



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2010

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

OR2010-10012

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# 385692 (OGC# 129967).

The University of Texas M.D. Anderson Cancer Center (the "center") received a request for information in the possession of the Department of Internet Technology that pertains to two named individuals during specified time periods. You state the center is releasing some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.111 of the Government Code, and privileged pursuant to Texas Rule of Evidence 509.¹ We have

¹Although 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-client and attorney work product privilege for information is not subject to section 552.022 are sections 552.107 and 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 6. Accordingly, we will consider your arguments under sections 552.107 and 552.111 of the Government Code.

considered your arguments and reviewed the submitted representative sample of information.²

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 center 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 argument for this information, as well as the remaining exceptions you claim.

Section 552.101 of the Government Code exempts 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 information protected by other statutes, such as section 161.032 of the Health and Safety Code. Section 161.032 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

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.

committee, as defined by section 161.031, to evaluate medical and health care services [.]”
Id. § 161.0315(a).

We understand the center’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 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 (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear

³See 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).

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 (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You state some of the submitted information consists of records, information, or reports of or provided by the IRB. Upon review, we find portions of the submitted information constitutes records of a medical committee. Thus, the center must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.⁴ However, we find the remaining e-mails at issue were created in the regular course of the center's business. See Health & Safety Code § 161.032(f). Therefore, the center may not withhold any of this information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

You also raise section 51.914 of the Education Code for portions of the remaining information. 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

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

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 do 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 some of 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 information at issue would allow others to appropriate scientific information and research data because it “directly reveal[s] the substance of scientific and research data.” Based on your representations and our review, we conclude the information we have marked is confidential under section 51.914. Thus, the center must withhold this marked information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.⁵ However, we find you have failed to demonstrate how the remaining information you seek to withhold consists of technological or scientific information or will reveal the details of the research. We therefore conclude the center may not withhold any of the remaining information at issue under section 552.101 in conjunction with section 51.914 of the Education Code.

You claim some of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 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 reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy,

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

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. In addition, this office has found certain 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), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public interest.⁶ Therefore, the center must withhold this marked information under section 552.101 on the basis of common-law privacy.

Next, you claim some of the remaining information is excepted from public disclosure under section 552.104 of the Government Code. Section 552.104 excepts 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 the marketplace for grant funding and sponsored research funding is extremely competitive. You state the center "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." Based on these representations, we find you have established the center has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. You contend that the release of some of the remaining information would "disclose [the center's] unique approach to epidemiological research" and therefore would benefit the center's competitors and compromise its position in the marketplace. We note the information at issue consists of general e-mails and a working title. Therefore, we find you have failed to demonstrate how release of this information will harm the center's marketplace interests. Accordingly,

⁶As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

the center may not withhold the information at issue under section 552.104 of the Government Code.

You raise section 552.107 of the Government Code for a portion of the remaining information. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107(1). 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 Texas 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 a portion of the remaining information consists of communications between and among center attorneys and other center employees. You state that these communications were made in furtherance of the rendition of legal services to the center, and you inform this office that these communications have remained confidential. Based on your representations and our review, we find the information you have marked constitutes privileged attorney-client communications. Accordingly, the center may withhold this information under section 552.107 of the Government Code.

In summary, the center must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The center must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The center must withhold the information we have marked under section 552.101 on the basis of common-law privacy. The center may withhold the information you have marked under section 552.107 of the Government Code. 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tp

Ref: ID# 385692

Enc. Submitted documents

c: Requestor
(w/o enclosures)