



September 13, 2000

Ms. Rebecca Hellbaum  
Associate General Counsel  
Texas Tech University Health Sciences Center  
3601 4<sup>th</sup> Street, 2B141  
Lubbock, Texas 79430-0001

OR2000-3532

Dear Ms. Hellbaum:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138945.

The Texas Tech University Health Sciences Center (the “university”) received a request for several categories of information, all pertaining to the university’s Department of Neuropsychiatry. Specifically, the requestor seeks the following:

1. Annual faculty evaluations for the Department of Neuropsychiatry for the academic years 1989-90 to the present.
2. All memos, e-mail, correspondence, or other documents related to the closing in January 2000 of the DNA Bank managed by Dr. Shirley Poduslo;
3. All memos, e-mail, correspondence or other documents related to the dispute with the DNA Bank and Dr. Shirley Poduslo involving the alleged use of a Jacob Creutzfeldt brain by Dr. Poduslo or others affiliated in any way with the DNA Bank;
4. All memos, e-mail, correspondence, or other documents from any administrator at Texas Tech University regarding Dr. Shirley Poduslow from 1995 to present;

5. All memos, e-mail, correspondence or other documents related to the hiring of Randolph Schiffer as chair of the Department of Neuropsychiatry at Texas Tech University;

6. All memos, e-mail, correspondence, or other documents related to the administrative closing of any research lab at Texas Tech University on the orders of any department chair, provost, or president for the years 1990 to the present.

You claim that portions of the requested information are excepted from disclosure under section 552.101, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the information at issue.<sup>1</sup>

We begin with your argument regarding section 552.117 of the Government Code. Section 552.117 excepts from required public disclosure information that reveals a public employee's home address, telephone number, social security number, or whether the public employee has family members, but only if the public employee has requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). Moreover, a governmental body may not withhold the information of a current or former employee who made the request for confidentiality under section 552.024 *after* the request for information was made. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for that information is made. Open Records Decision No. 530 at 5 (1989). You have provided us with a sample of records indicating that certain university employees have made timely elections under section 552.024, and a sample of documents containing certain employees' social security numbers. The university must withhold all employee information covered by section 552.117(1) that is contained in the requested documents to the extent that the relevant employees submitted timely elections under section 552.024.<sup>2</sup>

We note that even if certain employees did not timely submit an election under section 552.024, those employees' social security numbers may be confidential nevertheless under section 552.101 of the Government Code in conjunction with federal law.

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of all of the information at issue. *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 those submitted to this office.

<sup>2</sup>We note, however, that the submitted sample election form does not provide an option that would allow employees to request confidentiality regarding whether or not they have family members. Therefore, we emphasize that section 552.117 only applies to information for which an employee has specifically elected confidentiality in a timely manner. *See* Gov't Code §§ 552.024, .117(1).

Section 552.101 excepts from required public disclosure “information that is confidential by law, either constitutional, statutory, or by judicial decision.” Accordingly, section 552.101 encompasses confidentiality provisions such as the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). This provision makes confidential social security numbers and related records that have been obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* Therefore, if the social security numbers contained in the requested documents meet the criteria of section 405(c)(2)(C)(viii)(I), then they are confidential under this provision as encompassed by section 552.101.

We turn to the types of documents submitted under Tab 4 which you claim are confidential under section 552.101 in conjunction with the Medical Practices Act (“MPA”)<sup>3</sup> and common law privacy. As explained above, section 552.101 encompasses confidentiality provisions such as the MPA. The MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990).<sup>4</sup> Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). We have marked the medical

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<sup>3</sup>The Seventy-sixth Legislature repealed article 4495b of Vernon’s Texas Civil Statutes. *See* Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, § 6, 1999 Tex. Sess. Laws 1431, 2439 (Vernon) (adopting Occupations Code). The former article 4495b of Vernon’s Texas Civil Statutes now is codified as the Medical Practice Act at subtitle B of title 3 of the Occupations Code, and the former section 5.08 of article 4495b is codified at chapter 159 of the Occupations Code.

<sup>4</sup>Inasmuch as the Seventy-sixth Legislature intended no substantive change in the law in codifying the Medical Practice Act at subtitle B of title 3 of the Occupations Code, open records decisions interpreting the former section 5.08 of article 4495b of Vernon’s Texas Civil Statutes retain their relevance. *See* Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, § 7, 1999 Tex. Gen. Laws 1431, 2440.

records that appear under Tab 4. The university may release these records only in accordance with the MPA.<sup>5</sup>

Section 552.101 also protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. However, a deceased person has no right of privacy, and Texas law does not permit the family of a deceased person to maintain an action for the deceased's right of privacy because that right is personal. Open Records Decision No. 432 (1985), citing *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984); *see Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.) (Texas does not recognize relational or derivative right of privacy).

The documents submitted under Tab 4 include several documents that identify victims of Alzheimer disease and relatives of such victims. We believe that the fact that an individual suffers from Alzheimer disease is intimate and embarrassing and the release of which, at least in this instance, does not serve the public interest. However, those victims who are now deceased no longer have a right to privacy, and therefore, the university may not withhold their identities under section 552.101. To the extent the requested information contains the identities of individuals who are currently suffering from Alzheimer's, the university must withhold such information under section 552.101. Moreover, due to the hereditary nature of Alzheimer's which is particularly apparent in the submitted documents, we find that the identities of living relatives of Alzheimer victims, regardless of whether the victims themselves are still alive, have a privacy interest in their own right in the fact that there is a history of Alzheimer's in their families. Therefore, the university must also withhold the identities of relatives of Alzheimer victims under section 552.101. We have marked the types of information submitted under Tab 4 that are confidential under common law privacy and which the university must withhold under section 552.101.

In regard to the documents submitted under Tab 5, you claim that this information is confidential under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion

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<sup>5</sup>See Occ. Code §§ 159.004(5), 159.005(1) (providing that otherwise confidential medical information may be released to a person who bears a written consent of the patient, subject to certain requirements).

of personal privacy.” Gov’t Code § 552.102(a).<sup>6</sup> However, section 552.102 does not apply to applicants for employment. Open Records Decision No. 455 at 8 (1987). Because the information submitted under Tab 5 pertains to applicants for a position with the university, section 552.102 does not apply and the university may not withhold this information.

Next we turn to your argument regarding section 552.107 of the Government Code. Section 552.107(1) of the Government Code excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. Open Records Decision No. 574 at 3 (1990). In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* Having reviewed the information submitted under Tab 7, we agree that the information that you have indicated is excepted under section 552.107. Therefore, the university may withhold the information in Tab 7 in accordance with your markings.

Finally, we turn to your arguments regarding section 552.111. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993).

Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in

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<sup>6</sup>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 of the Public Information Act.

final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

Section 552.111 also encompasses the attorney work product doctrine. Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991)). This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.* When showing that the documents at issue were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 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 id.* at 5. We find that the types of documents submitted under "Tab 7," and one document submitted under Tab 6 contain intraagency communications regarding policy as well as attorney work product which the university may withhold under section 552.111. We agree that the information you have indicated is excepted under section 552.111. Therefore, the university may withhold the information under Tab 7 in accordance with your markings.

In conclusion, the university must withhold employee information that falls under section 552.117(1) to the extent it pertains to employees who have submitted timely elections for confidentiality under section 552.024. The requested documents contain medical records which the university may only release in accordance with the MPA. The university must withhold information that falls under common law privacy as encompassed by section 552.101. The university may withhold information that reveals certain types of attorney-client communications under section 552.107. Finally, the university may withhold certain intraagency communications and attorney work product under section 552.111.

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 appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public 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 the General Services Commission 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,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF/pr

Ref: ID# 138945

Encl. Submitted documents

cc: Mr. Floyd Holder, Jr.  
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cc: Mr. Robert Jackson  
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