KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 25, 2015

Ms. Kelly A. McDonald
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901 South Mopac Expressway, Suite 280
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OR2015-17755

Dear Ms. McDonald:

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# 576994.

The Baylor County Hospital District (the "district"), which you represent, received a request for (1) all documents relating to Pharmscript of Texas, L.L.C. or Pharmscript of Texas North (collectively, "Pharmscript"), (2) a statement of the methods by which the district obtains pharmacy goods and services for facilities, (3) attorney fee-bills relating to pharmacy goods or services provided at specified facilities, Pharmscript, or the district's acquisition of specified facilities. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code and privileged under Texas Rule of Evidence 503. We have received comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.[1]

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

[1]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 that those records contain substantially different types of information than that submitted to this office.

> (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:
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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
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> . . .
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> (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Id. § 552.022(a)(3), (16). The information in Exhibits C-1 and C-3 includes a contract subject to section 552.022(a)(3) and attorney fee bills subject to section 552.022(a)(16), respectively. The district must release the information subject to section 552.022 unless it is made confidential under the Act or other law. *See id.* § 552.022(a). Although you seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *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 Gov't Code § 552.103); *see also* Open Records Decision No. 665 at 2 n. 5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold any of the information subject to section 552.022 in Exhibits C-1 and C-3 under section 552.103 of the Government Code. However, 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). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information in Exhibit C-3. Further, we will consider your argument under section 552.103 for the information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
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> (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
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> (B) between the client's lawyer and the lawyer's representative;

> (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
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> (D) between the client's representatives or between the client and the client's representative; or
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> (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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, 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. *See* Open Records Decision No. 676 (2002). 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 communication 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 [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You contend the attorney-client privilege is applicable to the entirety of the information in the attorney fee bills in Exhibit C-3. Alternatively, you seek to withhold marked portions of the fee bills. We note section 552.022(a)(16) provides information "that is *in* a bill for attorney's fees" is not excepted from disclosure unless the information is confidential under the Act or other law or protected by the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). Thus, by its express language, section 552.022(a)(16) does not permit an attorney fee bill to be withheld in its entirety. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in its 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 is excepted only to extent it reveals client confidences or attorney's legal advice). Accordingly, we will determine whether the district may withhold the information you marked in the fee bills under rule 503. You assert the submitted fee bills include attorney-client communications between privileged parties. You state the communications at issue were made for the purpose of the rendition of legal services

to the district. You state the district has not waived the attorney-client privilege with regard to the communications. Upon review, we find the district may withhold the information we marked under Texas Rule of Evidence 503. However, we find the remaining information at issue either does not indicate it was communicated or consists of communications with parties whom you have identified but have not established are privileged parties for purposes of rule 503. Therefore, the district has not demonstrated the remaining information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the district may not withhold any of the remaining information at issue on that basis.

Section 552.103 of the Government Code provides, in relevant 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.
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> . . .
>
> (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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st -] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You state, and provide documentation showing, that prior to the day the district received the instant request, a lawsuit styled *PharMerica Corporation And PharMerica East, Inc. v. Baylor County Hospital District, et.al*, Cause No. 15 C000775, was filed, was removed to, and is currently pending against the district in the Federal District Court for the Western District of Kentucky. Therefore, we agree litigation was pending on the date the district received the present request for information. You also state the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the

district may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district may withhold the information we have marked under Texas Rule of Evidence 503. With the exception of the information subject to section 552.022 of the Government Code, the district may withhold the remaining information under section 552.103 of the Government Code. The district must release the remaining information in the submitted contract and fee bills in Exhibits C-1 and C-3.

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,

Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/akg

Ref: ID# 576994

Enc. Submitted documents

c: Requestor
(w/o enclosures)