



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 25, 2010

Ms. Nneka C. Egbuniwe
Deputy General Counsel
Parkland Health and Hospital System
5123 Harry Hines Boulevard
Dallas, Texas 75235

OR2010-02881

Dear Ms. Egbuniwe:

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# 369857.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System ("Parkland") received a request for (1) a roster of all Parkland employees, and (2) all e-mails sent to or from Parkland's police chief during a specified time period. The requestor subsequently narrowed item one of his request to include only the following information for each Parkland employee: name, sex, ethnicity, salary, title, dates of employment, and date of birth. You claim that the requested employee information is excepted from disclosure under sections 552.101, 552.102, 552.150, and 552.151 of the Government Code. Parkland also provided notice to its employees of this request for information.¹ See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received comments from some of the third parties, one of whom claims sections 552.102 and 552.115 of the Government Code as exceptions to

¹You inform us that the hospital employs more than 9000 employees (collectively, the "third parties").

disclosure.² *Id.* We have considered the claimed exceptions and reviewed the submitted information.³

Initially, we note you did not submit any information responsive to item two of the request. 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 id.* §§ 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 the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code based on the common law and constitutional rights to privacy. One of the third parties has also raised section 552.102. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision[.]” and encompasses the 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 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. *See Hubert*, 652 S.W.2d at 550; *Indus. Found.*, 540 S.W.2d at 683-85. In *Industrial Foundation*, the Texas Supreme Court stated 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

²The same third party also raises section 552.024 of the Government Code; however, this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to home addresses, telephone numbers, social security numbers, or family member information of the current or former official or employee that is held by the employing governmental body. *See id.* § 552.024. We note that none of that type of information is at issue here.

³We 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.

organs. *Id.* at 683. Information pertaining to the work conduct and job performance of public employees is of 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).

Parkland and some of the third parties argue release of the requested information could "present a significant security risk" and possibly place the employee's life at risk. Prior decisions of this office determined information may be withheld from disclosure under section 552.101 in conjunction with common law privacy upon a showing of a "special circumstance" in which the release of information would likely cause someone to face an imminent threat of physical danger. *See, e.g.*, Open Records Decision Nos. 169 (1977), 123 (1976). However, the Third Court of Appeals recently ruled the "special circumstances" aspect of the common law right to privacy recognized in past open records decisions directly conflicts with Texas Supreme Court precedent regarding common law privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers*, 287 S.W.3d 390 (Tex. App.—Austin 2009, pet. filed). The court of appeals ruled that the two-part test set out in *Industrial Foundation* is the "sole criteria" for determining whether information can be withheld under common law privacy. *Id.*; *see also Indus. Found.*, 540 S.W.2d at 686.

In this instance, the information at issue consists of each employee's name, sex, ethnicity, salary, title, date of employment, and date of birth. We find that this information is not highly intimate or embarrassing information. Gov't Code § 552.022(a)(2) ("[N]ame, sex, ethnicity, salary, title, and dates of employment of each employee and officer" of governmental body are public information under the Act unless "expressly confidential under other law."); *see Tex. Comptroller of Pub. Accounts v. Att. Gen. of Tex.*, 244 S.W.3d 629, 638-9 (Tex. App.—2008, pet. granted) ("[W]e hold that date-of-birth information [is] not . . . confidential[.]"); Attorney General Opinion MW-283 (1980) (public employee's date of birth not protected under privacy); Open Records Decision No. 455 at 7 (1987) (applicants' birth dates, names, salaries, and kind of work are not protected by privacy). Therefore, as you have not satisfied the first element of the *Industrial Foundation* test for common law privacy, we find that the submitted information is not protected by common law privacy, and conclude that 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. *See Comptroller*, 244 S.W.3d at 639-40. 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.* You state, and we agree, "none of the requested information appears to fall within these 'zones of privacy.'" *Id.* at 639. 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.* at 639-40. 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 639 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After reviewing the submitted information, we find Parkland has not shown the information concerns the most intimate aspects of human affairs. *Comptroller*, 244 S.W.3d at 639-40. Thus, Parkland has failed to show the information is confidential under either type of constitutional privacy. Therefore, Parkland may not withhold any of the submitted information under section 552.101 on that ground. Gov't Code § 552.022(a)(2); *Comptroller*, 244 S.W.3d at 639-40.

Section 552.101 also encompasses information protected by other statutes. You contend the submitted information is excepted under section 552.101 in conjunction with section 521.051(a) of the Business and Commerce Code.⁴ This section 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 § 521.051(a) (formerly 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.* § 521.002(a)(1)(A). You assert the requested information meets the definition of "personal identifying information" under section 521.002(a)(1). *See id.* You indicate that because section 552.222 of the Act prohibits a governmental body from inquiring into the purpose for which requested information will be used, Parkland cannot determine how a requestor intends to use this information. *See id.* § 521.002(a)(1)(A); Gov't Code § 552.222(a), (b). You suggest a person with illegitimate motives who obtains the information at issue presents a risk of identity theft to Parkland's employees. We note section 552.204 of the Government Code provides that a governmental body is not responsible for a requestor's use of

⁴The Identity Theft Enforcement and Protection Act, formerly found in chapter 48 of the Business and Commerce Code, was repealed and recodified as chapter 521 of the Business and Commerce Code in 2007. *See* Act of May 17, 2007, 80th Leg., R.S., ch. 885, §§ 2.01 (adding chapter 521, Bus. & Comm. Code), 2.47(a)(2)-(4) (repealing former chapter 48, Bus. & Comm. Code), 2007 Tex. Gen. Laws 1906, 2082.

information released pursuant to the Act. *See id.* § 552.204(a). Further, section 521.051(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 § 521.051(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.* Therefore, section 521.051(a) does not prohibit Parkland from transferring the requested information. *See id.* Thus, we conclude Parkland may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 521.051 of the Business and Commerce Code.

You next contend that the requested information is excepted from disclosure under section 552.101 in conjunction with section 521.052 of the Business and Commerce Code, which provides in relevant part that

(a) A business shall implement and maintain reasonable procedures, including taking any appropriate corrective action, to protect from unlawful use or disclosure any sensitive personal information collected or maintained by the business in the regular course of business.

(b) A business shall destroy or arrange for the destruction of customer records containing sensitive personal information within the business's custody or control that are not to be retained by the business by:

(1) shredding;

(2) erasing; or

(3) otherwise modifying the sensitive personal information in the records to make the information unreadable or undecipherable through any means.

Bus. & Comm. Code § 521.052(a), (b). "Sensitive personal information" is defined as "an individual's first name or initial and last name in combination with any one or more" of several pieces of information, but does not include the individual's date of birth or any other information at issue. *Id.* § 521.002(a)(2)(A)(i-iii). You assert the requested information meets the definition of "sensitive personal information" under section 521.002(a)(2), and Parkland, therefore, has an affirmative duty to safeguard this information under section 521.052. *See id.* Although section 521.052 addresses how a business must dispose of a business record containing sensitive personal information of a customer, 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 521.052 does not apply to this type of information. *See* Bus. & Comm. Code § 521.052(b). Accordingly, Parkland may not withhold any portion of the requested information under section 552.101 in conjunction with section 521.052 of the Business and Commerce Code.

One of the third parties claims the requested information is excepted from disclosure under section 552.115 of the Government Code. Section 552.115 excepts from disclosure “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]” Gov’t Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration official. *See* Open Records Decision No. 338 (1982) (finding statutory predecessor to section 552.115 excepted only those birth and death records maintained by bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by Parkland, none of the submitted information may be withheld on this basis.

You next assert the submitted information is excepted from public disclosure under section 552.150 of the Government Code, which provides as follows:

(a) Information in the custody of a hospital district that relates to an employee or officer of the hospital district is excepted from the requirements of Section 552.021 if:

(1) it is information that, if disclosed under the specific circumstances pertaining to the individual, could reasonably be expected to compromise the safety of the individual, such as information that describes or depicts the likeness of the individual, information stating the times that the individual arrives at or departs from work, a description of the individual’s automobile, or the location where the individual works or parks; and

(2) the employee or officer applies in writing to the hospital district’s officer for public information to have the information withheld from public disclosure under this section and includes in the application:

(A) a description of the information; and

(B) the specific circumstances pertaining to the individual that demonstrate why disclosure of the information could reasonably be expected to compromise the safety of the individual.

(b) On receiving a written request for information described in an application submitted under Subsection (a)(2), the officer for public information shall:

(1) request a decision from the attorney general in accordance with Section 552.301 regarding withholding the information; and

(2) include a copy of the application submitted under Subsection (a)(2) with the request for the decision.

Gov't Code § 552.150. Section 552.150 provides that information held by a hospital district relating to a hospital district employee or officer is excepted from public disclosure provided (1) it is information that, if disclosed under the specific circumstances pertaining to the individual, could reasonably be expected to compromise the safety of the individual; and (2) the employee or officer makes a written application in accordance with section 552.150(a)(2) to the hospital district's officer for public information to have the information withheld from public disclosure under this section. *Id.* The individual's application must include a description of the information at issue and the specific circumstances pertaining to the individual that demonstrate why disclosure of the information could reasonably be expected to compromise his or her safety. *Id.*

Parkland has provided this office with copies of written applications sent to Parkland's officer for public information from thirty-six employees who describe the information at issue, explain their specific circumstances and concerns, and ask that their information not be publicly disclosed. Upon review and consideration of the applications provided by each individual who sought the protection of information, we determine that some of those applicants have described specific circumstances pertaining to the individual establishing that release of their names could "reasonably be expected to compromise the safety of the individual." *See id.* § 552.150(a)(1). Therefore, Parkland must withhold the names of those individuals whose applications we have marked under section 552.150 of the Government Code. In addition, to the extent that an individual's job title reveals the identity of an individual whose application we have marked, as, for example, when there is only one position with that title, Parkland must also withhold the individual's job title under section 552.150. However, we find none of the individuals has established that release of the remaining information at issue could "reasonably be expected to compromise the safety of the individual." *See id.; see also id.* § 552.022(a)(2).

One additional employee sent comments directly to the Office of the Attorney General (the "OAG"). The remaining employees and officers have not made an application to Parkland pursuant to section 552.150(a)(2). By its terms, section 552.150 is inapplicable to the employee whose comments were sent to the OAG instead of to Parkland and to those employees or officers who did not submit applications at all. *See id.* § 552.150(a)(2)

(employee who seeks to have information withheld from public disclosure must apply in writing to hospital district's officer for public information). Thus, we find Parkland and the employees and officers have failed to demonstrate that section 552.150 is applicable to any of the remaining information at issue. Therefore, Parkland may not withhold the remaining information at issue under section 552.150 of the Government Code.

Parkland also raises section 552.151 of the Government Code, which provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.151. Upon review, we find you have failed to demonstrate that release of the remaining information at issue would subject an employee to a substantial threat of physical harm. Therefore, we conclude section 552.151 is inapplicable to the remaining information at issue, and Parkland may not withhold any portion of the remaining information on that basis.

In summary, Parkland must withhold the names of those individuals whose applications we have marked under section 552.150 of the Government Code. To the extent an employee's job title reveals the identity of an individual whose application we have marked, Parkland must also withhold that information under section 552.150. The remaining submitted information must be released to the requestor.

Finally, we note that the requestor seeks the information at issue in electronic format. Section 552.228 of the Government Code requires a governmental body to provide a requestor 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 id.* § 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 information in the submitted paper format.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 369857

Enc. Submitted documents

c: Requestor
(w/o enclosures)