



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

April 25, 2003

Mr. Jeffrey S. Young  
Associate General Counsel  
Texas Tech University Health Sciences Center  
3601 4<sup>th</sup> Street, Stop 6246  
Lubbock, Texas 79430-6246

OR2003-2812

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180908.

The Texas Tech University Health Sciences Center (the "center") received a request for four categories of information regarding specified statements, correspondence, federal permits, and grant applications. You state that you have released a portion of the responsive information. You also state that the center previously received a request for some of the information responsive to category four of the instant request and that you previously requested an opinion from this office, with respect to such information. In response, this office issued Open Records Letter No. 2003-2811 (2003), in which we ruled that you may not withhold the information in question under section 552.110, and it must be released. In regard to the information responsive to the current request that is identical to the information previously requested and ruled upon by this office, we conclude that you must continue to rely on OR2003-2811 as a previous determination and release the requested information in accordance with OR2003-2811. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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). Finally, you claim that the remaining responsive information that is not subject to OR2003-2811 is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

....

(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.

....

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital . . . .

Section 161.031(a) defines a “medical committee” as “any committee . . . of (3) a university medical school or health science center . . . .” Section 161.031(b) provides that the “term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical organization [or] university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services . . . .” Health & Safety Code § 161.0315(a).

You inform us that the center’s Institutional Review Board (the “IRB”) is a university health sciences center committee established to oversee and review human research activities pursuant to federal law.<sup>1</sup> You also state that Exhibit E consists of IRB records. Federal regulations define an IRB as

any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of,

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<sup>1</sup>See 42 U.S.C. § 289(a) (providing that Secretary of Health and Human Services shall by regulation require that each entity which applies for grant, contract, or cooperative agreement for any project or program which involves conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to Secretary that it has established “Institutional Review Board” to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

biomedical research involving human subjects. The primary purpose of such review is to assure the protection of the rights and welfare of the human subjects . . . .

21 C.F.R § 56.102(g). Thus, we conclude that the center's IRB is a medical committee created under federal law, and consequently, the IRB falls within the definition of "medical committee" set forth in section 161.031 of the Health and Safety Code. Therefore, the submitted documents that reflect committee proceedings and deliberations relating to standards and quality of care are confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. *See Jordan v. Court of Appeals*, 701 S.W.2d 644, 647-48 (Tex. 1985) (determining that statutory predecessor extended to documents prepared by or at direction of committee in order to conduct open and thorough review, and privilege extends to minutes of committee meetings, correspondence between members relating to deliberation process, and any final committee product); *see also* Open Records Decision No. 591 (1991) (concluding that purpose of predecessor statute was to encourage frank discussion by medical professionals). We conclude that all of the submitted information in Exhibit E must be withheld.<sup>2</sup>

Next, you assert that the document in Exhibit F is protected from disclosure under section 552.101 in conjunction with section 72.6 of title 42 of the Code of Federal Regulations, which provides for the registration of facilities transferring or receiving listed select agents. *See* 42 C.F.R. 72.6(a)(1). This section requires the completion of a CDC Form EA-101 for each transfer sought. *See* 42 C.F.R. 72.6(d)(1). You state that the regulations governing this form "mandate disclosure only to the Secretary of the Department of Health and Human Services, appropriate federal law enforcement authorities, and authorized local law enforcement authorities" and do not require disclosure of the form to the public. However, the language of section 72.6(c)(2)(ii) simply states that "such forms shall be made readily accessible" to the authorities you cite. Section 72.6(c)(2)(ii) does not provide for the confidentiality of any CDC Form EA-101 that the center is required to maintain. *See* Open Records Decision No. 478 (1987) (as a general rule, statutory confidentiality under section 552.101 requires express language making particular information confidential). Therefore, the center may not withhold Exhibit F under section 72.6 of title 42 of the Code of Federal Regulations.

Additionally, you assert that the CDC EA-101 form at issue is confidential under section 262 of title 42 of the United States Code. Section 262a(h)(1) specifically states:

No Federal agency specified in paragraph (2) shall disclose under section 552 of Title 5 any of the following:

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<sup>2</sup>As we are able to make this determination, we need not address your argument under section 552.110 of the Government Code.

(A) Any registration or transfer documentation submitted under subsections (b) and (c) of this section for the possession, use, or transfer of a listed agent or toxin; or information derived therefrom to the extent that it identifies the listed agent or toxin possessed, used, or transferred by a specific registered person or discloses the identity or location of a specific registered person.

.....

*Id.* § 262a(h)(1) (West 2003).<sup>3</sup> We note that, by its terms, section 262a(h)(1) only applies to certain federal agencies identified in section 262a(h)(2). *See id.* § 262a(h)(2) (defining federal agencies for purposes of 42 U.S.C. § 262a(h)(1)). You state that “[a]lthough 42 U.S.C. § 262a pertains primarily to federal agencies, disclosing the contents of the EA-101 form is tantamount to disclosure of confidential information held by relevant federal agencies and in violation of 42 U.S.C. § 262a.” Thus, you acknowledge that the center is not a federal agency as defined by that provision. Instead, you argue that the center’s release of the CDC EA-101 form would be the equivalent of a release of the form by an applicable federal agency. We note, however, that statutory confidentiality requires express language that information is confidential. Moreover, confidentiality will not be implied from a statutory structure. *See* Open Records Decision Nos. 658 (1998), 478 (1987). Therefore, the Office of the Attorney General cannot unilaterally create a confidentiality provision where one does not exist. Furthermore, in light of Congress’ evident preference for limiting the scope of non-disclosure, we are unwilling to assume that Congress meant more than it said in enacting section 262a(h)(1). *See Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986) (stating that in developing plain language rule, Court recognizes reality of legislative process and concludes that only rarely will outside evidence of broad purposes underlying enactment of legislation be useful); *see also Kofa v INS*, 60 F.3d 1084 (4<sup>th</sup> Cir. 1995) (stating that statutory construction must begin with language of statute; to do otherwise would assume that Congress does not express its intent in words of statutes, but only by way of legislative history); *see generally Coast Alliance v. Babbitt*, 6 F. Supp. 2d 29 (D.D.C. 1998) (stating that if, in following Congress’ plain language in statute, agency cannot carry out Congress’ intent, remedy is not to distort or ignore Congress’ words, but rather to ask Congress to address problem). Because section 262a(h)(1) does not apply to the center, and you have not cited any other federal or state provision or judicial decision that would make Exhibit F confidential, we conclude that Exhibit F is not excepted from disclosure under section 552.101 of the Government Code, and it must be released.

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<sup>3</sup>The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub.L. No. 107-188, 116 Stat. 637, amended the Biological Agents Provisions of the Antiterrorism and Effective Death Penalty Act of 1996 by inserting section 351.

In summary, we conclude that: 1) the center must continue to rely on OR2003-2811 as a previous determination; 2) the center must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code; and 3) the center must release the document in Exhibit F.

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).

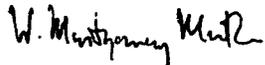
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/lmt

Ref: ID# 180908

Enc: Submitted documents

c: Mr. Mel Tittle  
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