



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2009

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

OR2009-09786

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# 349017.

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for correspondence between a specified university staff member and five other named individuals, occurring over a specified period of time. You state some information will be released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.117, and 552.137 of the Government Code.¹ We also understand you to claim that the submitted information is privileged under Texas Rule of Evidence 509. We have considered your arguments and reviewed the submitted representative sample of information.² We have also received

¹Although you also raise section 552.110 of the Government Code, we note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. As we have received no arguments from any third party seeking to withhold any portion of the submitted information under section 552.110, we do not address the applicability of section 552.110 to the submitted information. *See* Gov't Code § 552.305.

²We 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.

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

Initially, we note a portion of the submitted information, which we have marked, was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-09364 (2009). As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the university must continue to rely on Open Records Letter No. 2009-09364 as a previous determination and dispose of the information at issue in accordance with the prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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). We will address your arguments against disclosure for the remaining information not subject to the previous determination.

Section 552.103 of the Government Code 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 any of the remaining information under section 552.103 of the Government Code.

Section 552.101 of the Government Code exempts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 161.032 of the Health and Safety Code, which provides in relevant 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.

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, a "'medical committee' includes any committee, including a joint committee, of . . . a hospital [or] a medical organization . . ." *Id.* § 161.031(a). The term "medical committee" also includes "a committee, including a joint committee, of one or more of the entities listed in Subsection (a)." *Id.* § 161.031(c). Section 161.0315 provides in relevant part that "[t]he

governing body of a hospital [or] medical organization . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services [.]” *Id.* § 161.0315(a).

We understand the university’s Institutional Review Board (the “IRB”) is a committee established pursuant to federal law.³ 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, 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

³*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).

(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 or records provided by IRB to the governing body of a public hospital. Therefore, the university may not withhold any of the remaining information 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(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; [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 remaining 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.” We note, however, that the remaining information consists only of e-mail communications. Upon review, 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. We therefore conclude that the university may not withhold any of the remaining information under section 552.101 in conjunction with section 51.914 of the Education Code.

Next, you appear to raise 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 the remaining information is privileged under rule 509. However, you have not demonstrated that any of the remaining 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.

Section 552.104 of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. 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. Therefore, the university may not withhold any of the remaining information under section 552.104 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1).* Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* You assert that, prior to the university receiving the request for information, the employee at issue elected to keep these types of information confidential. Therefore, the university must withhold the information you have marked under section 552.117 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).* You have marked e-mail addresses in the submitted documents that are within the scope of section 552.137(a). You state the owners of these e-mail addresses have not consented to their public disclosure. Therefore, the university must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

You assert the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *Attorney General Opinion JM-672 (1987).* A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must

do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the university must continue to rely on Open Records Letter No. 2009-09364 as a previous determination and dispose of the information we marked in accordance with the prior ruling. The university must withhold the information you have marked under sections 552.117 and 552.137 of the Government Code. The remaining information must be released in accordance with copyright law.

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, 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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/dls

Ref: ID# 349017

Enc. Submitted documents

c: Requestor
(w/o enclosures)