



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2009

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

OR2009-09785

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# 349018.

The University of Texas Health Science Center at Houston (the "university") received a request for e-mails to or from specified individuals during specified time periods. You claim that some of the submitted information is not subject to the Act. You also claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we address your contention that the e-mails you have marked are not public information subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

¹We 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 assert that the e-mails you have marked “were not collected, assembled or maintained in connection with the transaction of any [u]niversity business, nor were they collected, assembled, or maintained pursuant to any law or ordinance.” Upon review of your arguments and the information at issue, we agree that the e-mails you have marked are purely personal, and thus do not constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the university. *See* Gov’t Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Thus, we conclude that these e-mails are not subject to the Act. Therefore, the university need not release the e-mails you have marked under the Act.²

You raise section 552.101 of the Government Code as an exception to disclosure. This section excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 51.914 of the Education Code. Section 51.914 provides in relevant 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[.]

²As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

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). Moreover, section 51.914 is applicable only to information “developed in whole or in part at a state institution of higher education.” Educ. Code §51.914(1).

You inform us that the information you have marked under section 51.914(1) consists of information developed by the university which has the potential for being sold, traded, or licensed for a fee. You contend that disclosure of this information would directly reveal the substance of the research and permit third parties to appropriate it. Based on your representations, we conclude that the portions of the submitted information that we have marked under section 51.914 are confidential under this section. As such, the university must withhold this information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. However, the submitted material also contains material tangential to the substance of the proposed research. We find that this information does not reveal the substance of the research at issue and is not confidential under section 51.914. Accordingly, the remaining information you have marked may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 160.007 of the Occupations Code. The university argues that a portion of the remaining information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code. Medical peer review is defined by the Medical Practice Act (the “MPA”), found at subtitle B of title 3 of the Occupations Code, to mean “the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care rendered by those practitioners.” Occ. Code §151.002(a)(7). A medical peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]” *Id.* §151.002(a)(8). Section 160.007 of the MPA states that, “[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” *Id.* § 160.007.

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code. You assert that a portion of the submitted information is subject to section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code, each of which pertains to the public availability of medical committee records. Section 161.032 of the Health and Safety Code provides in relevant part:

(c) Records, information, or reports of a medical committee, medical peer review committee, . . . and records, information, or reports provided by a medical committee, medical peer review committee, . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health and Safety Code § 161.032(c), (f). Similarly, section 160.007 of the Occupations Code provides:

(a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Occ. Code § 160.007(a). You assert that the information you have marked under these statutes “was created as part of a medical peer review inquiry [and] was submitted to, reviewed and used by a [university] medical committee charged with appointments, promotions, and tenure . . . for the purposes of assessing faculty members’ qualifications and professional achievement.” Based on our review of the relevant statutes, your arguments, and the information at issue, we agree that the information you have marked under section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code consists of confidential records of a medical peer review committee. Accordingly, the university must withhold this information pursuant to section 552.101 of the Government Code.

Section 552.107(1) of the Government Code 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