ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2009

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

OR2009-05051

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# 340188 (DCHD 09-006).

The Dallas County Hospital District d/b/a Parkland Health and Hospital System ("Parkland") received two requests from the same requestor. The first request seeks the comprehensive plan to improve Parkland's emergency department. The second request seeks specified e-mail communications. You state that you have released some information responsive to the second request to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.110, and 552.111 of the Government Code. You also state, and provide documentation showing, that you have notified the interested third parties, University HealthSystem Consortium ("UHC") and Thomson Reuters Heathcare Inc. ("Thomson Reuters"), of the request and of their opportunity to submit comments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from Thomson Reuters. We have considered the exceptions you claim and reviewed the submitted information.

First, you claim that Exhibits D-1 and D-2 are confidential under section 161.032 of the Health and Safety Code. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 161.032 provides in relevant part:

> (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.
>
> . . .
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> (c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, a "'medical committee' includes any committee, including a joint committee, of . . . a hospital [or] a medical organization . . . ." *Id.* § 161.031(a). The term "medical committee" also includes "a committee, including a joint committee, of one or more of the entities listed in Subsection (a)." *Id.* § 161.031(c). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital [or] medical organization . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services . . .." *Id.* § 161.0315(a).

The precise scope of the "medical committee" provision has been the subject of a number of judicial decisions. *Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that "documents generated by the committee in order to conduct open and thorough review" are confidential. This protection extends "to documents that have been prepared by or at the direction of the committee for committee purposes." *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents "gratuitously submitted to a committee" or "created without committee impetus and purpose." *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other things, statutory predecessor to section 161.032).

Exhibits D-1 and D-2 consist of e-mails and a presentation made to Parkland's Quality and Risk Management Committee of the Board of Managers. You state that these documents are confidential records and proceedings addressing issues in Parkland's emergency department following a survey done by an outside accreditation committee. Based on your representations and our review, we conclude that Exhibits D-1 and D-2 constitute records, information, or reports of a medical committee acting under subchapter D of chapter 161 of the Health and Safety Code. We therefore conclude that Exhibits D-1 and D-2 are confidential under section 161.032(a) of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.[1]

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[1]As our ruling is dispositive for this information, we need not address your argument under section 552.111 of the Government Code.

You assert the remainder of the submitted information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111. *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); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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. *Id.*; *see also City of Garland v. 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.–Austin 2001, no pet.); ORD 615 at 4-5.

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.

You state that the remainder of the information consists of e-mails, executive incentive plan goals, and spreadsheets relating to department and employee costs. You explain that these documents involve Parkland's core policy mission of quality health care to its patients. Based on your representations and our review, we agree that Parkland may withhold the information we have marked under section 552.111 and the deliberative process privilege. However, we note that the remaining information consists of purely administrative or factual information or information pertaining to routine personnel matters. You have failed to establish that this remaining information constitutes Parkland's advice, opinion, and recommendation. Therefore, Parkland may not withhold the remaining information under section 552.111 of the Government Code.

Next, we address the arguments submitted by the third parties. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, UHC has not submitted to this office any reasons explaining why its submitted information should not be released. Thus, we have no basis for concluding that any portion of UHC's submitted information constitutes proprietary information, and Parkland may not withhold any portion of UHC's information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, Parkland may not withhold any of the submitted information based on the proprietary interests of UHC.

Next, we understand Thomson Reuters to assert its information is confidential pursuant to a confidentiality provision in the subscription agreement between Thomson Reuters and Parkland. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W. 2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[t]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless Thomson Reuters' information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Thomson Reuters also claims that some of its information is excepted from disclosure under section 552.110(a) of the Government Code. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.1958); *see also* ORD 552 at 2. Section 757 provides that a trade secret is:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . A trade secret is a process or device for continuous use in the

> operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939). The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret:

> (1) the extent to which the information is known outside of the company;
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> (2) the extent to which it is known by employees and others involved in the company's business;
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> (3) the extent of measures taken by the company to guard the secrecy of the information;
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> (4) the value of the information to the company and its competitors;
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> (5) the amount of effort or money expended by the company in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Thomson Reuters claims that portions of its information are excepted from public disclosure under section 552.110(a) as trade secrets. Upon review, we find that Thomson Reuters has not demonstrated that any of the information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Accordingly, Parkland may not withhold any of Thomson Reuters' information under section 552.110(a) of the Government Code. Thus, no portion of Exhibit G-1 may be withheld under this exception.

In summary, Parkland must withhold Exhibits D-1 and D-2 under section 161.032(a) of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

Parkland may withhold the information we have marked under section 552.111 and the deliberative process privilege. 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 at (512) 475-2497.

Sincerely,

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

Ref: ID# 340188

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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