



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2009

Ms. Carolyn Foster
Assistant General Counsel
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2009-11982

Dear Ms. Foster:

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# 353519.

The Parkland Health & Hospital System ("Parkland") received a request for all documents which reflect any investigation or disciplinary action against the requestor's client, the requestor's client's personnel file, and any documents created or received by Parkland which refer to the requestor's client. You state you will provide the requestor's client's personnel file to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your assertion that some of the submitted documents are not responsive to the request for information. The requestor seeks all Parkland records which reflect an investigation or discipline directed against the requestor's client, or which refer to the requestor's client. Thus, to the extent the submitted records do not (1) relate to an investigation of the requestor's client, (2) relate to disciplinary action against the requestor's client or (3) refer to the requestor's client, they are not responsive to this request. Upon review, some of the documents in Exhibits C and D relate to an investigation of a Parkland employee other than the requestor's client and do not refer to the requestor's client. Thus, these records are not responsive to the instant request for information. This ruling does not

address the public availability of any information that is not responsive to the request, and Parkland is not required to release these records, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).¹

We next turn to Parkland's procedural obligations under the Act. Section 552.301(e) of the Government Code provides that a governmental body must submit to this office, no later than the fifteenth business day after the date of its receipt of the request for information, the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See Gov't Code § 552.301(e)(1)(D)*. Parkland received the request for information on June 9, 2009. Parkland did not send a copy of the information it seeks to withhold to this office until July 1, 2009, more than fifteen business days after receiving the request. *See Gov't Code § 552.301(e)*. You do not inform us that Parkland was closed for any business days between June 9, 2009 and July 1, 2009. Thus, Parkland failed to comply with the requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption the requested information is public and must be released. *Id.* § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302 of the Government Code); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994). Although you seek to withhold the submitted information under sections 552.103, 552.107(1), and 552.108 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Gov't Code § 552.007; Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Because your claims under sections 552.103, 552.107(1), and 552.108 do not provide compelling reasons for non-disclosure under section 552.302, in failing to comply with section 552.301 you have waived those exceptions. Accordingly, Parkland may not withhold any of the submitted information on the basis of your claims under

¹As our ruling is dispositive for this information, we need not address your arguments against its disclosure.

sections 552.103, 552.107(1), and 552.108. Consequently, because you only assert sections 552.103 and 552.108 for the information submitted in Exhibit E, and because our determination regarding these exceptions is dispositive, the information in this exhibit must be released in its entirety. However, you assert the information submitted in Exhibits B, C, D, and F is excepted under sections 552.101, 552.102, and 552.117 of the Government Code. Because these exceptions can provide compelling reasons to overcome the presumption of openness, we will consider your arguments under these exceptions.

You claim some responsive information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* § 552.102(a). Section 552.102 is applicable to information that relates to current and former public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. Accordingly, we will consider your claim under section 552.101 in conjunction with common-law privacy and your claim under section 552.102(a) together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *See id.* at 681-82. The responsive information in Exhibits C, D, and F pertains to Parkland's termination of the public employees at issue, and to the circumstances surrounding those terminations. This office has stated in numerous opinions that the public has a legitimate interest in knowing the reasons for the dismissal of public employees and the circumstances surrounding their termination. Open Records Decision No. 444 at 6 (1986); *see* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, we conclude this information may not be withheld under common-law privacy.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of

decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. You acknowledge, and we agree, that none of the submitted information falls within these "zones of privacy." The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the records at issue relate directly to the reasons for and circumstances surrounding the termination of Parkland employees. We find the public's need to know information relating to the work behavior and discipline of government employees generally outweighs those employees' privacy interests in the information. We therefore conclude Parkland may not withhold any information in Exhibits C, D, or F under section 552.101 in conjunction with constitutional privacy.

Section 552.101 also encompasses information other statutes make confidential, such as section 301.466 of the Occupations Code, which provides:

(a) A complaint and investigation concerning a nurse under this subchapter and all information and material compiled by the [Board of Nursing] in connection with the complaint and investigation are:

- (1) confidential and not subject to disclosure under Chapter 552, Government Code; and
- (2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or a board employee or agent involved in license holder discipline.

(b) Notwithstanding Subsection (a), information regarding a complaint and an investigation may be disclosed to:

- (1) a person involved with the board in a disciplinary action against the nurse;
- (2) a nursing licensing or disciplinary board in another jurisdiction;
- (3) a peer assistance program approved by the board under Chapter 467, Health and Safety Code;

(4) a law enforcement agency; or

(5) a person engaged in bona fide research, if all information identifying a specific individual has been deleted.

(c) The filing of formal charges against a nurse by the board, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code.

Occ. Code § 301.466. Section 301.466 only applies to information created or compiled by the Board of Nursing (the "board") as part of an investigation by the board. The submitted information consists of personnel records created and compiled by Parkland as part of its investigation of its employees. Because the records were not created and compiled by the board, you failed to establish the applicability of section 301.466 of the Occupations Code to any of the submitted documents, and none of the submitted information may be withheld on that basis.

Section 552.101 also encompasses section 161.032 of the Health and Safety Code, which provides in relevant part:

(c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

(e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services.

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital, . . . university medical center or health science center, [or] hospital district[.]

Health & Safety Code § 161.032(c), (e), (f). You state the Alertline Confidential Memorandum submitted in Exhibit C was created based on a report made to Parkland's Global Compliance line. You inform this office that reports made in this way are in fact

reports to Parkland's Compliance Department, which includes Parkland's Compliance Officer. You do not inform this office, however, whether this report was received, created, or maintained in the exercise of a proper function of this compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services. *Id.* § 161.032(e). Accordingly, we conclude you have failed to demonstrate that the Alertline Confidential Memorandum is made confidential under section 161.032(c), and Parkland may not withhold this document under section 552.101 of the Government Code.

You claim that portions of the responsive information are exempted under section 552.117 of the Government Code. Section 552.117(a)(1) exempts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), Parkland must withhold the personal information that pertains to a current or former employee of Parkland who elected, prior to Parkland's receipt of the request for information, to keep such information confidential. You provide documentation that four of the employees whose information is at issue timely elected to not allow public access to their home telephone numbers pursuant to section 552.024. Accordingly, we marked the home telephone numbers related to these four employees that Parkland must withhold under section 552.117. The remaining responsive information contains the home address, home telephone number, and family member information of another Parkland employee. You do not inform this office whether this employee elected to keep this information confidential. Accordingly, if the employee whose home address, home telephone number, and family member information we marked timely elected to keep this information confidential pursuant to section 552.024, Parkland must withhold this information under section 552.117(a)(1). However, if this employee did not timely elect under section 552.024, this information must be released.

In summary, Parkland must withhold the home telephone numbers we marked under section 552.117. Parkland must also withhold the remaining home address, home telephone number, and family member information we marked under section 552.117 if the employee to whom this information relates timely elected to keep this information confidential. The remaining responsive information must be released.

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.oag.state.tx.us/open/index_orl.php,

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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", with a long horizontal flourish extending to the right.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 353519

Enc. Submitted documents

cc: Requestor
(w/o enclosures)