



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 21, 2011

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

OR2011-08833

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# 421223 (OGC# 136779).

The University of Texas Health Science Center at Houston (the "university") received a request for e-mails sent to or from five named individuals during various specified time periods. You state the university has released most of the responsive information to the requestor. You also state that, as permitted by section 552.024(c) of the Government Code, you will redact information subject to section 552.117 of the Government Code.<sup>1</sup> In addition, you state you will redact personal e-mail addresses in accordance with Open Records Letter No. 684 (2009).<sup>2</sup> You claim portions of the submitted information are not

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<sup>1</sup>Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official timely made an election to not allow public access to the information. *See* Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)); Gov't Code § 552.024(c).

<sup>2</sup>This office issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

subject to the Act. Additionally, you claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.122, and 552.136 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup>

You state portions of the submitted information were the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2011-05012 (2011), 2009-09406 (2009), and 2009-06163 (2009). As we have no indication that the law, facts, or circumstances on which the prior rulings were based have changed, we conclude the university must continue to rely on these rulings as previous determinations and withhold or release any previously ruled upon information in accordance with the prior rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Next, we will consider your arguments for the information not subject to the prior rulings.

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

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<sup>3</sup>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.

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 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 information at issue is not subject to the Act and need not be released in response to this request for information.

Additionally, you contend that a portion of the remaining information is not subject to the Act pursuant to section 181.006 of the Health and Safety Code. Section 181.006 states that "[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 the information at issue.

Next, we address your exceptions to disclosure of the remaining information at issue. 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. 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 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.<sup>4</sup>

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 is confidential and is not 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[.]

Act of May 29, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 5, § 6.04 (to be codified as Educ. Code § 51.914(a-b)). 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 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,

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

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 most of the information at issue is confidential under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. However, we find you have failed to demonstrate how portions of the information at issue are confidential under section 51.914. Accordingly, the university must withhold the information you have marked, except as we have marked for release, under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* At 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is not of legitimate public interest. Thus, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information at issue to be highly intimate or embarrassing and not of legitimate public interest. Accordingly, no portion of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. You assert the remaining information at issue is protected under constitutional privacy, which 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. ORD 455 at 4. 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. *Id.* 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.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not demonstrated how constitutional privacy applies to the remaining information at issue. Accordingly, the remaining information at issue may not be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

Next, you raise section 552.107(1) 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. 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. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate 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. *See 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. *See 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See TEX. R. EVID. 503(b)(1)(A)-(E)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See 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 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 assert the information you have marked consists of communications between attorneys for and employees of the system. You indicate these communications were made in connection with the rendition of professional legal services for the system. You state the communications were not intended to be, and have not been, disclosed to third parties. Based on your representations and our review, we conclude the information you have marked consists of privileged attorney-client communications and may be withheld under section 552.107(1) of the Government Code.

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 documents are available to the public in their final form. Based on your representations and our review of the information at issue, we conclude the university may withhold the submitted draft documents, as well as 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.

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. Upon review, some of the information at issue qualifies as test questions under section 552.122(a). Accordingly, the university may withhold the information we have marked under section 552.122(a) of the Government Code. However, we find no portion of the remaining information at issue constitutes a test question for purposes of section 552.122(a) and it may not be withheld on that basis.

You assert that some of the remaining information is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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(a)-(b). You seek to withhold a teleconferencing access code under section 552.136. You explain that the teleconferencing telephone number and access codes do not change, and can be used to access teleconferencing accounts of the university in order to arrange long distance telephone calls. Based on these representations and our review, we determine that the university must withhold the information you have marked under section 552.136 of the Government Code.

In summary, the university must continue to rely on Open Records Letter Nos. 2011-05012, 2009-09406, and 2009-06163 and withhold or release information in accordance with these rulings. The e-mails you have marked pursuant to section 552.022 are not subject to the Act and need not be released in response to this request. The university must withhold the information you have marked under section 552.101 of the Government in conjunction with

section 161.032 of the Health and Safety Code. With the exception of the information we have marked for release, 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, as well as the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university may withhold the information you have marked under section 552.107(1) of the Government Code. The university may withhold the submitted draft documents, as well as the information we have marked under section 552.111 of the Government Code. The university may withhold the information we have marked under section 552.122 of the Government Code. The university must withhold the information you have marked under section 552.136 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](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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 421223

Enc. Submitted documents

c: Requestor  
(w/o enclosures)