



February 1, 2000

Ms. Karen L. Neal
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2000-0326

Dear Ms. Neal:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 131781.

The Dallas County Hospital District (the "district") received a request for information relating to theft of morphine by two named employees of Parkland Memorial Hospital. You have submitted the responsive information for our review. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102 and 552.108 of the Government Code, section 5.08 of article 4495b of Vernon's Texas Civil Statutes, and section 241.151, *et seq.* of the Health and Safety Code. We have considered the exceptions you claim and have reviewed the information you submitted.

As you rely extensively on section 552.108 of the Government Code, we will address that exception first. Subsequent to the interpretation of section 552.108 in *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996), which you cite, the Seventy-fifth Legislature amended section 552.108 extensively. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1231, § 1, 1997 Tex. Gen. Laws 4697. As amended, section 552.108 now provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except [from public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Unless the information in question supplies the explanation on its face, a governmental body claiming an exception under section 552.108 must provide a reasonable explanation as to how and why section 552.108 applies to that information. *See* Gov't Code §§ 552.108, 552.301; *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 (1986). In raising section 552.108, you state only that the requested information "contains the information necessary . . . to detect and investigate a potential crime." Such a general contention is not sufficient; you must specifically demonstrate that one of the subdivisions of section 552.108 is applicable. In this instance,

it appears to this office that the investigation to which the requested information pertains is complete. You state that the responsive records “are from the closed internal files of one of the investigators for the . . . District’s Department of Public Safety.” You do not inform us as to whether the investigation remains in progress, whether there is a pending criminal prosecution, or whether the outcome of the investigation was other than a conviction or deferred adjudication. *See* Gov’t Code § 552.108(a)(1), (2) and (b)(2). Nor do you otherwise specifically demonstrate that the requested information represents an internal record or notation of a law enforcement agency whose disclosure “would interfere with law enforcement or prosecution.” Gov’t Code § 552.108(b)(1). In the absence of a sufficient demonstration that withholding the information in question is necessary to further a specific law enforcement interest, it is not excepted from public disclosure under section 552.108. We therefore conclude that requested information relating to the district’s investigation is not protected section 552.108 and is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) [T]he following categories of information are public information and are not excepted from required disclosure under [chapter 552 of the Government Code] unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108.

Gov’t Code § 552.022(a)(1). We believe that the information in question represents a completed report or investigation made by a governmental body that is specifically made public by section 552.022(a)(1). Accordingly, the department must release any information relating to its investigation unless it is “expressly confidential under other law.” Gov’t Code § 552.022(a).

You also claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the common law informer’s privilege. Section 552.101 protects information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision. The informer’s privilege is well-established under Texas case law and therefore is encompassed by section 552.101. *See, e.g., Aguilar v. State*, 444 S.W.2d 935 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724 (Tex. Crim. App. 1928); *see also* Open Records Decision No. 549 (1990). The United States Supreme Court described the rationale for the informer’s privilege in *Roviaro v. United States*, 353 U.S. 53, 59 (1957), as follows:

What is usually referred to as the informer’s privilege is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the furtherance

and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The informer's privilege protects the identities of individuals who report violations of statutes to police, other law enforcement agencies, and certain administrative officials. *See* Open Records Decision No. 279 (1981). In order for information to come under the protection of the informer's privilege, it must relate to a violation of a criminal or civil statute. *See* Open Records Decision Nos. 515 (1988), 391 (1983). The privilege excepts an informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 (1990). It does not protect the contents of a communication that does not reveal the identity of the informant. *See Roviario v. United States*, 353 U.S. at 60. Once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. *See* Open Records Decision No. 202 (1978). As its purpose is to protect the flow of information to a governmental body, rather than to protect a third person, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. *See* Open Records Decision No. 549 (1990). Additionally, the identity of a "complainant" who reports criminal activity to a police department is not protected by the informer's privilege, because the identity of such a complainant is generally considered to be public information. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.-- Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (1976) ; Open Records Decision No. 127 (1976). Also, the informer's privilege ordinarily does not apply to an employee who reports to an employer about the job performance of another employee. *See* Open Records Decision No. 515 (1988). In seeking to withhold information relating to witnesses and informants, you state only that "[i]t is probable that public disclosure of the names and statements of the witnesses and informants would harm the prospect of future cooperation between employees of the District and the law enforcement officers or subject them to possible intimidation or harassment." With one exception, we do not believe that the informer's privilege protects any of the submitted witness and informant information from public disclosure. Likewise, we do not believe that such information may be withheld from disclosure on the basis of Open Records Decision No. 333 (1982).¹ We have marked the information that the district may withhold under section 552.101 in conjunction with the informer's privilege.

You also claim that the requested information includes personnel records that are excepted from disclosure under section 552.102 of the Government Code, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion

¹In ORD 333, this office held that the identities of persons utilized as "contacts" by the vice division of the Houston Police Department could be withheld from disclosure under the former version of section 552.108. We do not believe that the rationale of that decision is applicable to the information you seek to withhold here.

of personal privacy[.]” The protection that section 552.102 affords to personnel information corresponds to that which section 552.101 provides to information encompassed by common law privacy. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App. – Austin 1983, writ ref’d n.r.e.). Information may be withheld under section 552.101 when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Industrial Foundation v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *See* 540 S.W.2d at 683. Employee privacy under section 552.102 is narrower than common law privacy under section 552.101, however, because of the greater public interest in disclosure of information relating to public employees. *See* Open Records Decision Nos. 470 (1987), 455 (1987), 444 (1986), 423 (1984), 405 (1983), 336 (1982), 284 (1981), 269 (1981), 169 (1977). Generally, section 552.102 may be invoked only when the information in question reveals “intimate details of a highly personal nature.” *See* Open Records Decision Nos. 315 (1982), 298 (1981), 284 (1981). Because of the legitimate public interest in the disclosure of the information presented here, we do not believe that section 552.102 protects any of the submitted personnel records from public disclosure.

You also claim that the requested information includes records that are excepted from disclosure under section 5.08 of article 4495b of Vernon’s Texas Civil Statutes and section 241.151, *et seq.* of the Health and Safety Code. We initially note that in enacting the new Occupations Code, the Seventy-sixth Legislature repealed article 4495b of Vernon’s Texas Civil Statutes. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 6, 1999 Tex. Sess. Laws 1431, 2439 (Vernon) (adopting Occupations Code). The former article 4495b of Vernon’s Texas Civil Statutes now is codified as the Medical Practice Act (the “Act”) at subtitle B of title 3 of the Occupations Code, and the former section 5.08 of article 4495b is codified at chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code provides in relevant part:

(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 . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The records that the district seeks to withhold appear to include patient records resulting from hospitalization. In Open Records Decision No. 546 (1990), this office stated that,

inasmuch as hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay would be confidential under the Act.² This office also has held that, in governing access to a specific subset of information, the Act prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We therefore agree that a portion of the information in question includes medical records that may be released only in accordance with the Medical Practice Act. We have marked that information.

You also raise section 241.151, *et seq.*, of the Health and Safety Code, which we interpret as a reference to subchapter G of chapter 241 of that code. Section 241.152 of the Health and Safety Code provides in relevant part:

(a) [A] hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

Health & Safety Code § 241.152(a). Section 241.151(2) of the Health and Safety Code defines "health care information" as "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." You have not informed us of the district's receipt of any written authorization to release any health care information. Therefore, we believe that any information encompassed by section 241.151(2) is confidential under section 552.101 of the Government Code in conjunction with section 241.152 of the Health and Safety Code.³ We have marked the information that the district must withhold under section 241.152.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

²Inasmuch as the Seventy-sixth Legislature intended no substantive change in the law in codifying the Medical Practice Act at subtitle B of title 3 of the Occupations Code, open records decisions interpreting the former section 5.08 of article 4495b of Vernon's Texas Civil Statutes retain their relevance. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 7, 1999 Tex. Gen. Laws 1431, 2440.

³Section 552.101 protects information considered to be confidential by law, including a statute. The language of the relevant confidentiality statute controls the extent to which information is protected from disclosure. *See* Open Records Decision No. 478 at 2 (1987). Unlike other exceptions to disclosure under chapter 552 of the Government Code, this office will raise section 552.101 on behalf of a governmental body because it protects third-party privacy interests and because section 552.352 prescribes criminal penalties for the disclosure of confidential information.

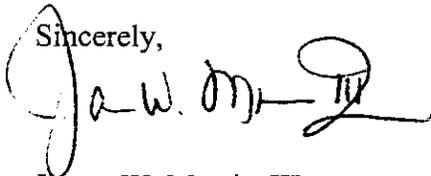
governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ch

Ref: ID# 131781

Encl. Submitted documents

cc: Ms. Donna Ressler
Fox 4 News
400 North Griffin
Dallas, Texas 75202
(w/o enclosures)