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OPINION COMMITTEE



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January 29, 2014

The Honorable Greg Abbott
Attorney General of the State of Texas
Attention: Opinions Committee
P.O. Box 12548
Austin, Texas 75701-2548

Re: Request for Attorney General Opinion to Determine Whether a Charitable Organization Formed Under Section 281.0565 of the Texas Health and Safety Code is a political corporation or subdivision of the State of Texas.

Dear General Abbott:

As Chair of the Senate Jurisprudence Committee, an official authorized to request your ruling under Texas Government Code §402.042(b), I respectfully request your opinion as to whether a charitable organization formed under Section 281.0565 of the Texas Health and Safety Code¹ is a political corporation or subdivision of the State of Texas. Additionally, if a charitable organization formed under Section 281.0565 is determined to be a political corporation or subdivision of the State of Texas, does Section 281.0518 of the Texas Health & Safety Code² authorize such charitable organization to engage in a joint venture with a for-profit entity? I request your opinion in this matter to resolve uncertainty so that the Parkland Center for Clinical Innovation (the "Center") may more fully implement its charitable

¹ Tex. Health & Safety Code Ann. §281.0565 (Vernon 2010) [hereinafter Section 281.0565].

² Tex. Health & Safety Code Ann. §281.0518 (Vernon Supp. 2013) [hereinafter Section 281.0518].

mission to support the Dallas County Hospital District d/b/a Parkland Health & Hospital System ("Parkland Hospital") which implementation might include entering into a joint venture with a for-profit entity created by the Center.

Background

Parkland Hospital originally established the Center, as an administrative section within Parkland Hospital, in 2008 to engage in the research, development, application, and delivery of innovative information technologies to advance the quality of patient care. On April 24, 2012, the Board of Managers of Parkland Hospital adopted a resolution authorizing the creation of a nonprofit corporation to carry out the activities of the Center. On May 10, 2012, the Center was incorporated as a Texas nonprofit corporation to assume the responsibility of conducting activities that were previously conducted within Parkland Hospital. In July 2012, the Center submitted an application for recognition of exemption under Section 501(c)(3) of the Internal Revenue Code of 1986 (the "Code") and, pursuant to Internal Revenue Service guidance, is currently authorized to operate as an organization that is exempt from federal income tax under Section 501(a) of the Code by being listed as an exempt organization in Section 501(c)(3) of the Code during the pendency of the application.³ The Center is governed by a Board of Directors appointed by the Parkland Hospital Board of Managers.⁴

Since its formation, the Center has supported Parkland Hospital through several activities, including: (1) developing real-time electronic predictive models for diabetes and cardiopulmonary arrest patients; (2) creating the Parkland Intelligent e-Coordination and Evaluation System, an electronic coordination and decision support system that (a) sifts through a hospital's electronic medical record data in real-time to identify patients with specific illnesses using natural language processing, (b) employs electronic predictive models to anticipate adverse clinical events, and (c) coordinates and monitors clinical and operational action plans at the individual patient and population level; (3) implementing a study to derive and validate a new model of joint primary care-nephrology care to improve clinical management of risk factors for progression of chronic kidney disease and cardiovascular complications in patients with chronic kidney disease. In order to attract and retain the top scientific and administrative talent necessary for continued innovation, the Center contemplates entering into a joint venture with a for-profit entity created by the Center to engage in activities consistent with its for-profit status.

³ IRS, Contributions to Organization with IRS Application Pending, <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Contributions-to-Organization-with-IRS-Application-Pending>.

⁴ Parkland Center for Clinical Innovation Bylaws, art. II, §2.2(a)(1), attached hereto as Exhibit A [hereinafter Bylaws].

I respectfully request your assistance in resolving the following questions:

1. Is the Center, as a charitable organization formed under Section 281.0565, a political corporation or subdivision of the State of Texas for purposes of the application of Article III, Section 52 of the Texas Constitution⁵?
2. If the Center is determined to be a “political corporation or subdivision” of the State of Texas for purposes of the application of Article III, Section 52 of the Texas Constitution, does Section 281.0518, nonetheless, authorize the Center to engage in any of the following activities: (a) enter into a joint venture or other agreement with a public or private entity contractually controlled by the Center (i.e. the Center will not own stock or other ownership interest in the public or private entity); (b) enter into a joint venture or other agreement with a public or private entity through the creation of a for-profit Texas corporation that the Center will control through the ownership of stock; (c) enter into a joint venture or other agreement with a public or private entity through the creation of a Texas limited liability company that the Center will control through its membership interest; (d) enter into a partnership agreement with a public or private entity that the Center will control by owning or controlling a majority of the partnership interest?

The uncertainty regarding the Center’s status, and the motivation behind my request of your Office, relates to a section of the Center’s enabling legislation that provides in pertinent part that “a charitable organization created by a [hospital] district under [Section 281.0565] is a unit of local government for purposes of Chapter 101, Civil Practice and Remedies Code.”⁶ Given that political corporations and subdivisions of the State of Texas are, by definition, units of government, uncertainty regarding the Center’s status is understandable. However, it is quite possible that statutory authority and case law suggest the Center is not a political corporation or subdivision of the State of Texas. Your Office’s definitive ruling on this matter will be greatly appreciated.

Please accept the following discussion as an effort to help frame the legal issues surrounding the questions above. For purposes of your opinion, please assume the following facts—(i) the Center intends to collaborate with or create a for-profit entity for the purposes of: (a) developing and commercializing certain technologies or intellectual property and

⁵ The Texas Constitution prohibits the legislature from authorizing any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. Tex. Const. art, III, §52(a). [hereinafter Section 52]

⁶ Tex. Health & Safety Code Ann. §281.0565(c) (Vernon 2010).

related services initially developed by the Center, (b) providing scientific services to the Center in support of its mission to support Parkland Hospital, and (c) contracting with customers; (ii) with respect to any joint venture or partnership agreement between the Center and the for-profit entity, the purposes of such joint venture or partnership agreement will involve the sale or licensing of or provision of services with respect to the sale or licensing of technology or intellectual property owned by or licensed to the Center; (iii) with respect to any joint venture or partnership agreement between the Center and the for-profit entity, the Center intends to control the for-profit entity by either (a) contractual agreement whereby the for-profit entity agrees not to take any actions without the Center's approval, and the Center does not own any stock or other ownership interest in the for-profit entity, (b) majority stock ownership (if the entity is formed as a Texas for-profit corporation), (c) majority membership interest (if the entity is formed as a Texas limited liability company), or (d) majority partnership interest (if the entity is formed as a partnership); and (iv) with respect to any joint venture or partnership agreement between the Center and the for-profit entity, the Center's stock, membership, or partnership interests will be designed to limit or eliminate the Center's risk of economic loss (e.g.: authorizing the Center to receive a share of the for-profit entity's revenues from operations, as opposed to profits, in exchange for certain proprietary assets developed by the Center).

Statutory construction appears to suggest that interpreting Section 281.0565 to characterize the Center as a political corporation or subdivision of the State of Texas fails to give effect to the plain meaning of the statute. This Office has clearly explained the rule of statutory construction that an unambiguous statute will be interpreted according to its plain meaning.⁷ Courts will give effect to the plain meaning of a statute if its meaning was plain to the legislators who voted for it.⁸ With regards to the Center, the Legislature expressly provided that charitable organizations created by hospital districts are units of local government *for purposes of Chapter 101, Civil Practice and Remedies Code*.⁹ This statutory language appears unambiguous and does not seem to convey on the charitable organization the broader designation as a political corporation or subdivision of the State of Texas. Arguably, if the Legislature intended to broadly designate charitable organizations created by hospital districts under Section 281.0565 as political corporations or subdivisions of the State, the Legislature could have done so in the statute. However, it appears that in adopting Section 281.0565, the Legislature declined to extend such broad designation to the charitable organization and opted instead to ensure the charitable organization could avail itself of the tort liability limitations provided to units of local government under Chapter 101, Civil Practice and Remedies Code.

⁷ See Op. Tex. Att'y Gen. No. DM-400 (2001) at 5 (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239 (Tex. 1994)).

⁸ *Id.*

⁹ Tex. Health & Safety Code Ann. §281.0565(c) (Vernon 2010) (italics added).

Case law also appears to suggest that the Center should not be characterized as a political corporation or subdivision of the State of Texas. In *Bolen v. Bd. of Firemen, Policemen & Fire Alarm Operators' Tr.*,¹⁰ the San Antonio Court of Civil Appeals established criteria for determining if an entity was a political corporation or political subdivision of the State. In this case, the Appellant, who served as the *ex officio* treasurer of the pension system, appealed the judgment of the trial court that the Board of Firemen, Policemen, and Fire Alarm Operators' Trustees of San Antonio, Texas (the "Board") could lawfully direct the investment of funds under its jurisdiction in investment trust shares representing an interest in the stock of private corporations.¹¹ The Bolen Court reasoned that the constitutional prohibitions set forth in Section 52 did not apply to the Board (and therefore the Board's investment decisions) because the Board was not "a county, a city, a town or any other political corporation or subdivision of the State."¹² In *Bolen*, the Court analysis set forth some minimum characteristics of a political subdivision to include manifesting: "geographical area and boundaries, public elections, public officials, taxing power and a general public purpose or benefit."¹³ Your Office can help clarify matters on this point because it appears that just as the Board failed to exhibit the characteristics of a political subdivision set forth in *Bolen*, so, too, does the Center fail to exhibit these same characteristics. The Center has no geographical area or boundary, has no taxing or bonding power,¹⁴ and is not subject to public elections. Inasmuch as the Center's only purpose is specifically to support the operations of Parkland Hospital through the (i) development of resources for health care services, (ii) provision of ancillary support services, and (iii) solicitation and administration of grants,¹⁵ the Center has a much narrower direct benefit as compared to Parkland Hospital's benefit to the residents of the hospital district at large. Although the Chair of the Parkland Hospital Board of Managers (who is appointed by the Dallas County Commissioners Court) is required to be a Director for the Center,¹⁶ none of the Center's Board of Directors is appointed by locally elected officials.¹⁷

¹⁰ 308 S.W.2d 904 (Tex. Civ. App.—San Antonio 1957, writ ref'd).

¹¹ *Id.* at 905.

¹² *Id.*

¹³ *Id.*

¹⁴ See Op. Tex. Att'y Gen. No. JM-137 (1984) at 2 (reasoning that, in determining whether city hospital authorities were political subdivisions, the bonding authority of the Richardson Hospital Authority was an adequate approximation for the taxing authority characteristic set forth in the *Bolen* criteria).

¹⁵ Bylaws art. I, §1.2

¹⁶ Bylaws art. II, Section 2.2(a)(1).

¹⁷ See Op. Tex. Att'y Gen. No. JM-137 (1984) at 2 (quoting *Guaranty Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 531 (Tex. 1980) ("[m]embers of the governing body of a political subdivision are elected in local elections or are appointed by locally elected officials"). At most, the Center's Board of Directors are appointed by officials who themselves were appointed by locally elected officials.

Indeed, it seems that the Center's characteristics are similar to each entity that your Office has determined not to be a political subdivision or municipal corporation. In several opinions, your Office has followed the *Bolen* Court's reasoning and analysis to determine that several other statutory entities were not political subdivisions of this State. In one opinion, your Office was asked to determine whether Texas Tech University's purchase of group term life from a mutual company violated Section 52's prohibition of political subdivisions becoming a stockholder in any corporation.¹⁸ After noting that the university did not satisfy the *Bolen* criteria for characterization as a political subdivision,¹⁹ your Office determined that the university was not a municipal corporation, either.²⁰ In a subsequent opinion, your Office again determined the university was not a political subdivision of the State but was prohibited, on other grounds, from entering into a joint venture agreement with either a private or municipal utility to construct and operate a cogeneration facility²¹. Your Office has also used the *Bolen* criteria to determine that housing authorities²² and community centers for mental health and mental retardation²³ would not be characterized as political subdivisions of the State.

A determination that the Center is a political corporation or subdivision of the State of Texas could engender more confusion and uncertainty because additional statutes appear to authorize the Center to engage in the very activities that are denied to political corporations and subdivisions of the State of Texas by the reach of Section 52. Given that Section 281.0565 provided the authority for the Center's creation by Parkland Hospital, the Center is a statutory creation, and its powers may be prescribed by statute.²⁴ Several statutes authorize nonprofit corporations like the Center to enter into joint ventures with public or private entities. One statute authorizes Parkland Hospital, directly or through the Center as its nonprofit corporation, to enter into a joint venture with a public or private entity to facilitate

¹⁸ Op. Tex. Att'y Gen. No. H-365 (1974) at 1.

¹⁹ *Id.* at 2.

²⁰ *See Id.* (citing *Hatcher v. State*, 125 Tex. 84, 81 S.W.2d 499 (1935) and explaining that "the primary function of a municipal corporation is to regulate and administer the internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated and not common to the people of the state at large.") This Office also quoted the court's definition in *Welch v. State* that a municipal corporation, "[is a] body politic and corporate constituted by the incorporation of the inhabitants of a definite locality for the purposes of local government[t]" Op. Tex. Att'y Gen. No. H-365 (1974) at 2 (quoting 148 S.W.2d 876, 879 (Tex. Civ. App.—Dallas 1941, writ ref'd).

²¹ Op. Tex. Att'y Gen. No. JM-769 (1987).

²² Op. Tex. Att'y Gen. No. H-338 (1974) at 4.

²³ *See Id.* (citing Op. Tex. Att'y Gen. No. H-291 (1974)).

²⁴ *See Op. Tex. Att'y Gen. No. GA-0280* (2004) at 4 (noting that as the Border Health Institute, an entity that was determined by this Office not to be a political subdivision, just as the Center maintains it is not a political subdivision, was created by statute, its duties may also be prescribed by statute).

leases of undeveloped real property.²⁵ A second statute authorizes Parkland Hospital, directly or through the Center as its nonprofit corporation, to enter into a joint venture with a public or private entity to more generally “carry out the functions of or provide services to” Parkland Hospital.²⁶ Even more relevant in this instance, Section 281.0518 specifically authorizes Parkland Hospital or the Center to “contract, collaborate, or enter into a joint venture or other agreement with a public or private entity to . . . sell or license technology or intellectual property that is owned by or licensed to [Parkland Hospital or the Center] or provide services related to technology or intellectual property sold or licensed by [Parkland Hospital or the Center].”²⁷ Since principles of statutory construction require the presumption that the Legislature intended each statute to comply with Section 52,²⁸ a determination that the Center is a political corporation or subdivision of the State of Texas could cause significant confusion and uncertainty.

I understand the role of the opinion committee is to advise requestors on purely legal matters²⁹ and not resolve fact questions. Given the Center’s plans, Section 52 might not nullify a properly constructed agreement, satisfying the conditions set forth on page 3 above, between the Center and a for-profit entity. In *Lewis v. Indep. Sch. Dist.*, the Texas Supreme Court determined that Section 52 prohibited a school district from purchasing a non-assessable fire insurance policy where, upon payment of the premium, the school district, as policyholder, became a member of the mutual insurance corporation with voting rights.³⁰ The Court reasoned that, notwithstanding the limitation of policyholder liability to the amount of deposit premium paid under the policy,³¹ the fact, that policyholders were members of the insurance corporation entitled to voting rights during the term of said policy, meant that the school district’s ownership of the insurance policy was tantamount to becoming a stockholder in the insurance corporation. Because Section 52 prohibited political corporations or subdivisions of the State from becoming stockholders, the school district, well-established as a political corporation or subdivision of the State,³² was barred from paying the premium on the fire insurance policy. In contrast to the school district in *Lewis*, it

²⁵ Tex. Health & Safety Code Ann. §281.050(b) (Vernon 2010).

²⁶ Tex. Health & Safety Code Ann. §285.091(a) (Vernon 2010).

²⁷ Tex. Health & Safety Code Ann. §281.0518(a) (Vernon Supp. 2013).

²⁸ See Tex. Gov’t Code Ann. §311.021 (Vernon 2013) (“In enacting a statute, it is presumed that: (1) compliance with the constitutions of this state and the United States is intende[d]”).

²⁹ Op. Tex. Att’y Gen. No. GA-0876 (2011) at 1.

³⁰ 139 Tex. 83, 161 S.W.2d 450 (1942). Article III, Section 52(a) was subsequently amended to specifically permit political subdivisions to use public funds to pay the premiums on non-assessable insurance policies issued by mutual insurance companies authorized to conduct business in the State.

³¹ *Id.* at 452.

³² *Id.*

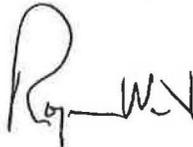
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appears that if the Center did not become a member of the for-profit entity, Section 52's restrictions might not be implicated.

Finally, your Office's reasoning on at least one occasion suggests that, under certain conditions, the Center's ownership of stock in the for-profit entity might not be prohibited. This Office has reasoned that a rationale behind Section 52's prohibition of school districts like the one in *Lewis* from purchasing insurance from mutual companies was protecting the public from a risk of economic loss. In purchasing the insurance policy and becoming a stockholder in the insurance corporation, the political subdivision, as a public body, would extend credit to a private entity through the purchase of its capital stock,³³ and would, thereby, subject the general public to a risk of economic loss depending on the actions of the private entity. Again, in contrast to the school district in *Lewis*, it appears that if the Center receives a share of the for-profit entity's revenues from operations without regard to sharing economic loss, the public would be shielded from any risk of significant economic loss. Arguably, Section 52's *raison d'être* would be observed, and its restrictions might not be implicated.

I appreciate your indulgence regarding my explanation of the legal issues surrounding the questions I have asked of your Office. I am available to provide any other information or assistance you need to facilitate a response. I look forward to your opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Royce West". The signature is written in a cursive style with a large initial "R" and a distinct "W".

Royce West
State Senator, District 23

³³ Op. Tex. Att'y Gen. No. H-1300 (1978) at 2.