



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2009

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

OR2009-10042

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# 349550:

The University of Texas M. D. Anderson Cancer Center (the "university") received a request for all records for a specified time period in the possession of named university employees, including all records regarding the requestor.¹ You state the university has provided some of the responsive information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.108, 552.110, 552.111, and 552.117 of the Government Code, and privileged under Texas Rule of Evidence 509.² We have considered the exceptions you claim and reviewed

¹We note the university asked for clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Although you also raise section 552.101 of the Government Code in conjunction with, among other things, the attorney-client privilege and the attorney work product privilege, this office has concluded that 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

the submitted representative sample of information.³ We have also considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we address the requestor's argument that the university failed to comply with the ten-business-day deadline prescribed by section 552.301(b) of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply no later than the tenth business day after the date of receiving the written request. *Id.* § 552.301(b). The university received the request on April 30, 2009. The university submitted its request for an open records decision to this office on May 14, 2009; therefore, we find the university complied with the procedural requirements of the Act.

Next, 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. 2009-09786 (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. 2009-09786 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.

sections 552.107 and 552.111 of the Government Code.

³We assume 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 those records contain substantially different types of information than that submitted to this office.

(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 assert the remaining information is excepted under section 552.103 because the requestor has alleged that university employees have engaged in discrimination, harassment, and retaliation in violation of the law. We note, however, that a threat to sue without any further action is not sufficient to establish reasonably anticipated litigation. *See ORD 331*. In this instance, you have not informed us that the requestor has taken any other 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 portion of the remaining information 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 confidentiality provisions such as section 161.032 of the Health and Safety Code, which provides in relevant part:

(c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

...

(e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Officer of Inspector General of the United States Department of Health and Human Services.

...

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital . . . [or] hospital district[.]

Health & Safety Code § 161.032(c), (e), (f). You state portions of the remaining information are maintained by the university's compliance officers in connection with internal compliance investigations that were performed or are being performed in accordance with the university's compliance program, which was developed pursuant to the guidelines issued by the Office of Inspector General of the United States Department of Health and Human Services. You indicate the documents at issue are not made or maintained in the regular course of business. *Cf. Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). Based on your representations and our review, we conclude the information you have marked consists of records, information, or reports of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Accordingly, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.⁴

Next, you claim portions of the remaining information are subject to the Texas Homeland Security Act ("HSA"). Section 552.101 also encompasses the HSA. As part of the HSA, the Seventy-eighth Legislature passed House Bill 9, which added sections 418.176 through 418.182 to chapter 418 of the Government Code. These provisions make certain

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

information related to terrorism confidential. Specifically, section 418.181 of the Government Code provides in relevant part:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code § 418.181; *see generally id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). The fact information may be related to a governmental body's security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the university "is an academic research center supported . . . by federally funded research and engages numerous scientific partnerships, including public-private partnerships, to advance scientific discovery for the benefit of the public's health." You further contend that if the public health were threatened, the university would be a key asset in the administration of public health. Upon review, we agree the university is a "critical infrastructure" as defined by section 421.001 of the Government Code. *See id.* § 421.001.

You also state the information at issue was "created for the purpose of identifying potential critical infrastructure vulnerabilities" and that this information specifically details security vulnerabilities of the university. You assert this information, if released, "could readily provide information allowing certain individuals to attempt to breach the security of the [university]." Based on your representations and our review, we conclude that the university must withhold the information we have marked under section 552.101 in conjunction with section 418.181 of the Government Code.⁵

You assert portions of the remaining information are subject to common-law privacy. 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).

⁵As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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, we agree that portions of the remaining information constitute highly intimate or embarrassing information of no legitimate public interest. Therefore, the university must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.⁶

Next, you contend some of the remaining information is excepted under section 51.914 of the Education Code, which is also encompassed by section 552.101. Section 51.914 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[.]

⁶As our ruling is dispositive for this information, we need not address your remaining arguments 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.” 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).

You state that the information you have marked contains confidential technological and scientific information related to the university’s approach to epidemiological research, “including research currently being conducted.” You also state that the information “is valuable not only in its own right, but also because it has the potential to impact other research, inventions, and health interventions, including the types of pharmaceuticals, care and treatment offered to patients.” You assert that the type of information reflected in the documents you have marked is intellectual property capable of being sold, traded, or licensed for a fee. Based on your representations and our review, we agree that parts of the remaining information, which we have marked, are confidential under section 51.914 of the Education Code and must be withheld under section 552.101 of the Government Code. However, you have marked an email pertaining to a scheduled symposium under section 51.914. You have not explained, nor can we discern, how this information relates to research being developed in whole or in part by the university. *See* ORD 497 (stating that information related to research is not protected if it does not reveal details about research). Accordingly, the university may not withhold the remaining information at issue under section 552.101 in conjunction with section 51.914.

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). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

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 contend a portion of the remaining information pertains to the university's unique approach to epidemiological research and release of this information would benefit the university's competitors and compromise its position in the marketplace. You have not sufficiently demonstrated, however, that release of the email pertaining to a scheduled symposium would harm the university's marketplace interests in a competitive situation. We therefore conclude that the university may not withhold any portion of the remaining information under section 552.104 of the Government Code.

Next, you argue some of the remaining information is excepted under section 552.107 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 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 Tex. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 portions of the remaining information constitute confidential communications between university attorneys and university staff, made for the purpose of rendering legal services to the university. We note that all of the parties to the communications at issue are privileged parties. Upon review, we find the university may withhold the information we have marked under section 552.107 of the Government Code.⁷

Next, you argue a portion of the remaining information is excepted under section 552.108 of the Government Code. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the information you have marked relates to ongoing criminal investigations conducted by the university’s police department. In this instance, a portion of the information you have marked under section 552.108 pertains to staffing and administrative issues. We note section 552.108 is generally not applicable to purely administrative records that do not involve the investigation or prosecution of crime. *See City of Fort Worth v. Corryn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). Based on your representations and our review of the information at issue, we conclude that the release of the information we have marked only would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, the university may withhold the information we have marked under section 552.108(a)(1).

You also assert that portions of the remaining information are excepted from disclosure under section 552.110 of the Government Code because the information at issue contains “previously undisclosed commercial information, the disclosure of which would likely cause substantial competitive harm.” Section 552.110(b) protects “[c]ommercial 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

⁷As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

obtained[.]” Gov’t Code § 552.110(b). However, by its terms, section 552.110(b) only protects the interests of the person from whom the information was obtained. This section 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. We note that the information at issue was not obtained from a third party, but rather comes from communications involving university employees. Upon review, we find that the university has failed to establish the applicability of section 552.110(b). Therefore, no part of the information at issue may be withheld pursuant to section 552.110(b).

You also raise section 552.117 of the Government Code. 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). 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. You have marked information for exclusion under this exception. You state that the employee concerned timely elected under section 552.024 to keep such information private. Accordingly, the university must withhold the information you have marked under section 552.117(a)(1).

Lastly, we note the remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code.⁸ Section 552.137 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 a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

⁸The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the university must continue to rely on Open Records Letter No. 2009-09786 as a previous determination and dispose of the information we have marked in accordance with the prior ruling. The university must withhold (1) the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code, (2) the information we have marked under section 552.101 in conjunction with section 418.181 of the Government Code, (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, (4) the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code, (5) the information you have marked under section 552.117 of the Government Code, and (6) the information we have marked under section 552.137 of the Government Code. The university may withhold the information we have marked under section 552.107 of the Government Code and the information we have marked under section 552.108 of the Government Code. The remain information must be released to the requestor.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 349550

Enc. Submitted documents

c: Requestor
(w/o enclosures)