



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 9, 2015

Ms. Lucie S. Tredennick  
Counsel for the Education Service Center Region 11  
Thompson & Horton, L.L.P.  
3200 Southwest Freeway, Suite 2000  
Houston, Texas 77027

OR2015-21250

Dear Ms. Tredennick:

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# 582479.

Education Service Center Region 11 ("Region 11"), which you represent, received a request for specified information pertaining to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, as well as privileged under Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and Federal Rule of Civil Procedure 26(b)(3).<sup>1</sup> We have considered the submitted arguments and reviewed the submitted representative sample of information.

Initially, we note the submitted information in Exhibit C may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-18250 (2015). In Open Records Letter No. 2015-18250 we concluded, among other things, Region 11 may withhold the information at issue under section 552.103 of the Government Code. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, for the requested information that is

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, and Federal Rule of Civil Procedure 26(b)(3), this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

identical to the information previously requested and ruled upon by this office, we conclude Region 11 may continue to rely on Open Records Letter No. 2015-18250 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). We will consider your arguments for the submitted information to the extent it was not subject to the prior ruling.

Next, we note the information we have marked in Exhibit D and the entirety of Exhibit E consist of a completed report and investigation that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is public information and not excepted from required disclosure unless made confidential under the Act or other law. Gov't Code § 552.022(a)(1). You seek to withhold the information at issue under sections 552.103, 552.107, and 552.111 of the Government Code. However, these sections are discretionary exceptions to disclosure and do 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 section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information may not be withheld under section 552.103, section 552.107, or section 552.111. In addition, the courts have not found the Federal Rules of Civil Procedure to be "other law" for the purposes of section 552.022. Therefore, Region 11 may not withhold the submitted information under rule 26(b)(3) of the Federal Rules of Civil Procedure. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Moreover, section 552.101 makes information confidential under the Act. Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503, the work product privilege under Texas Rule of Civil Procedure 192.5, and section 552.101 for the information at issue. We will also address your remaining arguments for the information in Exhibit C and the information in Exhibit D that is not subject to section 552.022(a)(1) of the Government Code.

Section 552.103 of the Government Code provides in relevant part 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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show 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 the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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 excepted from disclosure under section 552.103(a).

Region 11 states, and provides documentation showing, a lawsuit styled *Randall Blanton v. Education Service Center Region 11*, No. 4:15-CV-00303-O, was pending against Region 11 in the United States District Court for the Northern District of Texas, Fort Worth Division, when Region 11 received the request for information. Therefore, we agree litigation was pending when Region 11 received the request. We also find Region 11 has established the information we have marked is related to the pending litigation for purposes of section 552.103(a). Therefore, Region 11 may withhold the information we have marked under section 552.103(a) of the Government Code.<sup>2</sup>

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

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.

We now turn to your arguments against release of the information subject to section 552.022(a)(1) of the Government Code. Texas Rule of Evidence 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 to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(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;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

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, orig. proceeding).

You state the remaining information in Exhibit D consists of communications between outside counsel for Region 11 and Region 11 staff. You state the information was communicated for the purpose of facilitating the rendition of professional legal services to

Region 11, and you state the communications at issue have remained 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, Region 11 may withhold the information we have marked in Exhibit D under Texas Rule of Evidence 503.<sup>3</sup>

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work-product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent it implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

Region 11 claims the remaining information is privileged under Texas Rule of Civil Procedure 192.5. You explain this information pertains to the above referenced pending litigation. However, you have failed to explain how the information was created for trial or in anticipation of litigation. Thus, we find Region 11 has failed to demonstrate the

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

information at issue is protected core work product. Accordingly, Region 11 may not withhold the remaining information under Texas Rule of Civil Procedure 192.5.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code also encompasses 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.

(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). Upon review, we find the information we have marked constitutes 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, Region 11 must withhold the information we marked in Exhibit E under section 552.101 of the Government Code in conjunction with the MPA.

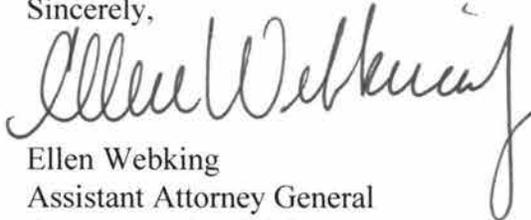
In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude Region 11 may continue to rely on Open Records Letter No. 2015-18250 as a previous determination and withhold the identical information in accordance with that ruling. Region 11 may withhold (1) the information we have marked under section 552.103(a) of the Government Code and (2) the information we have marked in Exhibit D under Texas Rule of Evidence 503. Region 11 must withhold the

information we marked in Exhibit E under section 552.101 of the Government Code in conjunction with the MPA and must release the remaining information.

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](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,

A handwritten signature in cursive script, appearing to read "Ellen Webking".

Ellen Webking  
Assistant Attorney General  
Open Records Division

EW/akg

Ref: ID# 582479

Enc. Submitted documents

c: Requestor  
(w/o enclosures)