



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2011

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

OR2011-05012

Dear Ms. Angadicheril:

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# 414172 (OGC# 135054).

The University of Texas Health Science Center at Houston (the "university") received a request for information involving a university employee and the requestor during specified time intervals. You inform us some of the information either has been or will be released. You also inform us some of the submitted information may be the subject of previous open records letter rulings. You state some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You contend some of the submitted information is not subject to the Act. You also claim most of the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.122, and 552.139 of the Government Code.

¹We note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A copy of the DOE's letter to this office is posted on the Attorney General's website at: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

We have considered the exceptions you claim and reviewed the information you submitted.² We also have considered the comments we received from the requestor.³

You state some of the submitted information may have been the subject of previous requests for information that resulted in open records letter rulings. To the extent the submitted information was the subject of previous rulings, the university must dispose of any such information in accordance with those rulings, provided there has been no change in the law, facts, and circumstances on which the previous rulings were based. To the extent the submitted information is not the subject of a previous ruling, the underlying law, facts, and circumstances of which have not changed, we will address your arguments against disclosure of the information. *See* Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We begin with your contention some of the submitted information is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as consisting of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of 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). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You state some of the submitted information, which you have marked, consists of personal messages that have no connection with the university's business and are incidental uses of e-mail by a university employee. You also state these communications were not collected or assembled and are not maintained pursuant to any law

²This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the university to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

³*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

or ordinance or in connection with the transaction of university business. You explain the university has an Email and Internet Usage Policy that recognizes and allows incidental use of electronic mail by employees. Based on your representations and our review of the information at issue, we conclude the communications you have marked do not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (Gov't Code § 552.002 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 marked information is not subject to the Act and need not be released in response to this request for information.

You also contend other submitted information does not fall within the scope of section 552.002 of the Government Code. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. *See* ORD 581 at 6 (construing predecessor statute). You state some of the submitted information consists of a database schema, also known as a records layout, and a data dictionary, also known as a coding manual. You contend the database schema and the data dictionary, which you have marked, function solely as tools to maintain, manipulate, or protect a related database. Based on your representations and our review of the information at issue, we conclude the marked database schema and data dictionary are not public information, as defined by section 552.002 of the Government Code, and need not be released in response to this request for information.⁴

Next, we address your exceptions to disclosure of the remaining information at issue. 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. Section 161.032 of the Health and Safety Code 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, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or

⁴As we are able to make this determination, we need not address your other arguments against disclosure of the marked information.

compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code § 161.032(a), (c), (f) (footnotes omitted). A “medical committee” is defined as any committee, including a joint committee, of a hospital, a medical organization, a university medical school or health science center, a health maintenance organization licensed under chapter 843 of the Insurance Code, an extended care facility, a hospital district, or a hospital authority. *See 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 of the Health and Safety Code states “[t]he governing body of a hospital [or a] university medical school or health science center . . . may form . . . a medical committee, as defined by Section 161.031, to evaluate medical and health care services[.]” *Id.* § 161.0315(a).

The precise scope of section 161.032 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); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). 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,” but does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *See Jordan*, 701 S.W.2d at 647-48; *see* Open Records Decision No. 591 (1991) (construing statutory predecessor to Health and Safety Code § 161.032). 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 Occ. Code § 160.007 in Health and Safety Code § 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business). The phrase “records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. *See McCown*, 927 S.W.2d at 9-10.

You inform us some of the remaining information, which you have marked, consists of records of a number of university committees, including the Six-Year Review Committee; the Futures Committee, also known as the Vision Committee; an *ad hoc* Cardiovascular Cell Therapy Research Network committee; and the Committee for the Protection of Human Subjects. You explain these committees "are each tasked with evaluating various aspects of medical and health care services and ensuring that the highest quality of care is provided at the [u]niversity." You state "the core function of each of these committees is to evaluate medical and health care services." You also state the marked information was prepared by or for the committees concerned. Based on your representations and our review of the information at issue, we conclude the university must withhold the marked information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.⁵

Section 552.101 of the Government Code also encompasses section 51.914 of the Education Code, which provides in 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 programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1)-(2). As stated in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular

⁵As we are able to make this determination, we need not address your other arguments against disclosure of the marked information.

scientific information has “a potential for being sold, traded, or licensed for a fee.” *See* ORD 651 at 9. Furthermore, whether particular scientific information has such a potential is a question of fact this office is unable to resolve in the opinion process. *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. *Id.*; *but see id.* at 9 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note section 51.194 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 contend some of the remaining information at issue, which you have marked, falls within the scope of section 51.914. You state the marked documents contain scientific information as well as procedures and other information relating to a product, device, or process, or the application of such, developed by university employees. You also state the marked information describes research, innovation, and the results of experimentation and research and has the potential of being sold, traded, or licensed for a fee. Based on your representations and our review of the information at issue, we conclude the university 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. We conclude you have not demonstrated the remaining information at issue is confidential under section 51.914 and may not withhold the remaining information on that basis under section 552.101.

You also claim 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 this privilege is to protect advice, opinion, and recommendation in the decisional process and 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 (1993), 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov’t Code § 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).

Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 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).

This office also has concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

We note section 552.111 can encompass a governmental body's communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). In order for section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You contend some of the remaining information, which you have marked, falls within the scope of section 552.111. You state the marked information relates to communications involving employees of the university, other institutions within the University of Texas System, and entities with which the university shares a privity of interest. You explain these communications pertain to policymaking matters, including strategy and planning, affecting the university, component institutions within the university, and entities in privity with the university. You also inform us the submitted draft document is available to the public in its final form. Based on your representations and our review of the information at issue, we conclude the university may withhold the information we have marked under section 552.111 of the Government Code. We find the remaining information at issue does not constitute advice, opinion, or recommendations that implicate the university's policymaking processes and may not be withheld under section 552.111.

Lastly, we address your claim under section 552.122 of the Government Code. Section 552.122(a) excepts from disclosure "a test item developed by an educational

institution that is funded wholly or in part by state revenue[.]” Gov’t Code § 552.122(a). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

You have marked the information you seek to withhold under section 552.122. You state the marked information consists of questions and answers from an examination administered by a university faculty member to students in a joint program offered to students of the university and Baylor College of Medicine. You state release of this information would compromise the university’s ability to test for skills expected of students in the affected class and require the university to expend time, effort, and money to continually create new tests that accurately capture students’ core understanding of the program’s concepts. Based on your representations and our review of the information at issue, we conclude the university may withhold the marked information under section 552.122 of the Government Code.

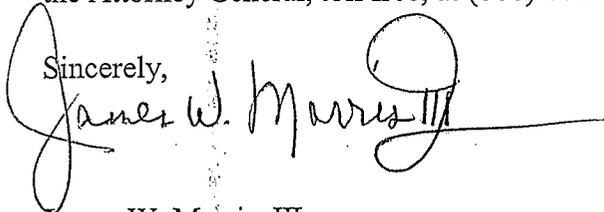
In summary, the university (1) must dispose of any submitted information that was the subject of previous open records letter rulings in accordance with those rulings, provided there has been no change in the law, facts, and circumstances on which the previous rulings were based; (2) need not release the submitted information that is not subject to section 552.002 of the Government Code; (3) 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) must withhold the information we have marked under section 552.101 in conjunction with section 51.914 of the Education Code; (5) may withhold the information we have marked under section 552.111 of the Government Code; and (6) may withhold the information you have marked under section 552.122 of the Government Code. The university must release the rest of the submitted information.

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,

A handwritten signature in black ink, reading "James W. Morris III". The signature is written in a cursive style with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 414172

Enc: Submitted documents

c: Requestor
(w/o enclosures)