ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2010

Ms. Nneka C. Egbuniwe
Deputy General Counsel
Legal Affairs
Parkland Health & Hospital System
5123 Harry Hines Boulevard
Dallas, Texas 75235

OR2010-08296

Dear Ms. Egbuniwe:

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# 381689.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System ("Parkland") received a request for fourteen categories of information related to an investigation of loss of controlled substances at a Parkland pharmacy and individuals involved in that investigation. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.111, 552.117, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

[1]We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

> public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted documents include a final Advisory Services Agreement that pertains to the receipt or expenditure of public funds by Parkland and therefore is subject to section 552.022(a)(3). Parkland may only withhold the information subject to section 552.022(a)(3) if it is confidential under "other law." You claim this agreement is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. However, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 6 (2002) (section 552.107 is not "other law" for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, sections 552.103, 552.107, 552.108, and 552.111 are not "other law" for purposes of section 552.022 and Parkland may not withhold the agreement on those bases. However, the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence, and the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Thus, we will consider whether rule 503 or rule 192.5 protects the Advisory Services Agreement.

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

You state the submitted information, including the Advisory Services Agreement, was created in anticipation of criminal litigation. However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." *See* Tex. R. Civ. P. 2. Thus, rule 192.5 of the Texas Rules of Civil Procedure cannot apply to the submitted Advisory Services Agreement based on any criminal litigation. Although you also mention civil litigation, you explain neither how the agreement was created in anticipation of civil litigation in particular, nor how it contains an attorney's mental impressions, opinions, or legal theories. Accordingly, we conclude the submitted agreement may not be withheld under rule 192.5 of Texas Rules of Civil Procedure.

You also raise the attorney-client privilege, found in rule 503 of the Texas Rules of Evidence, for the Advisory Services Agreement. Rule 503(b)(1) provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> >
> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged

and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). 861 S.W.2d at 427.

You represent the submitted Advisory Services Agreement was created by consultants for Parkland's legal counsel in order to facilitate the rendition of professional legal advice to Parkland. However, you state Parkland has provided all the submitted information, including this agreement, to the State Board of Pharmacy and the U.S. Department of Justice, neither of which are privileged parties. We find that, in doing so, Parkland has waived the attorney-client privilege with respect to the submitted agreement. *See* Tex. R. Evid. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990) (attorney-client and work product privileges waived when privileged information was disclosed to Federal Bureau of Investigation, Internal Revenue Service, and Wall Street Journal); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex.1986). Thus, the Advisory Services Agreement may not be withheld on the basis of the attorney-client privilege under Texas Rule of Evidence 503. As you raise no other exceptions to disclosure of the agreement, this document, which we have marked, must be released.

We next turn to your argument under section 552.108 of the Government Code for the remaining information. Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, the submitted information consists of records held by Parkland's police department, as well as administrative and personnel records held by Parkland. Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a representation from the entity with the law enforcement interest (1) stating that entity wishes to withhold the information, and (2) demonstrating the information relates to the pending case. You provide a letter from the Dallas County District Attorney's Office (the "district attorney") objecting to release of the submitted information. In this letter, the district attorney represents all the submitted information, including the administrative and personnel documents, is likely to be documentary evidence in pending criminal cases, and that release of this information would interfere with the district attorney's prosecution of those cases. Based on this representation and our review, we determine release of most of the remaining information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active

cases); *see also* Open Records Decision No. 474 at 4-5 (1987) (section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct).

However, basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-8; *see also* Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information from the submitted offense report, Parkland may withhold the remaining information at issue under section 552.108(a)(1) of the Government Code.[2]

Because you seek to withhold all the submitted records under sections 552.103 and 552.111, we will address your arguments under those exceptions for the basic information. Section 552.103 of the Government Code provides in pertinent part as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Parkland has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). In Open Records Decision No. 597 (1991), this office determined that basic information may not be withheld under the statutory predecessor to section 552.103. ORD 597 at 3. Because the

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[2]As we are able to make this determination, we need not address your claims under section 552.107, section 552.111, or section 552.117 of the Government Code.

remaining information consists only of basic information, it may not be withheld under section 552.103.

Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

851 S.W.2d at 207. A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. In the case of a communication, a governmental body must show the communication was between a party and the party's representatives. ORD 677 at 7-8. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8.

You do not explain how the department created the offense report for any litigation to which it is a party. Further, you state the offense reports have been released to non-privileged parties. Consequently, any privilege that might otherwise have attached to these documents has been waived. *See* 798 S.W.2d at 554; ORD 677 at 6-8. Thus, none of the basic

information may be withheld on the basis of the attorney work product privilege under section 552.111.

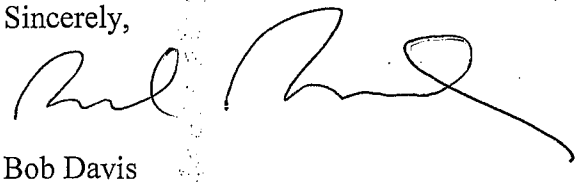
Basic information, in this instance, contains the arrestees' social security numbers, which are excepted from disclosure under section 552.147 of the Government Code. This section provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147(a). Accordingly, Parkland may withhold the arrestees' social security numbers from the basic information under section 552.147 of the Government Code.[3]

In summary, with the exception of the arrestees' social security numbers that may be withheld under section 552.147 of the Government Code, Parkland must release the basic information and the information we marked under section 552.022(a)(3) of the Government Code. Parkland may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code.

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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

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[3]Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147(b). Although you marked the arrestees' social security numbers under section 552.117 of the Government Code, this section only applies to information a governmental body holds in its capacity as an employer. Because these numbers are held in a law-enforcement capacity, they may not be withheld under section 552.117.

Ref: ID# 381689

Enc. Submitted documents

cc: Requestor
(w/o enclosures)