



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2011

Mr. Ryan S. Henry
For Parkland Health & Hospital System
Denton, Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212-4685

OR2011-15056

Dear Mr. Henry:

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# 433287.

The Dallas County Hospital District d/b/a Parkland Health and Hospital System ("Parkland"), which you represent, received a request for all information pertaining to an investigation of four named individuals and entities by the Dallas County Hospital District Police Department (the "department"), and fourteen other categories of information. You state Parkland will release the requested policies. You also state Parkland does not possess information responsive to items five or six of the request. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). We also note Parkland has redacted certain information pursuant to Open Records Decision No. 684 (2009).¹ You claim that the remaining submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108 and 552.111

¹Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including: direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy; a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; and an e-mail address of a member of the public under section 552.137 of the Government Code.

of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we understand you to assert a portion of the submitted investigation records constitute grand jury information that is not subject to disclosure under the Act. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and is, therefore, not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and, therefore, are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. The information at issue reflects it was gathered by Parkland for its own use in Parkland's investigation. Thus, we find Parkland has failed to explain how the information at issue is held by Parkland on behalf of the grand jury and is, therefore, subject to the Act. *See* Gov't Code § 552.002 (providing that information collected, assembled, or maintained in connection with the transaction of official business by a governmental body is "public information"). Accordingly, we will address the Act's applicability to all of the submitted information.

Next, we note some of the submitted 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). In this instance, the submitted information includes completed reports, evaluations, and investigations made of, for, or by Parkland. The information we have indicated is subject to section 552.022(a)(1). Section 552.022(a)(3) provides for required disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). The submitted information also includes information in a voucher and a contract relating to the receipt or expenditure of public or other funds by the authority. The information we have indicated is subject to

²We assume that 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.

section 552.022(a)(3). Section 552.022(a)(15) provides for required 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 indicated job descriptions are subject to section 552.022(a)(15) if Parkland considers job descriptions to be open to the public under its policies. Although you claim this information is subject to sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions that protect a governmental body’s interest and are, therefore, not “other law” for purposes of section 552.022. *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 Record Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Therefore, Parkland may not withhold the information at issue under section 552.103, section 552.107, or section 552.111 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 and the attorney work product privilege under rule 192.5 for the indicated information. Further, information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code. Accordingly, we will consider your arguments under section 552.108 for the indicated information. We will also consider your remaining arguments against disclosure of the information not subject to section 552.022.

We turn next to your assertion of section 552.103 for the information not subject to section 552.022 of the Government Code. Section 552.103 provides, in relevant part:

(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). The governmental body has the burden of providing relevant facts and documents to show 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 on the date the university received the request for information, 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide evidence showing, the incidents to which the request pertains resulted in multiple law suits involving Parkland and its relationship with TechForce Technology, Inc. You explain Parkland is currently a defendant in a suit filed by TechForce Technology, in which the plaintiff seeks recovery arising from the allegedly questionable relationship of the individuals named in the request. Upon review, we find that at the time Parkland received the instant request for information it was involved in pending litigation. Further, you explain the pending litigation against Parkland involves balances TechForce claims are owed to it arising from the alleged questionable relationship of one of the named individuals and TechForce. Based on your statements, and our review, we find the submitted information not subject to section 552.022 relates to the pending litigation for purposes of section 552.103. Accordingly, we agree Parkland may withhold the submitted information not subject to section 552.022 pursuant to section 552.103 of the Government Code.³

However, once information is obtained from or provided to all the opposing parties in the litigation, there is no interest in withholding that information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, we address your arguments for the remaining information, which is subject to section 552.022 of the Government Code. Section 552.108(a)(2) of the Government Code exempts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state pages 1 through 55 relate to a criminal investigation conducted by the department. You further explain that the department's investigation is concluded and did not result in a conviction or deferred adjudication. Based on your representations, we conclude section 552.108(a)(2) is applicable to the information at issue. Accordingly, Parkland may

³As our ruling on this issue is dispositive, we do not address your remaining arguments against disclosure of this information.

withhold pages 1 through 55 of the remaining information under section 552.108(a)(2) of the Government Code.

Texas Rule of Evidence 503 enacts the attorney-client privilege. 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;
- (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).

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. *See* ORD 676 at 6-7. 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. *Id.* Upon a demonstration of all three factors, the entire communication is 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero*

Energy Corp., 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You assert the remaining information at issue relates to the underlying investigation, and was produced for and provided to Parkland's legal counsel for this issue. However, the information does not document communications or documents communication with individuals who are non-privileged parties. Accordingly, none of the information at issue may be withheld under rule 503 of the Texas Rules of Evidence.

Next, we address your argument under Texas Rule of Civil Procedure 192.5 for the remaining information at issue. Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9–10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* 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 the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) 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 (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). 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. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You state the remaining information at issue was prepared after the discovery of the issues which led to litigation. You assert the information at issue was created by the Director of Corporate Compliance and other employees in the course of the investigation into the underlying incident, as well as in preparation for anticipated litigation. You also state the information at issue contains the attorney's mental impressions, conclusions, and legal

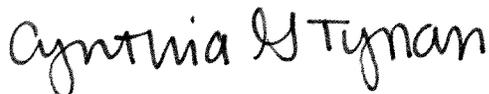
theories. However, the information at issue consists of purchase orders, purchase requisitions, bids, invoices, and e-mail correspondence between Parkland and TechForce, the plaintiff in the suit against Parkland, as well as Parkland's request for a quote from TechForce and certification recognizing TechForce as a Minority Business Enterprise. Upon review, we find you have failed to demonstrate that any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created for trial or in anticipation of litigation. Therefore, we conclude Parkland may not withhold any of the information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, except for the information subject to section 552.022 of the Government Code, Parkland may withhold the submitted information under section 552.103 of the Government Code. Parkland may withhold pages 1 through 55 under section 552.108(a)(2) of the Government Code. The remaining 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 433287

Enc. Submitted documents

c: Requestor
(w/o enclosures)