



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2011

Mr. Ryan S. Henry and Ms. Jameene Y. Banks
Denton Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212-4685

OR2011-12995

Dear Mr. Henry and Ms. Banks:

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# 429261.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (“Parkland”), which you represent, received a request for all documents related to the termination of a named individual, including separation agreements, settlement agreements, non-disparagement agreements, documents concerning eligibility for rehire, financial agreements, and complaints or allegations of any kind. Parkland states it does not possess responsive separation agreements, settlement agreements, non-disparagement agreements, documents concerning eligibility for rehire, or financial agreements.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, 552.150, and 552.151 of the Government Code. Parkland also provided notice to the named individual of this request for information. We have received comments submitted by the requestor’s attorney. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the claimed exceptions and reviewed the submitted information.

You state portions of the submitted information, which you have marked, are not responsive to the instant request. Upon review of the information you have marked, we agree that this

¹We note 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).

information is not responsive to the request. This ruling does not address the public availability of the information you have marked that is not responsive to the request and Parkland is not required to release that information in response to the request.

Next, we address the requestor's attorney's assertion that Parkland failed to comply with the Act's procedural requirements. *See id.* §§ 552.301(a), .302. The requestor's attorney states that an evaluation was referenced in the documents released to the requestor in response to the instant request and that the evaluation would pre-date and be responsive to an earlier request made on December 20, 2010. The requestor's attorney asserts that Parkland did not release this document in response to the December 20 request, nor did it seek a ruling from this office with respect to such document, and accordingly, to the extent that Parkland now seeks to withhold such a document, it has waived its right to do so. The requestor's attorney also asserts that certain notes submitted to this office by Parkland as responsive to the instant request may have also pre-dated the December 20, 2010, request and been responsive thereto, and therefore, Parkland has waived its right to withhold such notes as well.

With regard to the notes, upon review, we note this information was created after the date Parkland received the requestor's previous request. Accordingly, we find that Parkland timely submitted this information for our review. With regard to the evaluation at issue, no such document was submitted by Parkland to this office as responsive to the instant request, and other than the requestor's attorney's assertions, we have no information demonstrating that this evaluation did in fact exist on the date of the earlier request. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See id.* §§ 552.002, .021, .227, .351. The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990). Accordingly, we find that, to the extent such an evaluation existed on the date of the earlier request, and to the extent it is responsive to the instant request, it must now be released to the requestor pursuant to section 552.302, as Parkland has failed to comply with section 552.301 with regard to such a document. *See Gov't Code* §§ 552.301(a), 552.302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins.*

Exch., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Parkland states the information on pages 10 and 11 document communications between an attorney for Parkland and Parkland employees that were made for the purposes of the rendition of legal services to Parkland. Furthermore, Parkland states the communications were intended to be confidential, and the confidentiality of the communications has been maintained. Upon review, we find Parkland may withhold pages 10 and 11 under section 552.107 of the Government Code. Because section 552.107 is dispositive, we do not address Parkland’s section 552.111 assertion for this information.

Section 552.150 of the Government Code provides as follows:

(a) Information in the custody of a hospital district that relates to an employee or officer of the hospital district is excepted from the requirements of Section 552.021 if:

(1) it is information that, if disclosed under the specific circumstances pertaining to the individual, could reasonably be expected to compromise the safety of the individual, such as information that describes or depicts the likeness of the individual, information stating the times that the individual arrives at or departs from work, a description of the individual’s automobile, or the location where the individual works or parks; and

(2) the employee or officer applies in writing to the hospital district's officer for public information to have the information withheld from public disclosure under this section and includes in the application:

(A) a description of the information; and

(B) the specific circumstances pertaining to the individual that demonstrate why disclosure of the information could reasonably be expected to compromise the safety of the individual.

(b) On receiving a written request for information described in an application submitted under Subsection (a)(2), the officer for public information shall:

(1) request a decision from the attorney general in accordance with Section 552.301 regarding withholding the information; and

(2) include a copy of the application submitted under Subsection (a)(2) with the request for the decision.

Gov't Code § 552.150. Section 552.150 provides that information held by a hospital district relating to a hospital district employee or officer is excepted from public disclosure provided (1) it is information that, if disclosed under the specific circumstances pertaining to the individual, could reasonably be expected to compromise the safety of the individual; and (2) the employee or officer makes a written application in accordance with section 552.150(a)(2) to the hospital district's officer for public information to have the information withheld from public disclosure under this section. *Id.* The individual's application must include a description of the information at issue and the specific circumstances pertaining to the individual that demonstrate why disclosure of the information could reasonably be expected to compromise his or her safety. *Id.*

Parkland states it has provided the named individual "notice of this request and of her ability to request that the information in [Parkland's] custody that contains this particular information. . . be withheld if they reasonably believe these exceptions apply to her." Parkland further states that should the individual "fail to respond to [Parkland's] notice. . . [Parkland] represents that this information will promptly be released to the requestor as no other exceptions" apply. As of the date of this letter, you do not inform us that the individual at issue has responded to your notice to request that her information be withheld under section 552.150, nor have you submitted a copy of a written application sent to Parkland's officer for public information. Accordingly, we find neither Parkland nor the individual whose information is at issue have demonstrated that section 552.150 is applicable to the information at issue. Therefore, Parkland may not withhold any of the remaining information at issue under section 552.150 of the Government Code.

Parkland also raises section 552.151 of the Government Code, which provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

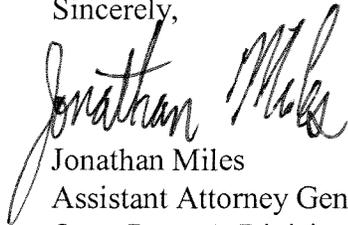
Id. § 552.151. Upon review, we find you have failed to demonstrate that release of the information at issue would subject the employee to a substantial threat of physical harm. Therefore, we conclude section 552.151 is inapplicable to the remaining information at issue, and Parkland may not withhold any portion of the remaining information on that basis.

In summary, Parkland may withhold pages 10 and 11 under section 552.107 of the Government Code. 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, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 429261

Enc. Submitted documents

c: Requestor
(w/o enclosures)