ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2014

Mr. Brian C. Newby
Counsel for the Benbrook Water Authority
Cantey Hanger LLP
600 West 6th Street, Suite 300
Fort Worth, Texas 76102-3685

OR2014-18627

Dear Mr. Newby:

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# 539610.

The Benbrook Water Authority (the "authority"), which you represent, received a request for five categories of information related to a workers compensation injury claim filed by the requestor. You state the authority will redact social security numbers pursuant to section 552.147(b) of the Government Code.[1] You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503.[2] We have considered your arguments and reviewed the submitted representative sample of information.[3]

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[1]Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

[2]Although you do not raise sections 552.107 and 552.111 of the Government Code in your brief, we understand you to raise these sections based on the substance of your arguments.

[3]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.

Initially, we note you have submitted only certain e-mails, medical documents, and attorney fee bills that are responsive to the instant request for information. You have not submitted information responsive to the remaining portions of the request. Although you state the authority has submitted a representative sample of the requested information, we find the submitted information is not representative of all the types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the types of information you have submitted for our review. This ruling does not authorize the authority to withhold any information that is substantially different from the types of information you submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). Accordingly, to the extent any information responsive to the remaining portions of the request existed on the date the authority received the request, we assume the authority has released it. If the authority has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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 made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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.
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> (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 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 subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded 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). We have further found when a file is

created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications.

Upon review, we find the documents in Attachment 3 constitute records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient's medical records. Accordingly, the authority must withhold Attachment 3 under section 552.101 of the Government Code in conjunction with the MPA.[4]

Next, we note the submitted attorney fee bills fall within the scope of section 552.022 of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is confidential under the Act or other law. *See* Gov't Code § 522.022(a)(16). The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" that makes information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your claim under Texas Rule of Evidence 503 for the attorney fee bills.

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:
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> > (A) between the client or a representative of the client and the cient'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.

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[4]As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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 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 it was not intended to be disclosed to third persons and 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).

You assert the submitted fee bills should be withheld under rule 503. We understand you to assert the submitted fee bills include privileged attorney-client communications between the authority's outside legal counsel and authority employees in their capacities as clients. We understand the communications at issue were made for the purpose of the rendition of legal services to the authority. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the authority has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the authority may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, we find you have not demonstrated how the remaining information in the fee bills documents an attorney-client communication for purposes of rule 503. Accordingly, the remaining information in the fee bills may not be withheld on that basis. As you raise no other exceptions to disclosure of this information, it must be released pursuant to section 552.022(a)(16) of the Government Code.

We now address your arguments for the remaining information not subject to section 552.022. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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). 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 inform us the information at issue consists of communications between the authority's outside legal counsel and authority employees in their capacities as clients. We understand

you to assert the communications were made for the purpose of the rendition of legal services to the authority. You indicate the communications were intended to be confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the authority may generally withhold the e-mails under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails received from or sent to a non-privileged party. Furthermore, if the e-mails received from or sent to a non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the authority separate and apart from the otherwise privileged e-mail strings in which they appear, then the authority may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mails are maintained by the authority separate and apart from the otherwise privileged e-mail strings in which they appear, we will address your claim under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. The test for determining whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5. *See Nat'l Tank Co.*, 851 S.W.2d at 207. Upon review, we find you have failed to demonstrate how the information at issue constitutes material prepared, impressions developed, or a communication made in anticipation of litigation by or for the authority. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, the authority may not withhold the non-privileged e-mails under section 552.111 of the Government Code on the basis of the work-product privilege.

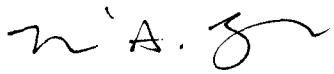
In summary, the authority must withhold Attachment 3 under section 552.101 of the Government Code in conjunction with the MPA. With the exception of the information we

marked to withhold under Texas Rule of Evidence 503, the authority must release the submitted fee bills pursuant to section 552.022(a)(16) of the Government Code. The authority may generally withhold the remaining information not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code; however, the authority must release the non-privileged e-mails we have marked if the authority maintains them separate and apart from the otherwise privileged e-mail strings in which they appear.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
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NAY/bhf

Ref: ID# 539610

Enc. Submitted documents

c: Requestor
(w/o enclosures)