



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2011

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

OR2011-10396A

Dear Ms. Angadicheril:

This office issued Open Records Letter No. OR2011-10396 (2011) on July 20, 2011. We have examined this ruling and determined we made a clerical error when quoting the language from subsection 164.007(d) of the Occupations Code. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on July 20, 2011.

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# 422947.

The University of Texas Health Science Center at Houston (the "university") received a request for two categories of information, including (1) all records of complaints of retaliation and/or discrimination based on disability from a specified time period that are in the possession of the Department of Internet Technology (the "department"), the dean of the School of Bioinformatics, the dean of the Dental Branch, and three named individuals; and (2) any records from a specified time period which pertain to complaints about physicians made with the Texas Medical Board (the "board"), or any law enforcement or regulatory

agencies that are in the possession of the department, the office of the dean of the medical school at the university, and a fourth named individual. You state the university is releasing some of the requested information. You claim a portion of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, you inform us some of the responsive information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2009-06042 (2009), 2009-06163 (2009), 2009-06143 (2009), 2009-06185 (2009), 2009-06197 (2009), 2009-07457 (2009), 2009-07360 (2009), 2009-07441 (2009), 2009-07525 (2009), 2009-07501 (2009), 2009-07626 (2009), 2009-07971 (2009), 2009-07583 (2009), 2009-10588 (2009), and 2009-11651 (2009). With regard to information in the current request that is identical to information previously addressed in these rulings, we conclude, as you have not indicated the law, facts, and circumstances on which these 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).

You have also marked records you state were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-14318 (2009). In that ruling, we concluded that identifying information of certain individuals must be withheld under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code. You acknowledge the records at issue here are not subject to section 51.971(c). Accordingly, because the facts and circumstances affecting these records have changed, the university may not rely upon this prior ruling as a previous determination for these records.

Next, you argue the records you marked under section 181.006 of the Health and Safety Code are 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

¹We 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.

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 the other submitted information.

You have marked documents under section 552.107(1) of the Government Code. This section 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). 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 inform us the marked documents are communications between or among the attorneys and employees of the university and the University of Texas System which were made for the purpose of facilitating professional legal services. 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 find the university has demonstrated the applicability of

the attorney-client privilege to the marked documents. Thus, the university may withhold the documents you marked under section 552.107(1) of the Government Code.²

You marked portions of the remaining information under section 552.103 of the Government Code. This section provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You provide documentation showing the university received the request for information after a lawsuit, Civil Action No. 4:09-CV-00715, was filed against the university in the United States District Court for the Southern Division of Texas, Houston Division. Based upon your representation and our review, we find litigation involving the university was pending when it received the request. You explain a portion of the information you marked under section 552.103 directly involves the subject of the litigation because the requestor expressly seeks, and the marked information relates to, allegations of the university's retaliation and discrimination based on disability. Based on your representations and our review, we conclude this information is related to the pending litigation for purposes of section 552.103 of the Government Code, and the university may withhold it under that section.

²As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

You claim the remaining portion of the information you marked under section 552.103 is related to litigation that is reasonably anticipated. This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You have submitted documents showing that, prior to the university's receipt of the request for information, a former university employee filed an Americans with Disabilities Act complaint with the EEOC against the university. Based on your representations and our review, we find you have demonstrated that litigation was reasonably anticipated when the university received the request for information. You state the remaining portion of the information you marked under section 552.103 involves the subject of the anticipated litigation because the requestor expressly seeks, and the marked information relates to, allegations of the university's retaliation and discrimination based on disability. Thus, we find the university has established this information relates to the anticipated litigation for purposes of section 552.103 of the Government Code, and it may be withheld under that section.

However, once the information has been obtained by all parties to the pending litigation and the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Also, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 at 3 (1982).

You raise section 161.032 of the Health and Safety Code for portions of 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 protected by other statutes, such as section 161.032. This section 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, 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). For purposes of this confidentiality provision, a medical committee “includes any committee, including a joint committee, of . . . a hospital [or] a medical organization [or] a university medical school or health science center [or] a hospital district [.]” *Id.* § 161.031(a). Section 161.0315 provides that “[t]he governing body of a hospital, medical organization, university medical school or health science center [or] hospital district . . . 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 the “medical committee” provision has been the subject of a number of judicial decisions. *See, e.g., Mem’l 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.” *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other statutes, statutory predecessor to section 161.032).

You inform us a portion of the information you marked under section 161.032 consists of records of the university’s Performance and Improvement Committee (the “committee”). You state the committee is tasked with the duty of ensuring that various issues relating to the performance of the university’s psychiatric center are addressed, including medication errors, employee and patient satisfaction, and patient injuries. Based on your representations and our review, we agree the committee is a medical committee as defined by section 161.032. You state the marked information was prepared by the committee in carrying out its duties. *See Jordan*, 701 S.W.2d at 647-48 (confidentiality of section 161.032 extends to documents that have been prepared by or at the direction of medical committee for committee purposes). Thus, the university must withhold the committee records you marked pursuant to section 552.101 of the Government Code in conjunction with section 161.032(a) of the Health and Safety Code.

You assert the remaining information you marked under section 161.032 is maintained by the university’s Office of Institutional Compliance (the “OIC”) in connection with its compliance investigations. You inform us these investigations were carried out by the OIC’s Chief Compliance Officer in accordance with the university’s compliance program. You state the marked information was generated by the OIC as a result of its investigations. Thus, you indicate the information was not made or maintained in the regular course of business. *Cf. Texarkana Mem’l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records

made or maintained in regular course of business). We understand the university's compliance program was developed pursuant to guidelines issued by the Office of the Inspector General of the United States Department of Health and Human Services. *See* Health & Safety Code § 161.032(e). Based on your representations and our review, we conclude the remaining information you marked under section 161.032 is information of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Accordingly, the university must also withhold this information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

You have marked some of the remaining records under section 164.007 of the Occupations Code. Section 164.007(c) of the Occupations Code provides as follows:

Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the [board] or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Occ. Code § 164.007(c). By its terms, subsection 164.007(c) makes information confidential when in the possession of the board, its employees, or agents. Subsection 164.007(d) provides that “[n]ot later than the 30th day after the date of receipt of a written request from a license holder who is the subject of a formal complaint initiated and filed under section 164.005 or from the license holder’s counsel of record, . . . the board shall provide the license holder with access to all information in its possession that the board intends to offer into evidence[.]” *Id.* § 164.007(d). You inform us the marked records include complaints, reports, and other investigative materials possessed, received, or gathered by the board as part of its investigations of licensed physicians. You represent that because these investigations concerned medical care the physicians provided to certain patients in the course of their employment with the university, the university’s attorneys were the physicians’ counsel of record during these investigations. Further, you state the university received the marked records after its attorneys requested the records in their capacity as the physicians’ attorneys of record. Thus, you inform us the university obtained the records pursuant to the release provision in subsection 164.007(d). *See id.* You state that, pursuant to subsection 164.007(e), the confidentiality of these records was not waived when the board released them to the university under subsection 164.007(d). *See id.* § 164.007(e) (furnishing information under subsection (d) does not constitute waiver of confidentiality). We note, however, the confidentiality of subsection 164.007(c) applies only to records in the possession of the board, its employees, or agents. *See id.* § 164.007(c). Thus, under

subsection 164.007(e), any records the board is required to release under subsection 164.007(d) remain confidential in the hands of the board. However, subsection 164.007(e) does not make confidential the records in the possession of the license holder or his attorney of record. Therefore, the records you marked under section 164.007 of the Occupations Code are not confidential under that section.

You assert some of the remaining records are confidential under section 181.006 of the Health and Safety Code. Section 552.101 also encompasses section 181.006 of the Health and Safety Code. As previously stated, assuming the university is a covered entity, we must decide whether the records you marked consist of protected health information. Section 181.001 states that “[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [“HIPAA”].” Health & Safety Code § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPAA’s definition of the term. HIPAA defines “protected health information” as individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition[.]

...

(2) Protected health information excludes individually identifiable health information in:

...

(iii) Employment records held by a covered entity in its role as employer.

45 C.F.R. § 160.103. As previously noted, these records concern investigations of the medical care provided by physicians in the course of their employment with the university. Accordingly, we find these records are the employment records of these physicians that are being held by the university in its role as an employer. Thus, you have failed to demonstrate these records are confidential under section 181.006 of the Health and Safety Code.

We note that section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Upon review, we have marked the remaining documents that are records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by a physician. Accordingly, the university may only release these documents in accordance with the MPA.

You claim most of the remaining records are protected by common-law and constitutional privacy. 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. *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. The type of information considered highly intimate or 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. *Id.* at 683.

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. *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 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. ORD 455 at 4. 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.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Although you seek to withhold the remaining records you marked under privacy in their entirety, you have not explained, nor do the records reflect, this is a situation in which these records must be withheld in their entirety on the basis of privacy. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide reasons why the stated exceptions apply).

You claim portions of the remaining records contain medical information that is protected by privacy. This office has found 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. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Although common-law privacy protects some medical information, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). The remaining records responsive to category two of the request contain the medical information of a former university employee. This medical information relates to the former employee's claim that the university terminated her employment because of a disability. This office has stated in numerous formal decisions that the public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of public employees. Open Records Decision No. 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); *see e.g.*, Open Records Decision No. 423 at 3 (1984) (scope of public employee privacy is narrow). However, because it is not necessary to disclose the former employee's specific disability to discern the basis of her claims, we find there is no legitimate public interest in her specific disability in this instance. Thus, the university must withhold the medical information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

The remaining medical information you seek to withhold belongs to patients who alleged they were injured by physician misconduct. This medical information provided the basis for the board's investigations into whether the physicians actually committed misconduct when treating the patients. This office has determined that common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978); *see also* Open Records Decision No. 408 at 11 (1984) (fact that the allegations were found untrue could easily be released with the allegations themselves, mitigating harm). Thus, we find there is a legitimate public interest in the medical information contained in the remaining records. *See* Open Records Decision No. 423 at 3 (1984) (scope of public employee privacy is narrow). These records also identify the patients who alleged the misconduct. Some of these patients are deceased. Because the common-law and constitutional rights to privacy are personal rights that lapse at death, they do not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ *ref'd n.r.e.*); Open Records Decision No. 272 at 1 (1981). We find, however, there is

generally no legitimate public interest in the names of the living patients. However, some of these living patients' names are contained in court filed documents. We note common-law privacy and constitutional privacy are not applicable to information contained in public court records. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (sexual assault victims privacy right not violated by release of information in public court document). Accordingly, we have marked the living patients' names that are protected by privacy and must be withheld under section 552.101 of the Government Code.

You raise section 552.111 of the Government Code for a portion of the remaining information. This section excepts from disclosure "an interagency or intra-agency 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 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 that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See Open Records Decision No. 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see Open Records Decision No. 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).

Most of the remaining information you marked under section 552.111 only concerns the application of the disability appeals process policy to a former employee. This information is not related to a personnel matter of broad scope that affects the university's policy mission. We note, however, a portion of the records contains advice, opinions, or recommendations regarding the university's policymaking process with respect to its disability appeals process. Therefore, the university may withhold this information, which we marked, under section 552.111 of the Government Code.

You claim the remaining information includes information protected by section 552.117(a)(1) of the Government Code. This exception excepts from disclosure the home address and telephone number, social security number, family member information, and emergency contact information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. *See* Open Record Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. The remaining information contains the home address and telephone number of a former university employee, and the family member information of a current university employee. Accordingly, if these individuals did not timely elect confidentiality, their personal information may not be withheld under section 552.117(a)(1) of the Government Code. If, however, they timely elected to keep their personal information confidential, the university must withhold their personal information, which we marked, pursuant to section 552.117(a)(1).

You raise section 552.137 of the Government Code for the e-mail addresses contained in the remaining information. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the email address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). The e-mail address we marked is not specifically excluded by section 552.137(c). As such this e-mail address must be withheld under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b). We note the remaining e-mail addresses belong to individuals who have a contractual relationship with the university, or are e-mail addresses maintained

by the university for its officials or employees. Therefore, the remaining e-mail addresses may not be withheld under section 552.137.

Finally, the remaining information contains the birth date of a physician employed by the university. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* § 552.102(a).³ The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Accordingly, the birth date we marked must be withheld under section 552.102(a) of the Government Code. As you raise no other exceptions to disclosure, the remaining information must be released.

In summary, the university may withhold the documents you marked under section 552.107(1) of the Government Code. The records you marked under section 552.103 of the Government Code may be withheld. The university must withhold the documents you marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The information we marked under section 552.101 in conjunction with common-law privacy must be withheld. The birth date we marked must be withheld under section 552.102(a) of the Government Code. The university may only release the medical records we marked in accordance with the MPA. If the former university employee and current university employee timely elected to keep their personal information confidential, the university must withhold the personal information we marked under section 552.117(a)(1) of the Government Code. Otherwise, this information must be released along with the remaining information. Finally, unless the owner of the e-mail address we marked has affirmatively consented to its release, the e-mail address must be withheld under section 552.137 of the Government Code. If the owner has affirmatively consented to release, the email address must be released along with the remaining information. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free,

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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, appearing to read 'KLC', written over a horizontal line.

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/sdk

Ref: ID# 422947

Enc. Submitted documents

c: Requestor
(w/o enclosures)