



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 5, 2009

Ms. Neera Chatterjee  
Public Information Coordinator  
The University of Texas System  
201 West 7th Street  
Austin, Texas 78701-2902

OR2009-06003

Dear Ms. Chatterjee:

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# 341876 (OGC #117392).

The University of Texas Medical Branch at Galveston ("UTMB") received a request for nineteen categories of information pertaining to Hurricane Ike recovery efforts and communications between several named individuals.<sup>1</sup> You state that you have provided the requestor with some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.111, 552.1235, and 552.137 of the Government Code. You also believe that some of the submitted information implicates the interests of a third party. You state, and provide documentation showing, that you notified the City of Houston of UTMB's receipt of the request for information and of its right to submit arguments to this office as to why the requested information should not be released to the requestor.<sup>2</sup> *See* Gov't Code § 552.304 (providing that interested third party may

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<sup>1</sup>We note that UTMB asked for and received clarification regarding a portion of this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

<sup>2</sup>As of the date of this letter, we have not received any arguments from the City of Houston. Thus, none of the submitted information may be withheld on behalf of the City of Houston. *See* Gov't Code § 552.304.

submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.<sup>3</sup> We have also considered comments submitted by the requestor. *See id.*

Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You argue a portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 51.914(1) of the Education Code. Section 51.914 of the Education Code provides in pertinent part as follows:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, 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[.]

Educ. Code § 51.914(1). The purpose of section 51.914(1) is to protect the "actual or potential value" of technological and scientific information developed in whole or in part at a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting statutory predecessor to section 51.914). 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." *See* Open Records Decision No. 651 (1997). 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 (stating that university's determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review).

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<sup>3</sup>We 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.

You inform us that information you have labeled as Tab 5 consists of slides discussing specific experiments conducted by a professor at UTMB regarding drugs that are used for the treatment of mycoplasma and their results. You state that this information relates to a product, device, or process developed by UTMB professors that has the potential for being sold, traded, or licensed for a fee. You assert that the information at issue reveals the substance of the research. Based on your representations and our review of the information at issue, we conclude that UTMB must withhold the information within Tab 5 under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

Next, you assert that the information you have marked in Tab 7 is excepted from disclosure under section 552.111 of the Government Code. 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." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *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, 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* ORD 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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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 submitted information consists of draft policy documents and communications between and among members of UTMB regarding policy issues pertaining to potential testimony before the House Committee on Hurricane Ike Devastation and the Senate Intergovernmental Relations Subcommittee. Based upon your representations and our review, we agree that UTMB may withhold some of the submitted information within Tab 7 under section 552.111. However, we find that portions the remaining information at issue consist of purely factual information that is not excepted under section 552.111. Accordingly, you may only withhold the information we have marked under section 552.111.

Section 552.1235(a) of the Government Code excepts “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). However, 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 meaning “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.” Educ. Code § 61.003(8). 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).

UTMB seeks to withhold portions of Tab 7 under section 552.1235. We note, however, that UTMB maintains on its website information pertaining to some of the named foundations and their history of charitable donations to UTMB. Thus, UTMB has released these donors identities to the public. In addition, UTMB itself named campus research centers after some of the donors and released the donors’ name to the public. Accordingly, we find that the donors at issue have previously granted UTMB permission to reveal their identity. Therefore, UTMB may not withhold any of the information at issue in Tab 7 under section 552.1235 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail addresses you have marked are not of a type specifically excluded by

section 552.137(c) of the Government Code. Therefore, UTMB must withhold the marked e-mail addresses in accordance with section 552.137, unless the owners of the e-mail addresses have consented to their release.

In summary, UTMB must withhold Tab 5 under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. UTMB may withhold the information we have marked within Tab 7 under section 552.111 of the Government Code. UTMB must withhold the marked e-mail addresses in accordance with section 552.137, unless the owners of the e-mail addresses have consented to their release. 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](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,



Paige Savoie  
Assistant Attorney General  
Open Records Division

PS/cc

Ref: ID# 341876

Enc. Submitted documents

cc: Mayor Bill White  
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