ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 21, 2011

Ms. Neera Chatterjee
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-10485

Dear Ms. Chatterjee:

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# 424595 (OGC No. 137324).

The University of Texas Medical Branch at Galveston (the "university") received a request for five categories of information, including (1) a copy of all the university's policies reflecting the requirements of the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, and the manner and method of protecting patient information; (2) a copy of all documents from a specified time period reflecting complaints directed against employees for suspected HIPAA violations; (3) a copy of all documents reflecting the number of employees terminated for HIPAA violations; (4) copies of all documents reflecting the number of employees not terminated after being accused of HIPAA violations, the employment files of the accused employees, the complaints against the employees, and all records reflecting how the matters were resolved; and (5) the employment file of a named individual. You state the university is releasing some of the requested information. You claim portions of the submitted information are not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.122 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.[1]

[1]We 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.

Initially, you state, and provide documentation showing, the university sought clarification regarding categories three and four of the request for information. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information, rather than for specific records, governmental body may advise requestor of types of information available so request may be properly narrowed). You indicate the university has not received clarification of the portions of the request at issue. Thus, for the portions of the requested information for which you have not received clarification, we find the university is not required to release information in response to those portions of the request. However, if the requestor clarifies those portions of the request for information, the university must seek a ruling from this office before withholding any responsive information from the requestor. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

Next, you argue the submitted information you marked under section 181.006 of the Health and Safety Code 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 the other submitted information.

You raise section 161.032 of the Health and Safety Code for most of the submitted records. 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:

> (c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].
>
> . . .
>
> (e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the

> Office of Inspector General of the United States Department of Health and Human Services.
>
> . . .
>
> (f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital . . . [or] hospital district[.]

Health & Safety Code § 161.032(c), (e), (f). You assert the records you marked under section 161.032 were received and are maintained by the university's Office of Institutional Compliance (the "OIC") in connection with its compliance investigations. You state these records involve complaints that were directed to the OIC through the university's Fraud and Abuse Hotline. You also state the director of the university's compliance program reviewed these complaints and initiated investigations of the complaints. You inform us these investigations were conducted by the director as part of her duties as director of the compliance program and were conducted in accordance with that program. Further, you indicate the records are 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 Unites States Department of Health and Human Services. *See* Health & Safety Code § 161.032(e). Based on your representations and our review, we conclude the records you marked under section 161.032 are records of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Accordingly, the university must withhold the records you marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.[2]

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

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

You assert the remaining records consist of questions and answers from an exam given to all university employees who perform billing services and coding for insurance purposes. You argue release of this information will compromise the university's ability to test for the bill coding knowledge of its employees performing this function; and require the university to expend time, effort, and money to continually create new tests, while still assuring the exams accurately capture the employee's core understanding of bill coding. Based on your representations and our review, we find the questions are test items under section 552.122(a) of the Government Code and may be withheld under that section. However, you have failed to demonstrate how the employee's answers to these questions reveal the questions themselves. Thus, the employee's answers may not be withheld under section 552.122(a). As you raise no other exceptions to disclosure of this information, it must be released.

In summary the university must withhold the records marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The university may also withhold the exam questions under section 552.122(a) of the Government Code. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, 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,

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 424595

Enc. Submitted documents

c: Requestor
(w/o enclosures)