



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2007

Ms. Carol Longoria
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2007-01699

Dear Ms. Longoria:

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# 270934.

The University of Texas Southwestern Medical Center at Dallas ("UTSW") received a request for information relating to a research study. You indicate that UTSW has no information that is responsive to item 3 of the request.¹ You have submitted information that UTSW seeks to withhold under sections 552.101, 552.107, 552.1235, 552.136, and 552.137 of the Government Code. You also believe that the submitted information implicates the interests of GlaxoSmithKline ("Glaxo"). You notified Glaxo of this request for information and of its right to submit arguments to this office as to why the information should not be

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

released.² We have considered the exceptions you claim and have reviewed the submitted information.³

An interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Glaxo. Thus, Glaxo has not demonstrated that any of the submitted information is confidential or proprietary for the purposes of the Act. *See* Gov't Code §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 161.032 of the Health and Safety Code, which makes confidential the "records and proceedings of a medical committee." Health & Safety Code § 161.032(a). A "medical committee" is defined as any committee, including a joint committee of a hospital, medical organization, university medical school or health science center, health maintenance organization, or extended care facility. *See id.* § 161.031(a). The term also encompasses "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." *Id.* § 161.031(b).

The precise scope of the "medical committee" provision has been the subject of a number of judicial decisions. *See Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996)(orig. proceeding); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988)(orig. proceeding); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986)(orig. proceeding); *Hood v. Phillips*, 554 S.W.2d 160 (Tex.1977); *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977) (orig. proceeding); *McAllen Methodist Hosp. v. Ramirez*, 855 S.W.2d 195 (Tex. App. – Corpus Christi 1993, orig. proceeding), *overruled on other grounds by, Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Doctor's Hosp. v. West*, 765 S.W.2d 812 (Tex.App.—Houston [1st Dist.] 1988) (orig. proceeding); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex.App. – Fort Worth 1988) (orig. proceeding). 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

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes UTSW to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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 Health & Safety Code § 161.032).

You contend that the information at Tab 5 is confidential under section 161.032. You state that the information in question consists of documents utilized by UTSW’s Institutional Review Board for purposes of patient safety and quality improvement. Based on your representations and our review of the information, we conclude that UTSW must withhold the information at Tab 5 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

Section 552.101 also encompasses section 51.914 of the Education Code, which provides in part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1)-(2). As noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular scientific information has “a potential for being sold, traded, or licensed for a fee.” Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* Thus, this office has stated that in considering whether requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a university’s assertion that the information has

this potential. *See id.*; *but see id.* at 10 (university's determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.194 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988).

You have marked information at Tab 6 that UTSW seeks to withhold under section 51.914. You state that the information in question, including details of the research, changes in the protocol, and results obtained, has the potential for being sold, traded, or licensed for a fee. Based on your representations and our review of the information in question, we generally agree that some of the information, which we have marked, falls within the scope of the statute. We note, however, that the results of the research to which the information at issue pertains appear to have been published in a scientific journal.⁴ This office has determined that section 51.914 does not protect information relating to scientific research that has been published. *See* Open Records Decision 497 at 7 (addressing statutory predecessor). Therefore, to the extent that any of the information that UTSW seeks to withhold under the section 51.914 has been published, any such information is not confidential under the statute and may not be withheld from disclosure on that basis under section 552.101 of the Government Code. To the extent that the information that we have marked has not been published, UTSW must withhold that information under section 552.101 in conjunction with section 51.914.

You also raise section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this

⁴See the abstract from "Valacyclovir Prophylaxis to Prevent Recurrent Herpes at Delivery," *Obstetrics & Gynecology* 2006; 108: 141-147 at <http://www.greenjournal.org/cgi/content/abstract/108/1/141>.

office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You seek to withhold the e-mail communications at Tab 7 under section 552.107(1).⁵ You contend that the communications in question were made in connection with the rendition of professional legal services to UTSW. You have identified the parties to the communications. You state that these communications were intended to be and remain confidential. Based on your representations and our review of the information at issue, we agree that UTSW may withhold one of the communications under section 552.107(1). We have marked that information. We conclude that the remaining information at Tab 7 is not protected by the attorney-client privilege and may not be withheld under section 552.107(1).

Next, we address your claim under section 552.1235 of the Government Code. Section 552.1235 excepts from disclosure “the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” Gov’t Code § 552.1235(a). We note that this section does not except from disclosure the amount or value of an individual gift, grant, or donation. *See id.* § 552.1235(b). “Institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an “institution of higher education” as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section. *See Educ. Code* § 61.003. Because section 552.1235 does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See Gov’t Code* § 311.005. “Person” includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2).

⁵Although you also seek to withhold the information at Tab 7 under section 552.101, we note that section 552.101 does not encompass discovery privileges. *See Open Records Decision No. 676 at 1-3 (2002).*

You have marked information at Tab 6 that UTSW seeks to withhold under section 552.1235. We understand you to contend that the marked information either identifies or tends to identify a donor of UTSW. You state that this donor has not granted UTSW permission to reveal its identity. Based on your representations and our review of the information in question, we conclude that UTSW must withhold the information that you have marked under section 552.1235. We have marked additional information that must also be withheld on this basis.

You also raise section 552.136 of the Government Code, which provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device 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.

(b) Notwithstanding 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. You have marked information at Tab 6 that UTSW seeks to withhold under this exception. We agree that some of that information, which we have marked, must be withheld under section 552.136. We conclude that the rest of the marked information is not a credit card, debit card, charge card, or access device number for the purposes of section 552.136 and may not be withheld under this exception.

Lastly, we address your claim under section 552.137 of the Government Code. Section 552.137(a) states that "[e]xcept as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter." Gov't Code § 552.137(a). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the owner of the e-mail address has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We agree that UTSW must withhold the e-mail address that you have marked in Tab 6 under section 552.137, unless the owner of the e-mail address has consented to its disclosure.

In summary: (1) UTSW must withhold the information at Tab 5 under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code; (2) to the extent that the information has not been published, the information that we have marked at Tab 6 must be withheld under section 552.101 in conjunction with section 51.914 of the Education Code; (3) UTSW may withhold the information that we have marked at Tab 7 under section 552.107(1) of the Government Code; (4) UTSW must withhold the information that you have marked at Tab 6, along with the additional information that we have marked, under section 552.1235 of the Government Code; (5) UTSW must withhold the information that we have marked at Tab 6 under section 552.136 of the Government Code; and (6) the marked e-mail address at Tab 6 must be withheld under section 552.137 of the Government Code, unless the owner of the e-mail address has consented to its disclosure. The rest of the submitted information must be released.

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).

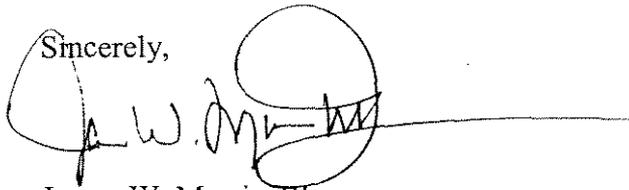
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 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 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,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a large circular flourish above the name and a horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jww

Ref: ID# 270934

Enc: Submitted documents

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