



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 29, 2011

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

OR2011-09315

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# 422349 (OGC# 136949).

The University of Texas Health Science Center at Houston (the "university") received a request for all e-mails and electronic records, excluding specified types of records, in a named individual's e-mail accounts during specified time periods. You state the university has provided some of the requested information to the requestor. You further state the university has redacted student-identifying information from the information submitted to this office pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ You claim some of the remaining requested information is not subject to the Act. Alternatively and additionally, you claim the remaining requested information is excepted from disclosure under sections 552.101, 552.111, 552.122, and 552.136 of the

¹The 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. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Government Code. We have considered your arguments and reviewed the submitted representative sample of information.²

Initially, you inform us some of the requested information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2011-09233 (2011), 2011-08833 (2011), 2011-05012 (2011), 2009-09406 (2009), and 2009-06163 (2009). With regard to information in the current request that is identical to information previously ruled upon by this office, we conclude, as you have not indicated the law, facts, and circumstances on which the prior rulings were based have changed, the university must continue to rely on those rulings as previous determinations and withhold or release the previously ruled upon information in accordance with those 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information was not the subject of the prior rulings, we will consider your arguments against its disclosure.

Next, we address your contention some of the requested information is not subject to the Act. The Act applies to "public information," which is defined under section 552.002 of the Government Code as:

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.

Gov't Code § 552.002; *see also id.* § 552.021. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body, or is used by a public official or employee in the performance of official duties. You represent the information you have marked as personal correspondence is personal in nature and does not relate to the transaction of official university business. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee

²We assume 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 those records contain substantially different types of information than that submitted to this office.

involving *de minimis* use of state resources). Based on your representations and our review, we find the information you have marked does not pertain to the official business of the university and, therefore, does not constitute public information as defined by section 552.002 of the Government Code. Accordingly, the university is not required to disclose this information under the Act.

You also argue that, pursuant to section 181.006 of the Health and Safety Code, the information you have marked as protected health information in the remaining information 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(2). We will assume, without deciding, the university is a covered entity. Section 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.

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. Section 552.101 encompasses information made confidential by other statutes, such as section 161.032 of the Health and Safety Code, which 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, medical peer review committee, . . . and records, information, or reports provided by a medical committee, medical peer review committee, . . . to the governing body of a public hospital . . . 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) (footnote omitted). Section 161.031(a) defines a “medical committee” as “any committee . . . of . . . (3) a university medical school or health science center[.]” *Id.* § 161.031(a)(3). Section 161.0315 provides “[t]he governing body of a hospital [or] university medical school or health science center . . . may form . . . a medical peer review committee, as defined by Section 151.002, Occupations Code, or a medical committee, as defined by Section 161.031, to evaluate medical and health care services [.]” *Id.* § 161.0315(a).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See, 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 “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 also* Open Records Decision No. 591 (1991) (construing statutory predecessor to Health and Safety Code § 161.032). Further, 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 also McCown*, 927 S.W.2d at 10 (stating reference to statutory predecessor to section 160.007 of the Occupations Code in section 161.032 of the Health and Safety Code is clear signal 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 two university committees, the Futures Committee, an *ad hoc* committee also referred to as the Vision Committee, and the Cardiovascular Cell Therapy Research Network Committee. 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 information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.³

³As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

Section 552.101 also encompasses section 51.914 of the Education Code, which provides, in part:

(a) 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[.]

...

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003.

Act of May 29, 2011, 82nd Leg., R.S., S.B. 5, § 6.04 (to be codified as an amendment to Educ. Code § 51.914(a) and to be codified as Educ. Code § 51.914(b)). As noted in Open Records Decision No. 651, 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 this office is unable to resolve in the opinion process. *See id.* Thus, this office has stated 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 the information has this potential. *See id. But see id.* at 9 (stating university's determination information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note section 51.914 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 state the portion of the remaining information you have marked includes unpublished research, unpublished research articles, and an unpublished manuscript authored and/or co-authored by university employees, as well as correspondence related to these documents. You explain these unpublished documents contain findings of various research projects that

contain scientific information, as well as procedures and other information, that relate to a product, device, or process developed by university employees. You further state the marked information has the potential for being sold, traded, or licensed for a fee. Based on your representations and our review, we conclude the information we have marked is confidential under section 51.914, and the university must withhold that information under section 552.101 of the Government Code. The remaining information you have marked, however, does not reveal the specifics of any actual research. Thus, we determine the university may not withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

You assert some of the remaining information is confidential under both common-law and constitutional privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Although the information at issue contains individuals' medical information that may be considered highly intimate or embarrassing, none of the information identifies the individuals. Therefore, any privacy interest those individuals may have in their medical information has already been protected. Consequently, the university may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *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)). Upon review, we find you have not demonstrated how any portion of the information at issue falls within the zones of privacy. Furthermore, as previously noted, the individuals whose information you seek to withhold are not identified in the information. Thus, we find you have not demonstrated how any portion of the information at issue implicates an individual's privacy interests for purposes of constitutional privacy. Consequently, the university may not

withhold any of the information at issue under section 552.101 of the Government Code in conjunction with constitutional privacy.

You claim some of the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

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

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) (section 552.111 of the Government Code 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 university employees and entities with which the university shares a privity of interest. You explain the university and those entities work together pursuant to a formal affiliation agreement to offer a dual degree program administered through the university and those entities. You further explain the communications pertain to policymaking matters affecting the university and the entities in privity with the university. You also inform us the submitted draft document is or will be 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, however, the remaining information at issue does not reveal advice, opinion, or recommendations that implicate the university's policymaking processes. Consequently, the university may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

Section 552.122 of the Government Code excepts from public 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). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *See* Open Records Decision No. 118 (1976); *see generally* Open Records Decision No. 626 at 4-5 (1994). 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).

You have marked the information you seek to withhold under section 552.122. You state the marked information contains questions and answers from quizzes administered by a university faculty member to students. You argue release of this information would compromise the university's ability to test for skills expected of students in the affected classes and require the university to expend time, effort, and money to continually create new tests that accurately capture students' core understanding of a program's concepts. Having considered your arguments and reviewed the information at issue, we find the submitted quizzes are test items under section 552.122(a). We also find release of the answers to the quiz questions would tend to reveal the questions themselves. Therefore, the university may withhold the quizzes and answers, which we have marked, under section 552.122(a) of the Government Code. You have failed to demonstrate, however, how the remaining information at issue, which consists of an e-mail message, constitutes a test item.

Consequently, the university may not withhold the remaining information at issue under section 552.122 of the Government Code.

Finally, you claim a portion of the remaining information is excepted from disclosure under section 552.136 of the Government Code, which provides:

(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. You seek to withhold a teleconferencing telephone number and access code. You explain the telephone number and access code do not change and can be used to access teleconferencing accounts of the university in order to arrange long distance telephone calls. Based on your arguments and our review, we conclude the teleconferencing access code, which we have marked, constitutes an access device number for purposes of section 552.136. Therefore, the university must withhold the teleconferencing access code under section 552.136 of the Government Code. You have failed to demonstrate, however, how the teleconferencing telephone number constitutes an access device number that may be used to obtain money, goods, services, or another thing of value for purposes of section 552.136. Consequently, the university may not withhold the teleconferencing telephone number under section 552.136 of the Government Code. As you have not claimed any other exceptions to disclosure for this information, the university must release it.

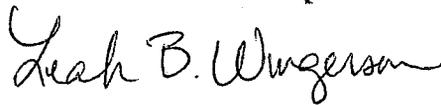
In summary, to the extent the requested information was ruled upon in Open Records Letter Nos. 2011-09233, 2011-08833, 2011-05012, 2009-09406, and 2009-06163, the university must withhold or release the previously ruled upon information in accordance with those rulings. The university must withhold the 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 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. The university may withhold the information we have marked under section 552.111 of the Government Code, and the quizzes and answers we have marked

under section 552.122(a) of the Government Code. The university must withhold the teleconferencing access code we have marked under section 552.136 of the Government Code. The university must release the remaining information.⁴

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 422349

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the remaining information contains e-mail addresses of members of the public, which you state the university will withhold under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.