Opinion issued December 20, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00146-CV

MICHAEL FALLON, M.D., Appellant

V.

THE UNIVERSITY OF TEXAS MD ANDERSON CANCER CENTER AND CRAIG HENDERSON AS OFFICEER FOR PUBLIC INFORMATION FOR THE UNIVERSITY OF TEXAS MD ANDERSON CANCER CENTER, Appellees

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On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2016-10013

MEMORANDUM OPINION

Appellant, Michael Fallon, M.D., challenges the trial court's orders dismissing his petition for a writ of mandamus and declaratory-judgment action[1] against appellees, The University of Texas MD Anderson Cancer Center and its Officer of Public Information, Craig Henderson (collectively, "the Cancer Center"). In three issues, Fallon contends that the trial court erred in granting the Cancer Center's plea to the jurisdiction, denying his motion for summary judgment, and dismissing his declaratory-judgment action.

We affirm in part and reverse and remand in part.

Background

In his third amended petition, Fallon alleges that he is an individual residing in New York and the Cancer Center is a governmental body of the State of Texas. In October 2015, Fallon, pursuant to the Texas Public Information Act ("PIA"),[2] served the Cancer Center with a public information request, seeking nine categories of information. In the first three categories (items 1-3), he seeks certain call records of the Cancer Center. In the remaining six categories (items 4-9), he seeks the following information:

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1 *See* TEX. GOV'T CODE ANN. § 552.321(a) (Vernon 2012) (authorizing writ of mandamus to compel governmental body to make information available for public inspection); TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011 (Vernon 2015) (Texas Uniform Declaratory Judgments Act ("DJA")).

2 *See* TEX. GOV'T CODE ANN. §§ 552.001–.353 (Vernon 2012 & Supp. 2018) (Texas Public Information Act ("PIA")).

4) All emails, faxes or other electronic communications to or from [twelve listed] individuals regarding the MDA affiliation process with Lourdes Hospital, Binghamton NY, the MD Anderson certification actions concerning Michael Fallon MD and any other evaluation of Dr. Michael Fallon for date range 9/1/2013 to the present . . . .

5) The MD Anderson Physician Network "Radiation Oncology Provider Quality Assessment – *Provisional*" reports for the Radiation Oncologists certified by MD Anderson at [fourteen listed] institutions *with patient, physician, and institution identifiers redacted*. A redacted copy of this report is attached to the cover email as a reference. . . .

6) Gross affiliation revenue received by MDA from the above institutions.

7) Agreement and engagement documentation between MDA and [seven listed] consultants. . . .

8) Fees paid to [the seven] consultants [listed in request no. 7]

9) Affiliation and discovery/due diligence agreement documentation between MDA and Our Lady of Lourdes memorial Hospital, Binghamton, NY

In February 2016, the Cancer Center produced call records in response to requested items 1-3. And it informed Fallon that it did not maintain information responsive to requested items 4-9, but noted that such information might be maintained by a "separate legal entity," MD Anderson Physicians Network ("the Network").

According to Fallon, responsive information possessed by the Network is "public information" that the Cancer Center has a duty to produce under the PIA.

However, the Cancer Center refused to produce such information. Fallon therefore filed his petition for a writ of mandamus, seeking to compel the Cancer Center to produce information responsive to requested items 4-9 and possessed by the Network.[3] He also seeks a declaration that such information constitutes "public information" under the PIA.[4]

The Cancer Center answered, generally denying the allegations and asserting sovereign immunity as a defense. It also filed a plea to the jurisdiction, asserting that the evidence, as a matter of law, proves that responsive information possessed by the Network is not "public information" under the PIA. The Cancer Center attached to its plea the affidavit of its Vice President of Global Business Development, Amy Hay, and an informal letter ruling of the Texas Attorney General.

In her affidavit, Hay testified, in relevant part:

- "[The Cancer Center] is an agency of the State of Texas and institution of The University of Texas System ('System')."
- "[The Network] is a private, Texas nonprofit corporation."
- "[The Network] is a separate legal entity from [the Cancer Center] with an independent certificate of formation."

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3 *See* TEX. GOV'T CODE ANN. § 552.321(a).

4 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a).

- "[The Network] is governed by an independent board of directors comprised entirely of physicians that is responsible for the direction and management of the affairs of the corporation."

- "A primary purpose of [the Network] is to provide quality improvement and best practices management services to qualified community hospitals through [the Network]'s Certified Member Program ('Certified Member Program')."

- "Under the Certified Member Program, [the Network] contracts and affiliates directly with community hospitals ('Certified Members') which pay [the Network] a fee as compensation for the services [the Network] provides such hospitals under these contracts."

- "[The Cancer Center] is not a party to [the Network]'s contracts with Certified Members, and [the Cancer Center] does not receive fees for the services [the Network] provides Certified Members or affiliation revenue from [the Network]'s affiliation with Certified Members."

- "[The Cancer Center] does not have an affiliation process or affiliation and discovery/due diligence agreement with Our Lady of Lourdes Memorial Hospital."

- "[The Cancer Center] did not perform any certification actions or other evaluation of Dr. Michael Fallon."

- "[The Cancer Center] has not received gross affiliation revenue from the institutions listed in item 5 of [Fallon's second request]."

- "[The Network] contracts directly with [Cancer Center] faculty members who serve as consultants for [the Network] in providing services to Certified Members."

- "[The Cancer Center] is not a party to any contracts between [the Network] and such consultants, and [the Cancer Center] does not pay or receive fees for the services such consultants provide [the Network] or Certified Members."

- "[The Cancer Center] does not have consulting agreements with the individuals listed in item 7 of [Fallon's second request]."

- "[The Cancer Center] did not pay consulting fees to the consultants listed in item 7 of [Fallon's second request]."

In the informal letter, the Texas Attorney General opined that, based on the Network's representations, the Network is not a governmental body under the PIA and, therefore, is not subject to the PIA's disclosure requirements.

Fallon filed a response to the Cancer Center's plea to the jurisdiction and a motion for summary judgment, asserting that the evidence, as a matter of law, establishes that the responsive information possessed by the Network is "public information" that the Cancer Center has a duty to produce. And he argued that the Cancer Center has a duty to produce the responsive information possessed by the Network because the Cancer Center has a right of access to the information. Fallon attached to his summary-judgment motion the Network's restated certificate of formation, which states that the Network "is to be administered solely for the benefit of [the Cancer Center] by providing, directly or indirectly, assistance and benefit, financial and otherwise, to the [Cancer Center] through whatever means are determined by the Board of Directors, including, but not limited to, making distributions or providing services." Further, the certificate of formation states, "[t]he direction and management of the affairs of the [Network] and the control and disposition of its properties and funds [is] vested in [the] Board of Directors,"

which is composed of physicians who practice medicine in Texas. The certificate of formation also states that "[t]he sole member of the Network shall be the President of the [Cancer Center]." And as the Network's sole member, the Cancer Center's president has the "right, power, and authority to amend" the Network's certificate of formation.

Fallon also attached to his summary-judgment motion a "Form 990" tax return of MD Anderson Services Corporation. The tax return identifies two "related tax-exempt organizations": (1) the Cancer Center and (2) the Physicians Network. The tax return lists the Cancer Center as the "direct controlling entity" of the Network. And Fallon cited to various pages from the Cancer Center's website, which purportedly underscore the close affiliation between the Cancer Center and the Network.

Before the trial court ruled on the Cancer Center's plea to the jurisdiction and Fallon's summary-judgment motion, the Network filed a plea in intervention. In its plea, the Network alleges that it is the Cancer Center's private, nonprofit affiliate and operates as a public charity. The Network is primarily focused on improving the quality of cancer care at community hospitals throughout the United States. And it administers various quality improvement programs, including its Certified Member Program.

According to the Network, under the Certified Member Program, out-of-state community hospitals and the Network enter into contracts under which it provides oncology quality improvement and best practices services developed by the Network. The Cancer Center is not a party to these contracts and does not benefit from them. Information relating the Certified Member Program is not created and maintained for the Cancer Center. And the Cancer Center does not have a right of access to such information or the Network's other documents and information related to Network's business conducted with third-party community hospitals.

The Network further alleges that information responsive to items 4-9 of Fallon's public information request was created by the Network as part of the quality assessments conducted by the Network for third-party community hospitals under the Certified Member Program. And the Network opines that Fallon is attempting to obtain the information for use in a suit that he filed against his former employer, Lourdes Hospital, which is located in upstate New York. According to the Network, Lourdes, several years ago, entered into a Certified Member Program development agreement. Under that agreement, the Network conducted a quality evaluation of Lourdes' oncology programs and providers through a medical peer review. Fallon then filed his lawsuit, alleging that the medical peer review

conducted by the Network under the development agreement resulted in the termination of his contract with the hospital.

Finally, the Network asserts that any information responsive to Fallon's public information request that is in its possession is not "public information" under the PIA, and, even if it were, such information is exempt from disclosure under various exceptions set forth in the statute.

After a hearing, the trial court granted the Cancer Center's plea to the jurisdiction, denied Fallon summary-judgment motion, and dismissed Fallon's petition for a writ of mandamus and declaratory-judgment action.

Plea to the Jurisdiction and Summary Judgment

In his first and second issues, Fallon argues that the trial court erred in granting the Cancer Center's plea to the jurisdiction and denying his summary-judgment motion because the evidence, as a matter of law, establishes that information responsive to items 4-9 of his public information request and possessed by the Network constitutes "public information" that the Cancer Center has a duty to produce under the PIA. *See* TEX. GOV'T CODE ANN. §§ 552.001–.353 (Vernon 2012 & Supp. 2018). In the Cancer Center's plea and Fallon's summary-judgment motion, both parties sought judgment on the same issue: whether the information requested by Fallon constitutes "public information" under the PIA.

Initially, we note that because the plea-to-the-jurisdiction standard mirrors that of a matter-of-law summary-judgment motion, we will consider Fallon's first and second issues together, reviewing the Cancer Center's jurisdictional plea and Fallon's summary-judgment motion under the de novo standard that applies to cross-motions for summary judgment. *See Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018); *Morello v. Seaway Crude Pipeline Co.*, No. 01-16-00765-CV, 2018 WL 2305541, at *7 (Tex. App.—Houston [1st Dist.] May 22, 2018, no pet.) (reviewing rulings on jurisdictional plea and summary-judgment motion together under de novo standard applicable to cross-summary-judgment-motions).

On cross-motions for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 278 (Tex. 2018). When the trial court grants one motion and denies the other, we review the summary-judgment evidence presented by both sides, determine all questions presented, and render the judgment that the trial court should have rendered. *Id.*; *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004).

The stated purpose of the PIA is to provide the public with "complete information about the affairs of government and the official acts of public officials and employees." TEX. GOV'T CODE ANN. § 552.001(a). Thus, under the PIA, a

"governmental body" must promptly produce "public information" on request unless an exemption from disclosure applies and is timely asserted. *See id.* §§ 552.101–.158, 552.221. "Public information" is broadly defined as follows:

> information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body;
>
> (2) for a governmental body and the governmental body:
>
> (A) owns the information;
>
> (B) has a right of access to the information; or
>
> (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
>
> (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a).[5]

"Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental

[5] The PIA also contains a non-exclusive list of categories of public information as well as certain specific exceptions from required disclosure. *See* TEX. GOV'T CODE ANN. §§ 552.022, 552.101–.158.

function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-1). "'Official business' means any matter over which a governmental body has any authority, administrative duties, or advisory duties." *Id.* § 552.003(2-a). Whether requested information is "public information" under the PIA is a question of law. *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 357 (Tex. 2000); *Harris Cty. Appraisal Dist. v. Integrity Title Co.*, 483 S.W.3d 62, 69 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). The Legislature has specified that the PIA "shall be liberally construed in favor of granting a request for information." TEX. GOV'T CODE ANN. § 552.001(b); *see id.* § 552.001(a) ("The provisions of this chapter shall be liberally construed to implement this policy.").

When, as here, a governmental body refuses to produce requested information because it does not consider the information to be public, the requestor may file a petition for a writ of mandamus to compel the governmental body to make the information available for public inspection.[6] *See id.* § 552.321(a); *Nehls v. Hartman Newspapers, LP*, 522 S.W.3d 23, 29 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). In the mandamus proceeding, the governmental body has the

[6] The requestor may also file a petition for a writ of mandamus if the governmental body contends that the requested information is exempted from disclosure, a situation not presented here. *See id.* § 552.321(a).

burden to prove that the requested information is not public information. *Adkisson v. Paxton*, 459 S.W.3d 761, 772 (Tex. App.—Austin 2015, no pet.).

Here, it is undisputed that Fallon, in items 4-9 of his public information request, seeks information related to the Certified Member Program. And it is undisputed that the Cancer Center does not possess responsive information. However, as Fallon explains, in items 4-9, he does not seek information possessed by the Cancer Center. Rather, he seeks information possessed by the Network. Specifically, in items 4-9, he seeks: (1) electronic communications regarding the Network's "affiliation process" with Lourdes and "evaluation[s]" of Fallon, (2) Network reports for certain radiation oncologists certified by the Network, (3) gross affiliation revenue received by the Network from certain Certified Members, (4) agreement and engagement documentation between the Network and certain consultants, (5) the fees paid to those consultants, and (6) affiliation and discovery/due diligence agreement documentation between the Network and Lourdes.

Fallon's Summary-Judgment Motion

In his second issue, Fallon asserts that the information he seeks is "public information." Under the PIA, information is "public information" if it is "written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . for a governmental body

and the governmental body . . . has a right of access to the information." TEX. GOV'T CODE ANN. § 552.002(a)(2)(B). Thus, to have prevailed on his summary-judgment motion, Fallon had to prove, as a matter of law, three elements: (1) the information responsive to requested items 4-9 and possessed by the Network is "in connection with the transaction of official business" of the Cancer Center, (2) the information is maintained "for" the Cancer Center, and (3) the Cancer Center has a "right of access" to the information. *Id.* However, Fallon, in his summary-judgment motion, only addressed the third element, i.e., whether the Cancer Center has a "right of access to" the information. He did not address the required first two elements, i.e., whether the information is "in connection with the transaction of official [Cancer Center] business" and whether the information is maintained "for" the Cancer Center. Because Fallon did not address the first two elements of his claim, thereby failing to prove, as a matter of law, that responsive information maintained by the Network is "public information" that the Cancer Center has a duty to disclose, we hold that the trial court did not err in denying his summary-judgment motion.

We overrule Fallon's second issue.

The Cancer Center's Plea to the Jurisdiction

In his first issue, Fallon asserts that the Cancer Center did not properly address, in his plea to the jurisdiction, all three elements of what constitutes "public information."

We first consider whether the Cancer Center proved, as a matter of law, that the Network does not maintain responsive information "in connection with the transaction of official business" of the Cancer Center. Under the PIA, "[i]nformation is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-1). "'Official business' means any matter over which a governmental body has any authority, administrative duties, or advisory duties." *Id.* § 552.003(2-a).

The Cancer Center argues that responsive information maintained by the Network is not in connection with the transaction of official Cancer Center business because: (1) the Network is a "separate legal entity" from the Cancer Center, (2) the Network is "not a governmental body," and (3) the Network's Certified Member Program "is not the official business" of the Cancer Center.

The Cancer Center has established that the Network is a "separate legal entity" and "not a governmental body." However, it has not established that the Network's is not connected to the Cancer Center's official business. Indeed, the entire point of the existence of section 552.002(a)(2) is that "pubic information" may sometimes be maintained by private entities.

The Cancer Center asserts that the business of the Network's Certified Member Program "is not the official business" of the Cancer Center, relying on the testimony of Hay, the Vice President of the Cancer Center. In her affidavit, Hay did testify that the Cancer Center is not a party to, and does not receive funds from, any of the Network's Certified Member Program contracts. However, even though the Cancer Center is not a party to the various contracts between the Network, community hospitals, and consultants, there is still evidence that the administration of the Certified Member Program constitutes "official business" of the Cancer Center.

First, MD Anderson Service Corporation's tax return identifies the Cancer Center as the "direct controlling entity" of the Network. And if the Cancer Center directly controls the Network, then the Cancer Center has "authority" over the programs that the Network administers, including the Certified Member Program. Second, the Network's certificate of formation requires that the Network's "sole member" be the president of the Cancer Center. And by appointing the Cancer

Center's president as the Network's sole member, the Network's certificate of formation appears to give the Cancer Center indirect control over the Network. Third, the various pages from the Cancer Center's website cited by Fallon show that there are Cancer Center administrative staff who have administrative or advisory duties over the Network. For example, the Cancer Center employs (1) an Executive Vice President for Administration, who "provides executive oversight" for the Network, (2) a Senior Vice President, who "provides leadership for a team focused on engaging community hospitals and health care systems across the nation and around the world with the goal of improving the quality of cancer care in those communities," and (3) a Vice President of Operations, who "is responsible for all clinical operations provided to partners at a network of national locations."

These three pieces of evidence, i.e., the tax return, the certificate of formation, and the Cancer Center's website pages' descriptions of the administrative staff positions, tend to show that the Cancer Center has "authority, administrative duties, or advisory duties" over the Certified Member Program, which, in turn, shows that the administration of the Certified Member Program constitutes the Cancer Center's "official business" under the PIA. Thus, we conclude that the Cancer Center has failed to prove, as a matter of law, that the responsive information possessed by the Network is not "in connection with the transaction of official business" of the Cancer Center.

Next, we consider whether the Cancer Center proved, as a matter of law, that the Network does not maintain responsive information "for" the Cancer Center.

According to the Cancer Center, Hay's testimony shows that responsive information possessed by the Network is not maintained "for" the Cancer Center; rather, it is maintained "for" the Network itself and the third-party hospitals and consultants with whom the Network contracts as part of the Certified Member Program.

In her affidavit testimony, Hay establishes two basic facts: (1) the Network and the Cancer Center are separate legal entities and (2) the Cancer Center is not a party to and does not receive funds from any of the Certified Member Program contracts. However, the fact that the Cancer Center and the Network are separate entities does not establish that the Network does not maintain responsive information "for" the Cancer Center. As discussed above, "public information" may be maintained by private entities. *Id.* § 552.002(a)(2). And even though the Cancer Center is not a party to, and does not receive funds from, the Certified Member Program contracts, there is evidence that the Network enters into those contracts and ultimately administers the Certified Member Program "for" the Cancer Center. For instance, the certificate of formation states that the Network "is to be administered solely for the benefit of [the Cancer Center] by providing, directly or indirectly, assistance and benefit, financial and otherwise, to the

[Cancer Center] through whatever means are determined by the Board of Directors, including, but not limited to, making distributions or providing services." And this provision indicates that the Certified Member Program contracts may be benefiting the Cancer Center "indirectly" by furthering the Cancer Center's mission of preventing and treating cancer. Further, it stands to reason that if the Network is administered "solely" for the Cancer Center's "benefit," then the Network's programs, including the Certified Member Program, are administered for the Cancer Center's benefit as well.

Notwithstanding the express language of the certificate of formation, the Cancer Center asserts that the Network cannot be characterized as administering the Certified Member Program "for" the Cancer Center. Relying on an opinion issued by the Austin Court of Appeals, which, in turn, relies on an advisory opinion of the Texas Attorney General, the Cancer Center asserts that a private entity maintains information "for" a governmental body only when the private entity maintains the information "on behalf of," "at the request of," or "under the direction of" the governmental body. *See Murphy v. City of Austin*, No. 03-04-00332-CV, 2005 WL 309203, at *3 (Tex. App.—Austin Feb. 10, 2005, no pet.) (mem. op.) (quoting Tex. Att'y Gen. ORD-462 (1989)). The Cancer Center further argues that the Network does not maintain responsive information "for" the

Cancer Center because the Cancer Center did not request or direct the Network to administer the Certified Member Program.

Although there is no evidence that the Cancer Center specifically "requested" or "directed" the Network to administer the Certified Member Program,[7] the certificate of formation constitutes evidence that the Network nevertheless administers the program on behalf of the Cancer Center. To the extent *Murphy* can be read as supporting a narrower understanding of when a private entity acts "on behalf of" a governmental body, we respectfully reject such a reading, as it conflicts with the statutory mandate that the PIA be "liberally construed" in favor of disclosure and ignores subsequent amendments to the statute's definition of public information. *See* TEX. GOV'T CODE ANN. § 552.001(b); *see also* Act of May 24, 2013, 83rd Leg., R.S., ch. 1204, §§ 1–2, Tex. Sess. Law Serv. 3012, 3012–13 (codified at TEX. GOV'T CODE ANN. §§ 552.002(a-1), 552.003(2-a)). These amendments added provisions that broadly define the circumstances under which information is in connection with the transaction of official business. TEX. GOV'T CODE ANN. §§ 552.002(a-1), .003(2-a). And they underscore that the PIA's terms should be broadly construed when doing so would further the PIA's policy favoring disclosure. Thus, we

[7] We note, however, that MD Anderson Service Corporation's tax return does show that the Cancer Center is the "direct controlling entity" of the Network, and this constitutes evidence that the Network administers the Certified Member Program under the general direction of the Cancer Center.

conclude that the Cancer Center has failed to establish, as a matter of law, that the Network does not maintain responsive information "for" the Cancer Center.

Finally, we consider whether the Cancer Center proved, as a matter of law, that it does not have a "right of access" to responsive information maintained by the Network.

The Cancer Center argues that it does not have a "right of access" to responsive information maintained by the Network because (1) the Network and the Cancer Center are separate legal entities and (2) the Cancer Center is not a party to, and does not receive funds from, any of the Certified Member Program contracts. As discussed above, there is evidence indicating that, despite these two facts, the Cancer Center has a "right of access" to responsive information maintained by the Network. The evidence includes MD Anderson Service Corporation's tax return and the Network's certificate of formation. As previously noted, the tax return shows that the Cancer Center is the "direct controlling entity" of the Network. And the certificate of formation provides that the Cancer Center's president is the "sole member" of the Network with the "right, power, and authority" to amend the Network's bylaws.

Under the certificate of formation, the Cancer Center's president does not just happen to be the Network's sole member. Rather, the Cancer Center's president is the Network's sole member *by virtue of his capacity as president* of

the Cancer Center. As the Network's sole member, the Cancer Center's president has a right to examine, and, thus, a "right of access" to the Network's books and records. *See* TEX. BUS. ORGS. CODE ANN. § 22.351 (Vernon 2012) ("A member of a corporation, on written demand stating the purpose of the demand, is entitled to examine and copy at the member's expense, in person or by agent, accountant, or attorney, at any reasonable time and for a proper purpose, the books and records of the corporation relevant to that purpose.").

If the Cancer Center directly controls the Network, and the Cancer Center's president serves as the Network's "sole member" with the "right, power, and authority" to amend the Network's bylaws and the right to examine the Network's books and records, it follows that the Cancer Center has a "right of access" to information possessed by the Network, both directly and through its president.

Although the Cancer Center asserts that "[t]he existence of a relationship between a governmental body and a separate legal entity does not itself establish a specific right of access to particular documents," the tax return and certificate of formation establish more than a mere "relationship" between the Cancer Center and the Network. They establish that the Cancer Center is the Network's "direct controlling entity" and sole beneficiary. And they establish that the Cancer Center's president is the Network's sole member with the "right, power, and authority" to amend the Network's bylaws and inspect the Network's books and

records. These facts, which the Cancer Center does not dispute, tend to show that the Cancer Center has a right of access to responsive information possessed by the Network.

Thus, we conclude that the Cancer Center has failed to establish, as a matter of law, that it does not have a "right of access" to responsive information maintained by the Network. In sum, the Cancer Center did not establish, as a matter of law, that information responsive to Fallon's requested items 4-9 and maintained by the Network is not "public information" under the PIA. Accordingly, we hold that the trial court erred in granting the Cancer Center's plea to the jurisdiction.

We sustain Fallon's first issue.

Declaratory Judgment

In his third issue, Fallon argues that the trial court erred in dismissing his declaratory-judgment action because no plea to the jurisdiction was filed with respect to his declaratory-judgment action and Texas law permits a party to seek judicial review of a governmental body's refusal to disclose public information through both a declaratory-judgment action and statutory mandamus. Here, the evidence raises a genuine issue of material fact as to whether responsive information maintained by the Network is "public information" under the PIA.

Accordingly, we hold that the trial court erred in dismissing Fallon's declaratory-judgment action.

We sustain Fallon's third issue.

Conclusion

We reverse the trial court's order granting the Cancer Center's plea to the jurisdiction, affirm the trial court's order denying Fallon's motion for summary judgment, and remand the case for further proceedings consistent with this opinion.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Massengale.