</sup> We note that the remaining documents contain additional information that may be subject to section 552.117. Section 552.117 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 who request that this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Section 552.117 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note some of the information you state you will withhold is not information that is subject to section 552.117. As such, the district may not withhold the information we have marked for release on pages 70 and 91 of Exhibit C under section 552.117. Further, we conclude the district must withhold the additional information we have marked on pages 40, 117, 125, 127, 136, 144, 166, and 377 of Exhibit C and on page 1 of Exhibit C-2 if the employees whose information is at issue timely elected to keep their personal information confidential pursuant to section 552.024. The district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. However, the district must withhold the cellular telephone numbers at issue only if the employees pay for the cellular telephone service with personal funds.

Section 552.139 of the Government Code provides:

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<sup>6</sup>Section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2); Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)).

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 5 (to be codified at Gov't Code § 552.139). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Gov't Code § 2059.055(b). You explain, and the submitted information reflects, the information you have marked constitutes passcodes for network access and computer operation, and it relates to computer vulnerabilities. Based on your representations and our review, we find you have demonstrated the information you have marked in green relates to computer network security, the design, operation, or defense of the district's computer network. Accordingly, the district must withhold the information you have marked in green under section 552.139 of the Government Code.<sup>7</sup>

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<sup>7</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

We note some of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

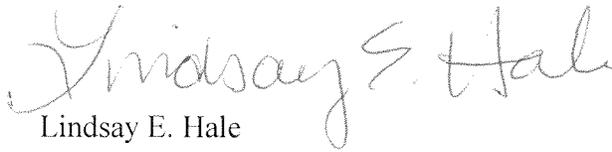
In summary: (1) the district may withhold the information on page 6 of Exhibit C-2 under section 552.103 of the Government Code; (2) with the exception of pages 206-211 and 353-356 of Exhibit C, the district must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code; (3) the district must withhold page 206 of Exhibit C and the information you have marked on page 183 of Exhibit C-2 under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code as mental health records; (4) the district must withhold pages 93, 185, and 199 of Exhibit C and the information we have marked on page 52 of Exhibit C-2 under section 552.101 in conjunction with the MPA; (5) the district may withhold the information you have marked in red on pages 207-211 of Exhibit C under Texas Rule of Evidence 503; (6) the district must withhold the information we have marked on pages 44, 49, 91 and 96 of Exhibit C and on pages 2, 5, 7-12, 14, 18-20, and 26 of Exhibit C-2 under 552.101 of the Government Code in conjunction with common-law privacy; (7) the district must withhold the information you have marked and the additional information we mark on page 137 of Exhibit C under section 552.102(a) of the Government Code; (8) with the exception of the information we have marked for release on pages 70 and 91 of Exhibit C, to the extent the employees whose information is at issue timely-elected confidentiality under section 552.024 and pay for the cellular service with personal funds, the district must withhold the additional information we have marked on pages 40, 117, 125, 127, 136, 144, 166, and 377 of Exhibit C and on page 1 of Exhibit C-2 under section 552.117(a)(1) of the Government Code; and (9) the district must withhold the information you have marked in green under section 552.139 of the Government Code. The district must release the remaining responsive information; however, any information protected by copyright may only be released in accordance with copyright law.

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,

A handwritten signature in cursive script that reads "Lindsay E. Hale".

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 438192

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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