



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 6, 2010

Ms. Nneka C. Egbuniwe  
Deputy General Counsel  
Parkland Health & Hospital System  
5201 Harry Hines Boulevard  
Dallas, Texas 75235

OR2010-09884

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# 385328.

The Parkland Health & Hospital System ("Parkland") received a request for 21 categories of information. You state that Parkland has no information that is responsive to parts of the request.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.111, 552.117, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.<sup>2</sup> We also have considered the comments we received from the requestor.<sup>3</sup>

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<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes Parkland to withhold any information that is substantially different from the submitted information. *See Gov't Code* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>3</sup>*See Gov't Code* § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

You also contend that the instant request for information is redundant of other recent requests made to Parkland by this requestor. Section 552.232 of the Government Code, "Responding to Repetitious or Redundant Requests," provides in part:

(a) A governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F, shall respond to the request, in relation to the information for which copies have been already furnished or made available, in accordance with this section[.]

(b) The governmental body shall certify to the requestor that copies of all or part of the requested information, as applicable, were previously furnished to the requestor or made available to the requestor on payment of applicable charges under Subchapter F. The certification must include:

- (1) a description of the information for which copies have been previously furnished or made available to the requestor;
- (2) the date that the governmental body received the requestor's original request for that information;
- (3) the date that the governmental body previously furnished copies of or made available copies of the information to the requestor;
- (4) a certification that no subsequent additions, deletions, or corrections have been made to that information; and
- (5) the name, title, and signature of the officer for public information or the officer's agent making the certification.

Gov't Code § 552.232(a)-(b). You state that parts of the instant request are repetitious and redundant of previous requests received by Parkland from this requestor. Based on your representations, we conclude that upon provision to the requestor of the certification required by section 552.232 of the Government Code, the requestor need not again be provided with any information that Parkland made available to him in response to his previous requests.

We note that Exhibits B-1, B-2, and B-5 were the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2010-08915 (2010), 2010-09346 (2010), and 2010-9585 (2010). You do not indicate that there has been any change in the law, facts, and circumstances on which the previous rulings are based. Therefore, you must dispose of Exhibits B-1, B-2, and B-5 in accordance with Open Records

Letter Nos. 2010-08915, 2010-09346, and 2010-9585.<sup>4</sup> See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We also note that some of the remaining information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). Thus, Exhibit B-11, which is a completed report made of, for, or by Parkland, is subject to section 552.022(a)(1). Section 552.022(a)(15) provides for disclosure of "information regarded as open to the public under an agency's policies," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(15). Thus, the job descriptions in Exhibit B-4 are subject to section 552.022(a)(15) if Parkland considers job descriptions to be open to the public under its policies.

Although you seek to withhold the information that is subject to section 552.022(a)(1) and (15) under sections 552.103, 552.107(1), and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. See *id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 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 generally). As such, sections 552.103, 552.107(1), and 552.111 are not other law that makes information confidential for the purposes of section 552.022(a)(1) and (15). Therefore, you may not withhold any of the information that is subject to section 552.022(a)(1) or (15) under sections 552.103, 552.107(1), or 552.111. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that makes information confidential for the purposes of section 552.022(a). See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503, and the attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertions of those privileges under rules 503 and 192.5. We also will consider your claim under section 552.103 of the Government Code for the submitted information that is not subject to section 552.022(a)(1) or (15), as well as your claims under sections 552.108, 552.136, and 552.137 of the Government Code.

We begin with your most inclusive exception to disclosure, section 552.103, which provides in part:

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<sup>4</sup>As we are able to make this determination, we need not address your arguments against disclosure of Exhibits B-1, B-2, and B-5.

(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.

...

(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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Open Records Decision No. 452 at 4 (1986).* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>5</sup> *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See Open Records Decision No. 331 (1982).*

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<sup>5</sup>Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981).*

You generally state that Parkland has a reasonable belief that litigation will ensue between Parkland and a named individual, based on correspondence with the individual and the individual's attorney. You assert that the individual concerned, a former medical resident in Parkland's residency program, and his attorney have sought "information regarding the professional liability coverage afforded to [the individual] as a Parkland resident, 'including information on how to submit claims.'" You state that "[the individual] and his attorney have indicated a belief that Parkland should be liable for payment required for his legal defense against a dispute allegedly arising out of his . . . residency at Parkland[.]" Having considered your arguments, we find that you have not provided, and the submitted information does not otherwise contain, any concrete evidence showing that either the individual concerned or his attorney actually threatened to file a lawsuit against Parkland or otherwise took any objective steps toward filing suit prior to Parkland's receipt of the instant request for information. Thus, we conclude that you have not demonstrated that Parkland reasonably anticipated litigation on the date of its receipt of the request. Therefore, you may not withhold any of the submitted information under section 552.103 of the Government Code.

Next, we consider your other exceptions to disclosure. Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). A governmental body claiming section 552.108(b)(1) must explain how and why release of the information at issue would interfere with law enforcement and crime prevention. *See Open Records Decision No. 562 at 10 (1990)*. The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques, but was not applicable to generally known policies and procedures. *See, e.g., Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution); but see Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known)*.

You seek to withhold the photocopies of identification badges submitted as Exhibit B-6 under section 552.108(b)(1). You state that these badges are a tangible reflection of internal decisions made by the Parkland Police Department as to whether certain employees of Parkland should be granted access to secured areas of the Parkland campus. You contend that release of the submitted copies of identification badges would undermine law enforcement efforts to secure Parkland property and make Parkland more susceptible to

criminal activity, "since an individual could create a replica badge and gain access to secured areas that contain valuable and dangerous items that could be illegally diverted for street use . . . or be used as weapons." Having considered your arguments, we find that you have not sufficiently demonstrated that release of the information at issue would interfere with law enforcement or crime prevention. We therefore conclude that you may not withhold any of the information in Exhibit B-6 under section 552.108(b)(1) of the Government Code.

Section 552.136 of the Government Code provides in part that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). You also seek to withhold the copies of identification badges in Exhibit B-6 under section 552.136. You contend that "[w]ith a copy of identification badge information, a person could create a replica and . . . steal the identity and access privileges of current Parkland employees," so as to gain unlawful access to goods and services. Having considered your arguments, we conclude that you have not demonstrated that the submitted copies of identification badges constitute access devices for the purposes of section 552.136. We therefore conclude that you may not withhold any of the information in Exhibit B-6 under section 552.136 of the Government Code.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You state that the owners of the marked e-mail addresses in Exhibit B-12 have not consented to the public disclosure of their e-mail addresses. We find that the e-mail addresses in question do not appear to be subject to section 552.137(c). We therefore conclude that you must withhold the marked e-mail addresses under section 552.137 of the Government Code.<sup>6</sup>

Lastly, we address your claim under Texas Rule of Evidence 503 for the information submitted as Exhibit B-11. Rule 503 enacts the attorney-client privilege and provides in part:

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:

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<sup>6</sup>We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You indicate that Exhibit B-11 is communicated among attorneys for and representatives of Parkland in connection with the rendition of professional legal services to Parkland. You state that the information is intended to be confidential and is not shared with non-privileged parties. Based on your representations and our review of the information at issue, we conclude that you may withhold Exhibit B-11 under Texas Rule of Evidence 503.<sup>7</sup>

In summary: (1) you must dispose of Exhibits B-1, B-2, and B-5 in accordance with Open Records Letter Nos. 2010-08915, 2010-09346, and 2010-9585; (2) you must withhold the

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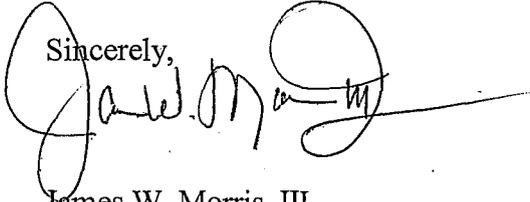
<sup>7</sup>As we are able to make this determination, we need not address your claim under Texas Rule of Civil Procedure 192.5.

marked e-mail addresses in Exhibit B-12 under section 552.137 of the Government Code; and (3) you may withhold Exhibit B-11 under Texas Rule of Evidence 503. The rest of the submitted 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](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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a long horizontal line extending to the right.

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

JWM/tp

Ref: ID# 385328

Enc: Submitted documents

c: Requestor  
(w/o enclosures)