



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 5, 2011

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

OR2011-09484

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# 422686 (OGC # 136994).

The University of Texas Health Science Center at Houston (the "university") received a request for information maintained by the Department(s) of Internet Technology and three named individuals pertaining to two named individuals during specified time periods. You state some of the requested information either has been or will be released. You also state some of the requested information may have been the subject of previous open records letter rulings. You contend some of the submitted information is not subject to the Act. You state the university will redact some of the requested information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You also state the university will redact e-mail addresses from the requested information under section 552.137 of the Government Code pursuant to Open Records

---

<sup>1</sup>We 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>.

Decision No. 684 (2009).<sup>2</sup> You claim other responsive information is excepted from disclosure under sections 552.101, 552.111, 552.122, and 552.136 of the Government Code. We have considered your arguments and reviewed the information you submitted.<sup>3</sup>

You inform us the university requested clarification of Item II of this request for information. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You state the requestor had not responded to the university's request for clarification as of the date of your request for this decision. Therefore, this decision does not address the public availability of any information that might be responsive to Item II of the request. Should the university receive a response to its request for clarification and seek to withhold any information responsive to the clarified request, the university must request another ruling. *See id.* §§ 552.301(a), .302.

You also inform us some of the requested information may have been the subject of previous requests for information that resulted in the issuance of open records letter rulings. To the extent the requested 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 requested information was 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 at issue. *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)).

You contend 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.

---

<sup>2</sup>Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code. *See ORD 684 at 14-15.*

<sup>3</sup>This 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).*

*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 constitute 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 e-mail 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 find the personal communications you have marked do not constitute public information for purposes of section 552.002 of the Government Code. 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). We therefore conclude the marked personal information is not subject to the Act and need not be released in response to this request for information.

Additionally, you contend that, pursuant to section 181.006 of the Health and Safety Code, other information you have marked is not subject to the Act. Section 181.006 provides in part that "for 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 such information is "not public information and is not subject to disclosure under [the Act]." We interpret this language to mean a covered entity's protected health information is subject to the Act's application. Furthermore, section 181.006, when demonstrated to be applicable, makes confidential information it covers. Thus, we will consider your exceptions to disclosure of all 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 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 explain some of the submitted information, which you have marked, consists of records of the university's Cardiovascular Cell Therapy Research Network and Genes, Environment and Health Initiative Committees. You state the marked information was prepared by or for these committees. You inform us "the core function of each of these committees is to evaluate medical and health care services[.]" You state the marked information was submitted to and obtained by these committees for purposes of assessing the professional skill and care of faculty members and other university employees. 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.<sup>4</sup>

Section 552.101 of the Government Code 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; [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[.]

...

(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

---

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

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 [of the Education Code].

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 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." 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. *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 university's assertion the information has this potential. *See 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 51.914 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 have marked the remaining information the university seeks to withhold under section 51.914. You explain this information consists of drafts of research, research articles, a manuscript authored or co-authored by university employees, and related correspondence. You state the manuscript, research, and articles are expected to be, but have not yet been, published. You also state these materials are related to research projects and contain scientific and other information that has the potential for being sold, traded, or licensed for a fee to other researchers or third parties interested in the information. 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 find 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.

Section 552.101 of the Government Code also encompasses constitutional and common-law rights to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions relating to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. *See Fado v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See id.* at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

You contend some of the remaining information, which you have marked, is protected by constitutional and common-law privacy. You assert release of the information at issue would reveal health and other personal information. Having considered your arguments and reviewed the information you contend is private, we note most of the information at issue does not identify any individual to whom the information may pertain. The remaining information at issue contains only a general reference to a personal matter. We find you have not demonstrated that any of the information at issue falls within the constitutional zones of privacy or that an individual's privacy interests outweigh public interest in the information. We also find you have not demonstrated the information at issue is highly intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude the university may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with constitutional or common-law privacy.

Next, we consider your claims under section 552.111 of the Government Code. Section 552.111 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 and representatives of entities with which the university shares a privity of interest. You contend these communications pertain to policymaking matters affecting the university, component institutions within the university, and entities in privity with the university. You also indicate the information at issue includes draft documents that either have been or will be made 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 information we have marked under section 552.111 of the Government Code. We find the remaining information at issue, some of which pertains to administrative and personnel matters, does not consist of policy-related advice, opinion, or recommendations. We therefore conclude the university may not be withhold any of the remaining information under section 552.111.

You also claim section 552.122 of the Government Code, which 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(a) 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 the university seeks to withhold under section 552.122. You state the information at issue consists of questions and answers from quizzes and tests administered by a university faculty member to students. You contend 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. Based on your representations and our review of the information at issue, we have marked the information the university may withhold under section 552.122 of the Government Code. We conclude the remaining information you have marked does not reveal test items and may not be withheld under section 552.122.

Lastly, section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). You contend the telephone numbers and access codes you have marked under section 552.136 could be used to access teleconferencing accounts and arrange long-distance telephone calls. Having considered your arguments, we agree the marked access codes constitute access device numbers for purposes of section 552.136 of the Government Code and must be withheld on that basis. We conclude the marked telephone numbers do not constitute access device numbers and may not be withheld under section 552.136. Although you also have marked other information the university seeks to withhold on this basis, you have not demonstrated how or why the remaining information falls within the scope of section 552.136. *See id.* § 552.301(e)(1)(A) (governmental body must explain applicability of claimed exception to information at issue). We therefore conclude the university may not withhold the remaining marked information under section 552.136.

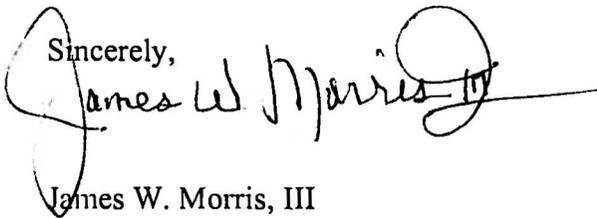
In summary, the university (1) must dispose of any submitted information that was the subject of previous open records letter rulings in accordance with those rulings, provided there has been no change in the law, facts, and circumstances on which the previous rulings were based; (2) need not release the submitted e-mail communications that are 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; (6) may withhold the information we have marked under section 552.122 of the Government Code; and (7) must withhold the access codes you have marked under section 552.136 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](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 that reads "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

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

JWM/eb

Ref: ID# 422686

Enc: Submitted documents

c: Requestor  
(w/o enclosures)