



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 16, 2012

Ms. Thao La  
Senior Attorney  
Parkland Health & Hospital System  
5201 Harry Hines Boulevard  
Dallas, Texas 75235

OR2012-16503

Dear Ms. La:

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# 466714.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System ("Parkland") received four requests from the same requestor for information pertaining to the Upper Payment Limit Initiative ("UPL") for private hospitals in Dallas County and the Dallas County Indigent Care Corporation ("DCICC") during four specified time periods, excluding the master services agreement.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor's attorney. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>We note Parkland asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>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.

Initially, we address Parkland's contention the requests for information are overly broad. We note section 552.222 of the Government Code authorizes a governmental body to communicate with a requestor for the purpose of clarifying or narrowing a request for information. *See id.* § 552.222(b). In this instance, Parkland requested clarification and the requestor narrowed a portion of one of the requests. We note a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See Open Records Decision No. 561 at 8-9 (1990)*. In this case, Parkland has reviewed its records and has identified information as responsive to the requests. Accordingly, we will address the applicability of the claimed exceptions.

Next, we note the requestor asserts portions of the submitted information are subject to sections 552.022(a)(3) and 552.022(a)(5) of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" while section 552.022(a)(5) of the Government Code provides for the required public release of "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]" Gov't Code § 552.022(a)(3), (5). Upon review, we find none of the submitted information consists of information in an account voucher or contract relating to the receipt or expenditure of public or other funds by a governmental body. Further, we find none of the submitted information consists of working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body. Accordingly, none of the submitted information is subject to required public disclosure under section 552.022(a)(3) or section 552.022(a)(5) of the Government Code.

Section 552.107(1) of the Government Code protects information that comes 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. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate 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. *See 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. *See In re Tex. 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See TEX. R.*

EVID. 503(b)(1). 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.*, 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. *See 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 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).

You state the information you have marked under section 552.107 consists of communications involving Parkland attorneys, legal staff, and employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to Parkland. You also state these communications were confidential, and Parkland has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have generally demonstrated the applicability of the attorney-client privilege to the information we have marked.

However, we note some of the communications at issue consist of a memo, e-mails, and e-mail strings including attachments received from or sent to non-privileged parties, including attorneys and staff for various DCICC participants and attorneys and staff for the University of Texas Southwestern Medical Center (the “university”). We find you have failed to demonstrate how any of the DCICC participants or the university shared a common legal interest with Parkland with respect to the subject matter of the communications at issue. *See TEX. R. EVID. 503(b)(1)(c); In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Accordingly, Parkland may not withhold the communications directly sent to or received from the DCICC participants or the university under section 552.107(1).

Further, if the e-mails and attachments received from or sent to non-privileged parties within the otherwise privileged e-mail strings are removed from the e-mail strings and stand alone, they are responsive to the instant requests for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by Parkland separate and apart from the otherwise privileged e-mail strings in which they appear, then Parkland may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the

Government Code. Otherwise, Parkland may withhold this information as well as the remaining information we have marked under section 552.107(1) of the Government Code.<sup>3</sup>

You assert some of the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “[a]n interagency or intraagency 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 deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *see also* Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, opinions, recommendations and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You state the information you have marked consists of communications and draft documents between Parkland executive leaders, Parkland employees, Parkland attorneys, commissioned consultants, university employees, and DCICC participants and their attorneys that contain advice, opinions, and recommendations. You state this information relates to policymaking matters. Upon review, we find Parkland may withhold the internal deliberations we have marked under section 552.111. Further, to the extent the draft documents we have marked will be or have been released to the public in their final form, Parkland may withhold the marked draft documents in their entirety under section 552.111 of the Government Code. If the marked draft documents have not been released or will not be released to the public in their final forms, then Parkland may not withhold them in their entireties under section 552.111 of the Government Code. To the extent the marked draft documents will not be released in final forms, we note portions of the draft documents contain internal deliberations, which we have marked, that may be withheld under section 552.111. However, we note some the remaining information at issue includes communications between Parkland employees and officials and DCICC participants and their attorneys, the university, and other parties you have not identified. We find you have not demonstrated how Parkland shares a privity of interest or common deliberative process with these entities. Additionally, we find some of the remaining information at issue to be general administrative information or purely factual in nature. Thus, you have not demonstrated the remaining information at issue contains internal advice, opinion, or recommendations pertaining to policymaking of Parkland. Consequently, Parkland may not withhold the remaining information at issue under section 552.111 of the Government Code.

You state the remaining information you have indicated is excepted from disclosure pursuant to section 552.116 of the Government Code. Section 552.116 provides:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also

maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(a), (b). You assert the information you have marked consists of audit working papers for payments to the UPL and DCICC that were compiled for purposes of internal audit or investigation into complex Medicaid funding allocation practices. However, you have not explained, or otherwise demonstrated, these audits were authorized or required by a statute of this state or by the bylaws or other action of Parkland's governing board. *See id.* § 552.116(b)(1). Consequently, we find you have not established the applicability of section 552.116 to the information at issue. Therefore, Parkland may not withhold any of the information at issue under section 552.116 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 181.006 of the Health & Safety Code. Section 181.006 states that: "[f]or a covered entity that is a governmental unit, an individual's protected health information:

(1) includes any information that reflects that an individual received health care from the covered entity; and

(2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Section 181.001(b)(2) defines “[c]overed entity,” in part, as “any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]”

*Id.* § 181.001(b)(2). We understand Parkland operates a hospital that maintains health information for the individuals it serves, including information showing individuals received medical care from Parkland. We understand you to assert the information collected, used, and stored by Parkland consists of protected health information. Thus, you claim Parkland is a covered entity for the purposes of section 181.006 of the Health and Safety Code.

In order to determine whether Parkland is a covered entity for the purposes of section 181.006 of the Health and Safety Code, we must address whether Parkland engages in the practice of collecting, analyzing, using, evaluating, storing or transmitting protected health information. Section 181.001 states, “[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [“HIPAA”].” *Id.* § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPAA’s definition of the term. HIPAA defines “protected health information” as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual[.]

*Id.* Further, “health care” is defined as “care, services, or supplies related to the health of an individual.” *Id.* Some of the information at issue consists of Parkland’s records that contain individually identifiable health information for purposes of section 160.103 of title 45 of the Code of Federal Regulations. Thus, the records we have marked contain protected health information for purposes of section 181.006 of the Health and Safety Code. Therefore, with respect to this information, Parkland is a health care entity that is in the practice of collecting, using, and storing protected health information and, consequently, is a covered entity for purposes of section 181.006 of the Health and Safety Code. Accordingly, Parkland must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code.

We note some of the remaining information is subject to section 552.136 of the Government Code.<sup>4</sup> Section 552.136 states “[n]otwithstanding any other provision of this chapter, 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. Accordingly, we find Parkland must withhold the bank account numbers and ABA routing numbers we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an e-mail address provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent. *See id.* § 552.137(c)(1). Because we are unable to discern whether the e-mail addresses we have marked fall within the scope of section 552.137(c), we must rule conditionally. To the extent the marked e-mail addresses belong to members of the public, Parkland must withhold the e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent the marked e-mail addresses are subject to subsection 552.137(c), the e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, Parkland may generally withhold the information we have marked under section 552.107(1) of the Government Code, but may not withhold the non-privileged communications and attachments we have marked if they are maintained by Parkland separate and apart from the otherwise privileged e-mail strings in which they appear. Parkland may withhold the information we have marked under section 552.111 of the Government Code, but the marked draft documents may only be withheld in their entirety if they will be or have been released to the public in their final forms. Parkland must

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code. Parkland must withhold the information we have marked under section 552.136 of the Government Code. To the extent the marked e-mail addresses belong to members of the public, Parkland must withhold the e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. 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](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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/som

Ref: ID# 466714

Enc. Submitted documents

c: Requestor  
(w/o enclosures)