



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2010

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

OR2010-09851

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# 385304.

The University of Texas Southwestern Medical Center at Dallas (the "university") received a request for: (1) employment contracts for six named individuals; (2) any personal testament, certification, or contract regarding the university's code of conduct and ethics signed by eight named individuals; (3) the university's code of conduct and ethics manual; (4) the latest master affiliation agreement with Parkland Hospital ("Parkland"); (5) a specified agreement regarding transfer of patients from Parkland to the university; (6) a specified insurance manual and information about how to submit claims; (7) medical staff bylaws; (8) the university's billing manual; (9) titles, offices, and positions held by eight named individuals; (10) copies of those eight individuals' employee identification badges; (11) a VIP list of potential influential patients; (12) blank copies of specified forms; (13) a list of current litigation involving the university; (14) contact information for certain individuals; (15) and Physical Medicine and Rehabilitation Educational Review Committee (the "ERC") decisions during a specified time period.¹ You state that the university will release some of the requested information. You further state that the university will redact

¹You state that the university sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

home telephone numbers, home addresses, social security numbers, and family member information subject to section 552.117 of the Government Code under section 552.024 of the Government Code.² You state that the university will also redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).³ You further state that the university has no information responsive to portions of the request.⁴ You claim that a portion of the remaining requested information is not subject to the Act. You also claim that the information at issue is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.1235, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, portions of which are representative samples.⁵ We have also considered comments submitted by 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 address your argument that a portion of the submitted information is not subject to the Act. You contend that pursuant to section 181.006 of the Health and Safety Code, the information you have marked is not subject to the Act. Section 181.006 states “[f]or a covered entity that is a governmental unit, an individual’s protected health information ... is not public information and is not subject to disclosure under [the Act].” Health & Safety Code § 181.006. We will assume, without deciding, the university is a covered entity. Subsection 181.006(2) does not remove protected health information from the Act’s application, but rather states this information is “not public information and is not subject to disclosure under [the Act].” We interpret this to mean a covered entity’s protected health information is subject to the Act’s application. Furthermore, this statute, when demonstrated to be applicable, makes confidential the information it covers. Thus, we will consider your arguments for this information, as well as for the remaining information.

²*See* Gov't Code § 552.024(c)(2) (if employee or official or former employee or official chooses not to allow public access to his or her personal information, the governmental body may redact the information without the necessity of requesting a decision from this office).

³This office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes withholding of ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁴The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

⁵We assume that the “representative samples” of records submitted to this office are 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.

Next, you inform us that a portion of the requested information is the same type of information currently at issue in a lawsuit pending against the Office of the Attorney General: *The Univ. Of Tex. Southwestern Med. Ctr. At Dallas v. Greg Abbott*, No. D-1-GN-08-000733 (200th Dist. Ct., Travis County, Tex.). We will not address whether this information is excepted under the Act, but will instead allow the trial court to determine whether the information must be released to the public.

Next, we note portions of the remaining information are made expressly public under section 552.022 of the Government Code, which provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(3), (15). In this instance, the submitted information includes contracts that pertain to the receipt or expenditure of funds by the university and information published on the University of Texas System's websites.⁶ That information, which we have marked, is subject to sections 552.022(a)(3) and 552.022(a)(15). Although you assert this information is excepted from disclosure under sections 552.103, that section is a discretionary exception within the Act and not "other law" that makes information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n. 5 (2000) (discretionary exceptions generally). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.103. As you raise no further exceptions to disclosure of this information,

⁶The submitted Standards of Conduct Guide is available at http://www.utsouthwestern.edu/vgn/images/portal/cit_56417/63/3/263424sog2005.pdf. Some of the submitted Professional Medical Liability Benefit Plan Handbooks are available at http://www.uth.tmc.edu/med/administration/gme/pdf_files/2010-PLI-HANDBOOK.pdf, http://www.uth.tmc.edu/med/administration/gme/pdf_files/2009-PLI-HANDBOOK.pdf, and http://www.uth.tmc.edu/med/administration/gme/pdf_files/2008-PLI-HANDBOOK.pdf.

it must be released to the requestor. We will, however, consider your claim under section 552.103, as well as your remaining arguments, for the information not subject to section 552.022.

We first address your claim under section 552.103 of the Government Code, as it is potentially the most encompassing. 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 that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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).*

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Open Records Decision No. 452 at 4 (1986)*. 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.⁷ *See Open Records Decision No. 555*

⁷Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

(1990); *see also* 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. *See* Open Records Decision No. 331 (1982).

You generally state that the university has a reasonable belief that litigation will ensue between the university and a named individual, based on correspondence with the individual. You assert that the individual concerned has sought “information relating to his resident professional liability coverage, as well as information on how to submit claims.” You state that “it appears that [the individual] is interested [in] filing claims against the [u]niversity related to issues of his medical licensure[.]” You further state that the individual “indicate[d] that he hired an attorney to represent him in a legal dispute involving actions taken by . . . the [Physical Medicine & Rehabilitation] residency director[.]” Having considered your arguments, we find that you have not provided, and the submitted information does not otherwise contain, any concrete evidence showing that the individual concerned actually threatened to file a lawsuit against the university or otherwise took any objective steps toward filing suit prior to the university’s receipt of the instant request for information. Thus, we conclude that you have not demonstrated that the university reasonably anticipated litigation on the date of its receipt of the request. Therefore, the university may not withhold any of the remaining information under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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, 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 pet.). 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 information you have marked under section 552.107 documents communications that were made for the purpose of providing legal advice to the university and its employees. You inform us that the communications at issue were intended to be and have remained confidential. You have identified the parties to the communication. Based on your representations and our review, we agree that the information you have marked under section 552.107 documents privileged attorney-client communications. Accordingly, the university may withhold the information you have marked under section 552.107(1) of the Government Code.⁸

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 protected by other statutes, 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.

...

(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 & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, “‘medical committee’ includes any committee, including a joint committee, of . . . a university medical school or health science center[.]” *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). Section 161.0315 provides in relevant part that “[t]he governing body of a . . . university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical peer review committee and health care services[.]” *Id.* § 161.0315(a). We understand you to contend that the ERC is a “medical committee.”

⁸As our ruling is dispositive of this information, we need not address your remaining arguments against its disclosure.

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 (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 ERC is authorized by university bylaws to “evaluate and render professional judgements regarding [the university’s] faculty.” You state that the information you have marked “was created as part of a medical peer review inquiry.” Based on your representations and our review, we agree the ERC constitutes a medical peer review committee as defined by section 161.031. Furthermore, upon review of the submitted information, we find that the information you have marked consists of records of a medical committee. 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.⁹

Section 552.108(b)(1) of the Government Code exempts from disclosure “[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(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.” See *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). A governmental body claiming section 552.108(b)(1) must explain

⁹As our ruling is dispositive of this information, we need not address your remaining argument against its disclosure.

how and why release of the information at issue would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques, but was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution); *but see* Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You seek to withhold photocopies of identification badges under section 552.108(b)(1). You state that these badges are a tangible reflection of internal decisions made by the university's police department as to whether certain university employees should be granted access to secured areas of the university campus. You contend that release of the submitted copies of identification badges would undermine law enforcement efforts to secure university property and make the university more susceptible to criminal activity "because an individual could create a replica badge and . . . gain access to secured areas that contain biological agents and other dangerous items that could be used as weapons." Having considered your arguments, we find that you have not sufficiently demonstrated that release of the information at issue would interfere with law enforcement or crime prevention. We therefore conclude the university may not withhold any of the information you have marked under section 552.108(b)(1) of the Government Code.

Section 552.136 of the Government Code provides in part that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). You also seek to withhold the copies of identification badges under section 552.136. You contend that "a person . . . could use this information to create replica badges and . . . steal the identity of current employees." You assert that a person could use replica badges to gain unlawful access to goods and services. Having considered your arguments, we conclude that you have not demonstrated that the submitted copies of identification badges constitute access devices for purposes of section 552.136. We therefore conclude that the university may not withhold any of the information you have marked under section 552.136 of the Government Code.

In summary, (1) the university may withhold the information you have marked under section 552.107(1) of the Government Code; and (2) 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. The remaining 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, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner

Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 385304

Enc. Submitted documents

c: Requestor
(w/o enclosures)