ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 1, 2013

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

OR2013-07173

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# 485848 (DCHD# 13-39).

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district") received a request for all records related to the district's retention of a named individual.[1] You state you have released some of the requested information. You claim the remaining information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2] We have also received and considered comments from an attorney for the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

---

[1]We note the district received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear or large amount of information has been requested, governmental body may ask requestor to clarify request).

[2]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 those records contain substantially different types of information than that submitted to this office.

Initially, you inform us, and provide documentation showing, the requestor specifically excluded patient "health information" from his request. You inform this office that patient "health information" includes patient names and identifying information. Accordingly, such information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and the district need not release such information in response to the present request.

Next, we note some of the requested information is the subject Open Records Letter Nos. 2011-18844 (2011) and 2012-04670 (2012). We also note there are lawsuits pending against the Office of the Attorney General that pertain to portions of the previously ruled upon information. *See Dallas County Hosp. Dist. d/b/a Parkland Health and Hospital System v. Greg Abbott, Tex. Attorney Gen.*, No. D-1-GN-11-003959 (126th Dist. Ct., Travis County, Tex.) and *Dallas County Hosp. Dist. d/b/a Parkland Health and Hospital System v. Greg Abbott, Tex. Attorney Gen.*, No. D-1-GV-12-000411 (53rd Dist. Ct., Travis County, Tex.). We note this information is contained in Exhibits C2.3 and C2.4. Accordingly, with regard to the information at issue in these lawsuits we will allow the trial court to resolve the issue of whether the information at issue in the pending litigation must be released to the public. With regard to information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuits, we conclude, as you have not indicated the law, facts, and circumstances on which the prior rulings were based have changed, the district must continue to rely on those rulings as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings.[3] *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the requestor's attorney contends that the responsive law enforcement files were made public. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold that exact information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. Gov't Code § 552.007; Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). *But see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory

[3]As our ruling is dispositive, we need not address your remaining arguments for this information.

predecessor to section 552.108). However, section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. The requestor's attorney contends the district voluntarily released the law enforcement files at issue in this request to the named individual in his capacity as a consultant for the district. The requestor's attorney further alleges the consultant released the information at issue in a letter written to the media. However, we find that the release of the information to the named individual in his capacity as a hired consultant for the district did not constitute a release to the general public under section 552.007. *See* Open Records Decision No. 666 at 4 (2000) (release of information to citizen advisory board did not implicate section 552.007). Further, although the consultant's letter references the case files at issue in this request, we have no indication the requested information has been released in its exact form to any members of the public. Accordingly, we find section 552.007 of the Government Code is inapplicable to the submitted information, and we will address the district's arguments against disclosure of this information.

We next note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The responsive information contains a completed consultant report that is subject to subsection 552.022(a)(1). The district must release this report pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* Although you raise the deliberative process privilege and work product privilege in section 552.111 of the Government Code, this is a discretionary exception and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the district may not withhold any portion of the information at issue under section 552.111 and the deliberative process privilege. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that make information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your work product argument under Texas Rule of Civil Procedure 192.5 for the information at issue. You also raise section 552.108. Because information subject to

section 552.022(a)(l) may be withheld under section 552.108, we will consider the applicability of this exception to the submitted information. Additionally, you claim this information is excepted under section 552.101 of the Government Code, which can make information confidential for purposes of section 552.022(a)(1). Therefore, we will also consider the applicability of this exception to the consultant report. We will also consider your arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Civil Procedure 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. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App. — Houston [14th Dist] 1993, no writ).

You generally assert the information subject to section 552.022(a)(1) consists of attorney work product. Upon review, we conclude you have failed to demonstrate the information subject to section 552.022(a)(1) consists of mental impressions, opinions, conclusions, or legal theories of an attorney or a representative of an attorney prepared in anticipation of litigation or for trial. Therefore, the information subject to section 552.022(a)(1) is not

privileged pursuant to Texas Rule of Civil Procedure 192.5, and the district may not withhold it on that basis.

Section 552.108 of the Government Code provides in part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:
>
> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
> >
> > (2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2). We note the protections offered by subsections 552.108(a)(1) and 552.108(a)(2) of the Government Code are, generally, mutually exclusive. Subsection 552.108(a)(1) generally applies to information that pertains to criminal investigations or prosecutions that are currently pending, while subsection 552.108(a)(2) protects law enforcement records that pertain to criminal investigations and prosecutions that have concluded in final results other than criminal convictions or deferred adjudications. A governmental body claiming subsection 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body that claims subsection 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* Gov't Code §§ 552.108(a)(2), .301(e)(1)(A).

You claim the responsive information in Exhibits C2.1 and C2.2, and the consultant report are excepted under both subsection 552.108(a)(1) and subsection 552.108(a)(2). However, you have submitted multiple reports and you have not identified which reports pertain to the ongoing criminal cases, and you have not specified which reports are closed. Thus, we find you have failed to demonstrate the applicability of section 552.108 to Exhibits C2.1 and C2.2, and the consultant report. *See id.* § 552.301(e)(1)(A), (2) (governmental body must label information to indicate which exceptions apply to which parts of information). Accordingly, we conclude the district has failed to demonstrate the applicability of either section 552.108(a)(1) or section 552.108(a)(2) of the Government Code to any of the information at issue, and it may not be withheld on either basis.

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[.]" *Id.* § 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." *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). Although you generally contend section 552.108(b)(1) is applicable to Exhibits C2.1 and C2.2 and the consultant report, we find you have not demonstrated the release of any of the information at issue would interfere with law enforcement. We therefore conclude the district may not withhold Exhibits C2.1, C2.2 and the consultant report under section 552.108(b)(1) of the Government Code.

You also raise common-law privacy for the information at issue. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has concluded other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). Upon review, we find none of the remaining responsive information is private. Therefore, the district may not withhold any of the remaining responsive information under section 552.101 on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides as follows:

> (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of

> the person, may not disclose information acquired from a polygraph examination to another person other than:
>
> > (1) the examinee or any other person specifically designated in writing by the examinee;
> >
> > (2) the person that requested the examination;
> >
> > (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
> >
> > (4) another polygraph examiner in private consultation; or
> >
> > (5) any other person required by due process of law.
>
> (b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.
>
> (c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Some of the remaining information, which we have marked, consists of information acquired from a polygraph examination subject to section 1703.306. The requestor does not appear to fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the district must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

In summary, with regard to the responsive information here that is also at issue in *Dallas County Hosp. Dist. d/b/a Parkland Health and Hospital System v. Greg Abbott, Tex. Attorney Gen.*, No. D-1-GN-11-003959 (126th Dist. Ct., Travis County, Tex.) and *Dallas County Hosp. Dist. d/b/a Parkland Health and Hospital System v. Greg Abbott, Tex. Attorney Gen.*, No. D-1-GV-12-000411 (53rd Dist. Ct., Travis County, Tex.) we will allow the trial court to determine whether the types of information at issue must be released to the public. With regard to information in the current request that is identical to information ruled upon by this office in Open Records Letter Nos. Nos. 2011-18844 and 2012-04670 and is not at issue in the aforementioned lawsuits, the district must continue to rely on those rulings as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. The district must withhold the marked polygraph information under section 552.101 of the Government Code in conjunction

with section 1703.306 of the Occupations Code. The district must release the remaining responsive information.

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,

Paige Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/bhf

Ref: ID# 485848

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

The Dallas Morning News
C/O Mr. Joseph R. Larsen
Sedgwick
1111 Bagby Street, Suite 2300
Houston, Texas 77002-2556
(w/o enclosures)