ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2010

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

OR2010-09244

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# 383779.

The University of Texas Health Science Center at Houston (the "university") received a request for communications between certain individuals during a specified time period and all records pertaining to the requestor in the information technology account and/or in the possession of a named individual. You state the university is releasing some of the requested information. 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, 552.108, 552.111, 552.117, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted information.[1]

The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of

[1]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.

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). You inform us that portions of the submitted information consist of personal e-mails that have no connection with university business and represent incidental use of university e-mail by university employees. After reviewing the information at issue, we agree that the information you have marked does 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 id.* § 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). Therefore, the information you have marked is not subject to the Act, and the university need not release it in response to this request.[2]

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. This exception encompasses information other statutes make confidential, such as section 161.032 of the Health and Safety Code, which provides in part:

> (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.
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> . . .
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> (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, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

Health and Safety Code § 161.032(a), (c). Section 161.031(a) defines a "medical committee" as "any committee . . . of (3) a university medical school or health science center[.]" *Id.* § 161.031(a)(3). Section 161.031(b) provides that the "term includes 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). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital [or] university medical school or health science center . . . may form a medical peer review committee, as defined by Section 151.002, Occupations Code, or a medical committee, as defined by Section 161.031, to evaluate medical and health care services[.]" *Id.* § 161.0315(a).

The precise scope of the "medical committee" provision has been the subject of a number of judicial decisions. *See Memorial Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1

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[2]As we are able to make this determination, we need not address your remaining arguments against the disclosure of portions of these e-mails.

(Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986); *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977); *Texarkana Memorial Hosp. , Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977); *McAllen Methodist Hosp. v. Ramirez*, 855 S.W.2d 195 (Tex. App.—Corpus Christi 1993), disapproved by, *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); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex. App.—Fort Worth 1988). 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. 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 of the Health and Safety Code). We note that section 161.032 does not make confidential "records made or maintained in the regular course of business by a hospital[.]" Health & Safety Code § 161.032(f); *see Memorial Hosp.—The Woodlands*, 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).

You state the information at issue constitutes records of the university's School of Public Health Faculty Council and Six-Year Faculty Review Committee, which you contend are medical committees. You also indicate the information at issue was prepared by or for use of the committees. Based on your representations and our review, we agree the committees at issue constitute medical peer review committees as defined by section 161.031. *Id.* § 161.031(b). Additionally, after review of the information at issue, we find that it consists of records of medical committees. Accordingly, the university must withhold the documents you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.[3]

Section 552.101 also encompasses section 51.914 of the Education Code, which 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

[3]As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

> programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee[.]

Educ. Code § 51.914(1). The legislature is silent as to how this office or a court is to determine whether particular information has "a potential for being sold, traded, or licensed for a fee." *See* Open Records Decision No. 651 (1997). Furthermore, whether particular 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 also note that section 51.194(1) 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(1) 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) includes a report made to the Cancer Prevention and Research Institute of Texas by University of Texas System faculty and employees. You state the report outlines a new process and approach to clinical research that 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 proposed plan and permit third parties to appropriate such processes. Based on your representations and our review, we conclude that the portions of the submitted information we have marked are confidential under section 51.914. 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.[4] However, you have not established that any of the remaining information at issue reveals the substance of the processes at issue; thus, none of the remaining information at issue is confidential under section 51.914.

Next, we will address your claims under section 552.108 of the Government Code for the information you have marked under that exception. Section 552.108 provides in relevant part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

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[4]As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

> (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
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> . . .
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> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:
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> (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming section 552.108(a)(1) or section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108(a)(1) protects information, the release of which would interfere with a particular criminal investigation or prosecution. You have not informed this office that the information you have marked relates to a particular criminal investigation or prosecution or how its release would interfere with a particular ongoing case. Thus, you have failed to demonstrate how release of the information at issue would interfere with the investigation or prosecution of a particular crime. Accordingly, we conclude that the university may not withhold the information you marked under section 552.108(a)(1).

Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You contend that release of the submitted information "would interfere with law enforcement and compromise [the university police department's] ability to secure the campus as well as compromise its ability to prevent and detect crime." However, upon review of the information at issue and your arguments, we find that the university has failed to explain in any detail how release of the submitted information would interfere with law enforcement or crime prevention. Accordingly, the information you have marked is not excepted from public disclosure under section 552.108(b)(1) of the Government Code. As you raise no additional exceptions against the disclosure of the information you marked under section 552.108, it must be released to the requestor.

Next, you contend that the information you have marked in the remaining information is excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code §552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state that the remaining information you have marked under section 552.111 consists of advice, opinions, and recommendations reflecting the policymaking processes of the

university with respect to its compensation plan. Upon review of your arguments and the submitted information, we find that the university has established the applicability of section 552.111 of the Government Code to some of the information you marked. Accordingly, the university may withhold the information we have marked under section 552.111. However, we find that the remaining information you have marked consists of purely factual information and it may not be withheld under section 552.111. As you raise no further exceptions against the disclosure of the remaining information you marked under section 552.111, it must be released to the requestor.

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. Gov't Code § 552.117(a)(1). 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 in the remaining documents that the university will redact under section 552.024, which authorizes a governmental body to redact from public release information subject to section 552.117 without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. *See* Gov't Code 552.024(a)-(c). We have marked additional information that the university must also withhold under section 552.117(a)(1) of the Government Code, to the extent the employee concerned timely elected to keep such information confidential under section 552.024.

Next, you claim some of the remaining information is confidential pursuant to common-law privacy and constitutional privacy, which are also encompassed by section 552.101 of the Government Code. The common-law right to privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. The types of information considered intimate or 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. *See id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations,

and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5, 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we find that none the remaining information you have marked constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Furthermore, we conclude you have not shown that the remaining information you have marked comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444 (1986), 423 at 2 (1984). Accordingly, the university may not withhold any of the remaining information at issue under section 552.101 in conjunction with common-law or constitutional privacy.

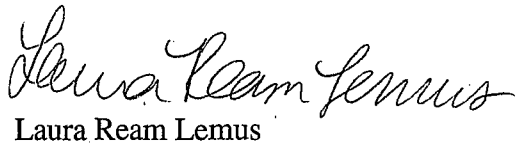
In summary, the information you have marked is not subject to the Act and need not be released in response to this request. The university must withhold the documents you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The university must also withhold the information we marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The university must withhold the information marked under section 552.117(a)(1) of the Government Code, to the extent the employee concerned timely elected under section 552.024 of the Government Code to keep such information confidential. 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,

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, toll free, at (888) 672-6787.

Sincerely,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/sdk

Ref: ID# 383779

Enc. Submitted documents

c: Requestor
(w/o enclosures)