



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 21, 2003

Mr. William Webster  
Chief Executive Officer  
Ector County Hospital District d/b/a Medical Center Hospital  
P.O. Box 7239  
Odessa, Texas 79760-7239

OR2003-0417

Dear Mr. Webster:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174559.

The Ector County Hospital District d/b/a Medical Center Hospital (the "hospital") received a request for the following information from the years 1995 to the present:

1. All agreements, contracts, compacts and/or concords, whether written and/or oral, that Medical Center Hospital has/had with any physician(s), corporation(s), limited partnership(s) and/or any other legal entity. If the contract agreement, compact and/or concord, is oral, then it is requested it (these) be reduced to writing. This includes, but is not limited to, services/property/leasing and/or purchases. However, it should not include office supplies.
2. All agreements, contracts and/or concords for leasing of personal property by Medical Center Hospital.
3. All agreements, contracts, compacts and/or concords with any medical doctor to provide services to and/or for Medical Center Hospital. The term "medical doctor" includes, but is not necessarily limited to, the Emergency Room.

4. A copy of the Comprehensive Annual Financial Report for the years 2000, 2001 and/or 2002.
5. Any agreements, contracts, assignments, compacts, schedules, docketing calendars and/or time sheets for any medical doctor and/or time sheets for any medical doctor and/or specialized technicians other than employees of Medical Center Hospital.
6. Any method of billing on behalf of any medical doctor to medicare, medicaid, insurance companies and/or health care providers. This will be restricted to Medical Center Hospital.
7. List of all doctors who are/have been paid for on-call services to the Emergency Room.
8. All monthly, semiannually [sic] and/or annual financial statement(s) for Ector County Hospital District d/b/a Medical Center Hospital.
9. If there is semiannual and/or annual audit for Medical Center Hospital, then produce it for the years which was prepared for Medical Center Hospital.
10. If Medical Center Hospital has ever paid a fine for improper billing of medicare and/or medicaid, then produce all correspondence and/or communication in regard to the fine.

You state that you have released information responsive to categories 4, 8, and 9 of the request and that the hospital does not maintain other requested information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed w.o.j.) (governmental body not required to prepare new information to respond to request). You also state that portions of the request are “overbroad” and that you cannot understand other parts of the request. *See Gov’t Code § 552.222(b)* (governmental body may seek to clarify request if it is unclear what information is being requested or to seek to narrow request if large amount of information has been requested); *see also* Open Records Decision No. 663 at 5 (1999) (discussing requests for clarification). You claim that information represented by the documents you have submitted to this office is excepted from disclosure under sections 552.101, 552.103, and 552.104 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup> We have also

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<sup>1</sup>We assume that the 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 that those records contain substantially different types of information than that submitted to this office.

considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we note that the submitted information includes several contracts and vouchers relating to the receipt or expenditure of funds by the hospital and a settlement agreement to which the hospital is a party. These types of records are "public information and not excepted from required disclosure . . . unless . . . expressly confidential under other law." *See* Gov't Code § 552.022(a)(3), (18). You claim that all of the requested information relates to pending litigation. However, section 552.103 of the Government Code is a discretionary exception intended to protect the interests of governmental bodies and is not "other law" that makes information confidential for purposes of section 552.022. *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); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the information that is subject to section 552.022 may not be withheld on the basis that it relates to pending litigation. However, you also claim that portions of this information are confidential by law and excepted from disclosure under section 552.104, and we will address these arguments. *See* Gov't Code § 552.104(b) (section 552.022 does not apply to information that is excepted from disclosure under section 552.104).

The documents that are subject to section 552.022 include a settlement agreement to which the hospital is a party (pages 347 through 356) and vouchers relating to the expenditure of funds by the hospital (pages 357 and 358). You assert that these documents are excepted under section 552.101 of the Government Code because they constitute records of a medical committee.<sup>2</sup> *See* Health & Safety Code § 161.032(c) ("Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.").

You claim that the settlement agreement and vouchers are records of the hospital's compliance committee and state that these documents "were not generated for routine business or administrative purposes." However, you also indicate, and the documents reflect, that these documents were created *before* the compliance committee came into existence. You do not explain how such records qualify as records of a medical committee. We therefore conclude that you have failed to provide sufficient information for this office to conclude that the settlement agreement and vouchers are records of a medical committee, and they may not be withheld under section 552.101 on that basis.

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<sup>2</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

We note, however, that the vouchers include bank account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Pursuant to this exception, the hospital must withhold the account numbers we have marked. As you do not claim any other exception for the settlement agreement and vouchers and they are not otherwise confidential by law, you must release them.

You assert that the other information that is subject to section 552.022 is excepted from disclosure under section 552.104. You claim that information represented by pages 1 through 345 and page 693 should be withheld because its release would give advantage to the hospital’s competitors. Section 552.104 of the Government Code exempts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations.<sup>3</sup> See Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. See Open Records Decision No. 514 at 2 (1988).

You state that the hospital “is a full-service hospital. It provides medical care to all residents of Ector County, Texas regardless of their ability to pay.” You also inform us that the hospital faces competition as a healthcare provider from several other hospitals in the immediate area. The hospital argues that its competitors could use most of the requested information, including the hospital’s contracts, to undermine the hospital’s market position relative to its competitors. Based on the hospital’s arguments and our review of the submitted information, we find that the hospital has demonstrated that it has specific marketplace interests; therefore, the hospital may be considered a “competitor” for purposes of section 552.104. See Open Records Decision No. 593 (1991). Furthermore, we conclude the hospital has shown that release of the information for which it claims exception under section 552.104 would bring about a specific harm to the hospital’s marketplace interests. Accordingly, we conclude that the hospital may withhold under section 552.104 the

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<sup>3</sup>As you do not indicate that the information in question relates to a competitive bidding situation, we do not consider this aspect of section 552.104.

requested information represented by pages 1 through 345 and page 693 of the submitted documents.

We now address your arguments under section 552.103 for information that is not subject to section 552.022. Section 552.103 provides as follows:

(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.

The hospital has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the hospital received the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 hospital must meet both prongs of this test for information to be excepted under 552.103(a).

In this case, you inform us that at the time the hospital received this request, it was party to two lawsuits, one of which involves the requestor's client. In support of your arguments, you have provided us with copies of the petitions that were filed in each suit prior to the hospital's receipt of the request. We therefore find that you have met the first prong of the section 552.103 test. Furthermore, after reviewing your arguments and the information at pages 346 through 692 as well as pages 694 and 695 that is not subject to section 552.022, we agree that it relates to the pending litigation for the purposes of section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information to which all parties in both pending suits have had access is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a)

ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, pursuant to section 552.104, the hospital may withhold information represented by pages 1 through 345 and page 693. Information represented by pages 346 through 692 as well as 694 and 695 may generally be withheld under section 552.103; however, records such as the settlement agreement (pages 347 through 356) and vouchers (pages 357 and 358) may not be withheld pursuant to section 552.103 and must be released in accordance with section 552.022. Prior to releasing such documents, the hospital must redact bank account numbers under section 552.136.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

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

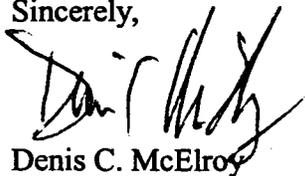
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/seg

Ref: ID# 174559

Enc. Submitted documents

c: Mr. Gerald K. Fugit  
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(w/o enclosures)