



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 7, 2009

Ms. Neera Chatterjee  
The University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2009-09364

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# 348217.

The University of Texas M.D. Anderson Cancer Center (the "university") received two requests from the same requestor for correspondence between various named university staff. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.110, 552.111, and 552.117 of the Government Code, and privileged under Texas Rule of Evidence 509.<sup>1</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege found in rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note that the proper exception to raise when asserting the attorney work product privilege for information that is not subject to section 552.022 is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6. Accordingly, we will consider your arguments under sections 552.107 and 552.111 of the Government Code.

<sup>2</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.

also considered comments received from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information is not responsive to this request because it is not within the time period specified by the requestor. This ruling does not address the public availability of non-responsive information, and the university is not required to release non-responsive information in response to this request. Accordingly, we will address your arguments with regard to the responsive information.

Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must

be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982).

You state that the requestor contacted the university’s attorney and alleged that university employees have engaged in discrimination, harassment, and retaliation in violation of the law. You further state the requestor alleged slander, libel, and disparagement by university employees. However, you have not informed us that the requestor has taken any concrete steps toward the initiation of litigation. Consequently, after reviewing your arguments we find you have not established that the university reasonably anticipated litigation when it received the request for information. Accordingly, the university may not withhold the submitted documents under section 552.103 of the Government Code.

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. Section 552.101 encompasses the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) HIPAA, 42 U.S.C. §§ 1320d-1320d-8, which you claim governs portions of the submitted information. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts.160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision Number 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with, and is limited to, the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that

is subject to disclosure under the Act confidential, the university may not withhold the submitted information on this basis.

Section 552.101 also encompasses section 51.914 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; [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.” Open Records Decision No. 651 at 9 (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 governmental body’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). We note that section 51.914 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). Thus, a governmental body must provide this office with an explanation of how release of a specific working title will reveal the details of the research for that working title.

You state that the submitted information contains confidential technological and scientific information related to epidemiological research that is both proposed and currently ongoing. You state that disclosure of the responsive documents would allow others to appropriate scientific information and research data because they “directly reveal the substance of scientific and research data.” Further, you state, and provide a specific example showing, that release of one of the submitted working titles could reveal the research being conducted. Additionally, you assert that the type of information reflected in the submitted information is intellectual property capable of being sold, traded, or licensed for a fee. Based on your representations and our review, we agree you have demonstrated that portions of the information reveal technological and scientific information about the research being conducted or that which is proposed. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

However, the remaining information consists of references, published research, additional working titles, and e-mail communications. We note this office has determined that section 51.914 does not protect information relating to scientific research that has been published. *See* ORD 497 at 7 (addressing statutory predecessor). Further, as noted above, section 51.914 does not protect working titles that the university has not demonstrated reveal the nature of the research. In this instance, you have not explained how release of the remaining working titles will reveal the nature of the research. Thus, we find you have failed to explain how this remaining information consists of technological or scientific information or that release of such information will reveal the details of the research at issue. Therefore, section 51.914 does not apply to the remaining information and it may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code. Section 161.032(a) 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).

We understand the university’s Institutional Review Board (the “IRB”) is a committee established pursuant to federal law.<sup>3</sup> Federal regulations define an IRB as

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<sup>3</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).

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

The precise scope of this provision has been the subject of a number of judicial decisions. See, e.g., *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~~, *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 purposes." *Jordan*, 701 S.W.2d at 647-48. However, this 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 statutory predecessor to section 161.032). We note that section 161.032 does not make confidential "records made or maintained in the regular course of business by a . . . university medical center or health science center[.]" Health & Safety Code § 161.032(f); see *McCown*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business). The phrase "records made or maintained in the regular course of business" has been construed to mean records that are neither created nor obtained in connection with a medical committee's deliberative proceedings. See *McCown*, 927 S.W.2d at 9-10 (Tex. 1996) (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You state the responsive documents contain records, information, or reports of or provided by the IRB. However, upon review, we find you have failed to demonstrate any portion of the remaining information consists of the records or proceedings of the IRB. Therefore, the remaining information may not be withheld 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 the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which

would be highly objectionable to a reasonably person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types 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 organs. *Id.* at 683. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, you have failed to demonstrate how the remaining information is intimate or embarrassing and is not of legitimate interest to the public. Therefore, none of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

Next, you claim Texas Rule of Evidence 509 for some of the remaining information. Texas Rule of Evidence 509 provides that confidential communications between a physician and patient, as well as a physician's records of the identity, diagnosis, evaluation, or treatment of a patient, are privileged in a civil proceeding and protected from discovery. TEX. R. EVID. 509(c). You assert that some of the submitted information is privileged under rule 509. However, you have not demonstrated that any of the submitted information constitutes confidential communications between a physician and a patient, or is a record of the identity, diagnosis, evaluation, or treatment of a patient. Therefore, the university may not withhold any of the remaining information on the basis of Texas Rule of Evidence 509.

You also raise section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See* Open Records Decision No. 593 (1991). First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You inform us that the marketplace for grant funding and sponsored research funding is extremely competitive. You state the university "competes against approximately tens to hundreds of thousands of other researchers at numerous institutions when it submits a

proposal for consideration for grant or sponsored research funding.” You contend that release of the remaining information would “disclose M.D. Anderson’s unique approach to epidemiological research” and therefore would benefit the university’s competitors and compromise its position in the marketplace. Having considered your arguments, we find you have only demonstrated a remote possibility of harm. You have not sufficiently demonstrated that release of the remaining information would harm the university’s specific marketplace interests in a particular competitive situation. We therefore conclude that the university may not withhold any of the remaining information under section 552.104 of the Government Code.

Next, you claim section 552.107 of the Government Code for a portion of the remaining information. Section 552.107(1) protects information coming 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. 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. 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. *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 a 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this 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. *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 state that the marked e-mails constitute communications between and amongst university staff and a university attorney that were made for the purpose of providing legal advice to the university. You have identified the parties to the communications. You state that these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the university may withhold the marked information under section 552.107 of the Government Code.

The university also asserts section 552.110 of the Government Code for portions of the remaining information. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110. By its terms, section 552.110 only protects the interests of the person from whom the information was obtained. This provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. Accordingly, we find the university has failed to establish the applicability of section 552.110 to its own information. Thus, the university may not withhold the submitted information under section 552.110.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.024, .117. Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note, however, that work telephone numbers are not excepted from disclosure by section 552.117. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Upon review, we find to the extent the employees to whom the marked information belongs timely elected to withhold the categories of information at issue under section 552.024, the university must withhold the information we have marked pursuant to section 552.117(a)(1). To the extent the employees at issue did not elect confidentiality, the information we have marked may not be withheld under section 552.117(a)(1).

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the

Education Code. The university may withhold the attorney-client communications you have marked under section 552.107 of the Government Code. The university must withhold the marked personal information of university employees under section 552.117(a)(1) of the Government Code. 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.

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Sincerely,



Karen E. Stack  
Assistant Attorney General  
Open Records Division

KES/cc

Ref: ID# 348217

Enc. Submitted documents

c: Requestor  
(w/o enclosures)