



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2008

Ms. Carolyn Foster
Assistant General Counsel
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2008-06675

Dear Ms. Foster:

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# 310178.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System ("Parkland") received a request for the following information related to Parkland employees:

First, Middle and Last Names, Employee ID Number, Gender, Race, Ethnicity, Nationality, Type (Full Time, Part Time, Temporary), Shift, Hourly Wage or Annual Salary, Work Location Name and Address, Department/Unit Name, Job Title/Classification, Hire Date, Birth Date, Home Address and Telephone Number[.]

The requestor subsequently narrowed his request to exclude employee home addresses and telephone numbers. Accordingly, this information is not responsive to the present request. This ruling does not address the public availability of the non-responsive information and the department need not release it in response to the request.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.115,

¹As we make this determination, we do not address your arguments against disclosure of this information.

and 552.136 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also received comments from the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address your assertion that the software Parkland utilizes “does not capture ‘shift’ assignment information for employees[,]” and that compiling the requested shift information “would require a large amount of research time [in order] to determine which shift [each] employee was working on the date of the request[.]” We note the Act does not require a governmental body to disclose information that did not exist when the request for information 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 No. 452 at 3 (1986). We also note that the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. See Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. See Open Records Decision No. 561 at 8 (1990). Moreover, a governmental body may not refuse to comply with a request on the ground of administrative inconvenience. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (“It is our opinion that the [predecessor to the] Act does not allow either the custodian of records or a court to consider the cost or method of supplying requested information in determining whether such information should be disclosed.”); Open Records Decision No. 49 (1988). We therefore find that Parkland may not refuse to comply with any portion of this request on the basis that doing so would be burdensome.³ We further note that you did not submit information responsive to the portions of the request for “race,” “nationality,” and “shift” assignments. We assume Parkland has released this information to the requestor. If Parkland has not, it must do so at this time to the extent that such information existed at the time it received the request. See Gov't Code §§ 552.301(a), .302; 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 under circumstances).

Parkland claims that the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code based on the individual right to privacy. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision[,]” and encompasses the

²Although you did not raise sections 552.115 and 552.136 within the ten-business-day deadline, because these are mandatory exceptions, we will address the applicability of your arguments. See Gov't Code §§ 552.301(b), .302.

³We note that you raise questions under the cost provisions of the Act. These provisions are found at subchapter F of the Act. See Gov't Code § 552.261 *et seq.* Questions regarding cost provisions should be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

doctrine of common law privacy. Gov't Code § 552.101. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation*, for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. *See Indus. Found.*, 540 S.W.2d at 683-85. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See Open Records Decision Nos. 444 at 5-6 (1986)* (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature"); *see also* Gov't Code § 552.022(a)(2) (name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of governmental body are public information). Although you assert that employee birth dates should be protected from disclosure, birth dates are not intimate or embarrassing. *Tex. Comptroller of Public Accounts v. Attorney Gen. of Tex.*, 244 S.W.3d 629 (Tex. App.—2008, n.p.h.) ("We hold that date-of-birth information is not confidential[.]"); *see* Attorney General Opinion MW-283 (1980) (public employee's date of birth not protected under privacy); Open Records Decision No. 455 at 7 (1987) (birth dates, names, and addresses are not protected by privacy). Upon review, we find that you have failed to explain how any portion of the information at issue constitutes highly intimate or embarrassing information the release of which would be highly objectionable to a reasonable person. Thus, we conclude that the submitted information is not protected by common law privacy, and no portion of the information may be withheld under section 552.101 or 552.102 of the Government Code on this basis.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family

relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After reviewing the submitted information, we find that it does not contain information that is confidential under constitutional privacy; therefore, Parkland may not withhold any of the submitted information under section 552.101 on that ground.

Section 552.101 also encompasses information protected by other statutes. You contend that the submitted information is excepted under section 552.101 in conjunction with section 48.101(a) of the Business and Commerce Code, which provides that

[a] person may not obtain, possess, transfer, or use personal identifying information of another person without the other person's consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name.

Bus. & Comm. Code § 48.101(a). "Personal identifying information" is defined as "information that alone or in conjunction with other information identifies an individual" and includes an individual's name. *Id.* § 48.002(1)(A). You assert that the requested information meets the definition of "personal identifying information" under section 48.002(1). *See id.* You indicate that because section 552.222 of the Act prohibits a governmental body that receives a request for information from inquiring into the purpose for which the information will be used, Parkland cannot comply with the requirements of section 48.101(a). *See id.* § 48.002(1)(A); Gov't Code § 552.222(a), (b). We note that section 552.204 of the Government Code provides that a governmental body is not responsible for a requestor's use of information released pursuant to the Act. *See id.* § 552.204(a). Further, section 48.101(a) does not prohibit the transfer of personal identifying information of another person unless the transfer is made with the intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name without that person's consent. *See* Bus. & Comm. Code § 48.101(a). In this instance, Parkland's release of the information at issue would be for the purpose of complying with the Act, and not "with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the [employee]'s name." *See id.* § 48.101(a). Therefore, section 48.101(a) does not prohibit Parkland from transferring the requested information. *See id.* Thus, we conclude that Parkland may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 48.101 of the Business and Commerce Code.

You assert that employee birth dates, work location name and address, and department/unit name are excepted from public disclosure under section 552.101 in conjunction with section 418.176 of the Government Code. This section was added to chapter 418 of the

Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.176 provides in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a). The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A).

The purpose of the HSA is to protect certain information that is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. The information at issue consists of routine personnel information that was collected, assembled, or maintained by Parkland during the regular course of business. You have not established that any of this information is maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or criminal activity related to terrorism. *See* Gov't Code §§ 418.176(a); Open Records Decision Nos. 542 (1990) (governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Thus, none of the information at issue is confidential under section 418.176 of the Government Code. We therefore conclude that Parkland may not withhold employee birth dates, work location name and address, or department/unit name under section 552.101 in conjunction with section 418.176 of the Government Code.

You next contend that employee birth dates are excepted under section 552.101 in conjunction with section 35.48 of the Business and Commerce Code, which provides in relevant part that

(d) When a business disposes of a business record that contains personal identifying information of a customer of the business, the business shall modify, by shredding, erasing, or other means, the personal identifying information to make it unreadable or undecipherable.

Bus. & Comm. Code § 35.48(d). “Personal identifying information” is defined as “an individual’s first name or initial and last name in combination with [any one of several pieces of information including the individual’s] date of birth[.]” *Id.* § 35.48(a)(1-a)(A). You assert that the requested employee birth dates meet the definition of “personal identifying information” under section 35.48(1-a)(A). *See id.* Although section 35.48 addresses how a business must dispose of a business record containing personal identifying information of a customer of the business, this section does not expressly make any information confidential. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to the public). Furthermore, the information at issue is personnel information of Parkland employees, not information of a customer of a business; thus, section 35.48 does not apply to this type of information. *See* Bus. & Comm. Code § 35.48(d). Accordingly, Parkland may not withhold birth dates of its employees under section 552.101 in conjunction with section 35.48.

Next, you claim that employee birth dates must be withheld pursuant to section 552.115 of the Government Code. Section 552.115 provides in part, “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of section 552.021[.]” Gov’t Code § 552.115(a). We note that section 552.115 is applicable only to information maintained by the Vital Statistics Unit or a local registration official. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials.) Because section 552.115 does not apply to information held by Parkland, employee birth dates may not be withheld on this basis.

You also assert that employee birth dates are “access device numbers” subject to section 552.136 of the Government Code. Section 552.136 provides that “[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(b). An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* Upon review, we find that Parkland has failed to demonstrate how employee birth dates constitute access device numbers subject to section 552.136. Therefore, Parkland may not withhold any of the information at issue pursuant to section 552.136 of the Government Code.

We note that the requestor seeks the information at issue in electronic format. Section 552.228 of the Government Code requires that a governmental body provide a copy

of the public information in the requested medium if it has the technological ability to do so without the purchase of software or hardware. See Gov't Code § 552.228(b)(1), (2). You do not inform us that Parkland lacks the technological capability to provide the information in that requested electronic format. Accordingly, if Parkland has the technological capability to provide the information at issue in the requested electronic format, it must do so; if Parkland does not have the technological capability, it may release the requested information in the submitted paper format.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

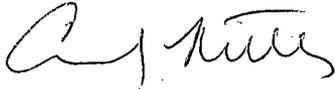
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 310178

Enc. Submitted documents

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