



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 29, 2011

Ms. L. Renee Lowe  
Assistant County Attorney  
Harris County  
2525 Holly Hall, Suite 190  
Houston, Texas 77054

OR2011-19144

Dear Ms. Lowe:

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# 439174 (CA File Nos. 11HSP0989 and 11HSP0999).

The Harris County Hospital District (the “district”) received two requests from the same requestor for twenty-four categories of communications, including those pertaining to (1) SBMC Healthcare, LLC d/b/a Spring Branch Medical Center; (2) requirements for membership in the district; (3) requirements for membership in or affiliation with Harris County Clinical Services; (4) the Medicaid Upper Payment Limit Program (the “UPL program”); and (5) certain Indigent Care Affiliation Agreements.<sup>1</sup> You state some of the responsive information will be released to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We understand you notified hospital systems, that, along with the district, are joint clients of Gjerset & Lorenz, L.L.P. (“G&L”) in regards to the UPL program, of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should

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<sup>1</sup>You state, and provide documentation showing, the district asked for and received clarification of the requests. *See* Gov’t Code § 552.222(b)(providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

§ 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from G&L on behalf of these hospital systems. We have also received comments submitted by the requestor. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note that the district failed to comply with section 552.301 of the Government Code in seeking an open records decision from this office. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). The district received the initial request for information on September 27, 2011. The district informed us it received the requestor's clarification of the request on September 28, 2011. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Accordingly, the district's ten-business-day deadline was October 12, 2011. In its request for a decision from this office, the district stated "the information requested falls within exceptions to the [Act.]" Although the district timely submitted a request for a decision from this office, we find the district did not raise any exceptions to disclosure by the ten-business-day deadline. Therefore, the district failed to comply with the procedural requirements mandated by section 552.301. Gov't Code § 552.301(b).

A governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information from disclosure. *See 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* Open Records

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<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although you raise section 552.107 of the Government Code and rule 503 of the Texas Rules of Evidence, this exception and rule are discretionary in nature. They generally serve only to protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions generally). The determination of whether the interests of third-parties constitute a compelling reason to withhold information under section 552.107 and rule 503 is made on a case-by-case basis. *See* ORD 676 at 12. In this instance, G&L has submitted arguments asserting the attorney-client privilege on behalf of the hospital systems. As noted above, G&L explains the hospital systems and the district are joint clients in regards to the UPL program. Having considered G&L's arguments, we find there is a compelling reason to consider the submitted arguments under the attorney-client privilege. Accordingly, we will consider the application of the attorney-client privilege under section 552.107 and rule 503.

The district acknowledges some of the responsive information is subject to section 552.022 of the Government Code. This section provides, in part, the following:

(a) the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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). In this instance, the submitted information includes attorney fee bills. Thus, the district must release this information pursuant to section 552.022(a)(16) unless it is expressly confidential under other law. G&L, on behalf of the other hospital systems, seeks to withhold this information under rule 503 of Texas Rules of Evidence. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider the assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also consider the arguments under section 552.107 for the information not subject to section 552.022(a)(16).

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).

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 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).

We understand G&L, on behalf of certain hospital systems, to claim the entire narrative entries in the submitted fee bills are privileged because the fee bills themselves are attorney-client communications. Because the substance of any attorney-client privileged communications would be contained only in the narrative entries, we see no distinction between claiming the entire narrative entries are privileged and claiming the entire fee bills

are privileged. Section 552.022(a)(16) of the Government Code, however, provides information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov’t Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decision Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney’s legal advice). Thus, under rule 503, the district may withhold only the parts of the submitted attorney fee bills that are specifically demonstrated to consist of privileged communications.

The district and G&L explain the submitted attorney fee bills contain information regarding the specific legal services provided regarding the UPL program. The district and G&L explain the district, along with certain other hospital systems, as joint clients, engage G&L to represent the district and the other hospital systems in connection with the development of the UPL program. The district and G&L state the fee bills document confidential communications with particular representatives of the joint clients and actions taken with regard to those conversations. Furthermore, these communications were made for the purpose of facilitating the rendition of professional legal services to the district and the hospital systems, which were intended to be, and have remained, confidential. Accordingly, on behalf of the other hospital systems, the district may withhold the information we have marked on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, we find the remaining information has not been shown to document confidential communications between privileged parties. Therefore, we conclude Texas Rule of Evidence 503 is not applicable to the remaining information, and it may not be withheld on this basis.

Next, we consider section 552.107 of the Government Code for the information not subject to section 552.022(a)(16) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above. We note communications with third party consultants with which a governmental body shares a privity of interest are protected under the privilege. Open Records Decision Nos. 464 (1987), 429 (1985). However, a governmental body does not share a privity of interest with a third party when it is involved in contract negotiations, as the parties’ interests are adverse.

As noted above, the district and G&L explain the district, along with certain other hospital systems, as joint clients, engaged G&L to represent the district and the other hospital systems in connection with the development of the UPL program. The district and G&L, on behalf

of the other hospital systems, state the information at issue either consists of communications between G&L, the district and other hospital systems as joint clients on matters regarding the UPL program. The district and G&L state the communications were intended to be and remain confidential. Therefore, based on these representations and our review, we conclude the district may generally withhold the information at issue under section 552.107(1) of the Government Code on behalf of the other hospital systems. We note, however, some of the otherwise privileged e-mail strings at issue include communications with non-privileged parties. If the communications with these non-privileged parties, which we have marked, exist separate and apart from the e-mail strings in which they appear, then the district may not withhold the communications with the non-privileged parties under section 552.107(1). Furthermore, we note a small portion of the information at issue consists of contract negotiations where the parties' interests were adverse; therefore, this information, which we have marked, is not privileged and may not be withheld under section 552.107.

In the event the communications with the non-privileged parties exist separate and apart from the e-mail strings in which they appear, then we note some of this information is subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The address we have marked does not appear to be of a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the marked e-mail address under section 552.137, unless the owner of the address affirmatively consents to its release. *See id.* § 552.137(b).

In summary, the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence on behalf of the other hospital systems. The district generally may withhold the remaining information not subject to section 552.022(a)(16) of the Government Code under section 552.107 of the Government Code on behalf of the other hospital systems, except as we have marked for release and except for any non-privileged e-mails we have marked that exist separate and apart from the e-mail strings to which they are attached. The district must withhold the e-mail address we have marked under section 552.137, unless the owner of the address affirmatively consents to its release. The district must release the remaining information.

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Tamara H. Holland  
Assistant Attorney General  
Open Records Division

THH/ag

Ref: ID# 439147

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Gjerset & Lorenz  
For CHRISTUS Health Gulf Coast  
Gulf Coast Division, Inc., and  
Memorial Hermann Hospital System  
2801 Via Fortuna Building 7, Suite 500  
Austin, Texas 78746-7567  
(w/o enclosures)