



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2011

Mr. Ryan S. Henry
Denton, Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212-4685

OR2011-13030

Dear Mr. Henry:

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# 429360.

The Dallas County Hospital District d/b/a/ Parkland Health and Hospital System (the "district"), which you represent, received a request for all records relating to two specified statements concerning the decision to phase out employing fourth-year medical students to work in the psychiatry emergency room. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments from the University of Texas Southwestern Medical Center (the "university") and an attorney for the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

We first address the university's claim that the submitted information consists of medical committee 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." *Id.* § 552.101. This exception encompasses information other statutes make confidential. Section 161.032 of the Health and Safety Code provides in part:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(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.

The university contends that the submitted information “represents preliminary physician professional services data generated by an ad hoc committee composed of [university] physicians and administrators working under the direction of and reporting to the [university’s] Medical Services Research and Development Board and the University Hospital Board.” The university further states “the core function of the ad hoc committee and the aforementioned Boards is to evaluate the provision of medical and health care services provided at [the district].” However, upon review, we find the university has failed to demonstrate how this information, which consists of budget and staffing information, was not created in the regular course of business. *See Memorial Hosp.—The Woodlands*, 927 S.W.2d at 10 (regular course of business means “records kept in connection with the treatment of . . . individual patients as well as the business and administrative files and papers apart from committee deliberations” and privilege does not prevent discovery of material presented to hospital committee if otherwise available and “offered or proved by means apart from the record of the committee.” (quoting *Texarkana Memorial Hosp.*, 551 S.W.2d at 35-6)). Therefore, we find the university has not established the submitted information is confidential under section 161.032, and the district may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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 met. *Id.* at 681-82.

The types of information considered intimate and embarrassing 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. This office has found that financial information that does not relate to a financial transaction between an individual and a governmental body ordinarily satisfies the first requirement of the test for common-law privacy. For example, information related to an individual’s mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. *See Open Records Decision Nos. 545 (1990), 523 (1989); see also Open Records Decision No. 600 (1992)* (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional

coverages, direct deposit authorization, forms allowing employee to allocate pre-tax compensation to group insurance, health care or dependent care). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 at 4 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy); *see also* Gov't Code § 552.022(a)(2) (name, salary, and title of public employee are public information). Upon review, we find the information the district has marked is not highly intimate or embarrassing or is of legitimate public concern. Accordingly, none of the information at issue may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.111 of the Government Code 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 section 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 reexamined the predecessor to the section 552.111 exception 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, and opinions reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *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). However, 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. *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 date impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the

memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

You state the submitted information consists of communications between district officials and their counterparts at the university. You explain the district and the university have a “long-standing contractual relationship that requires these two agencies to coordinate numerous policy decisions.” Thus, we conclude the district and the university share a privity of interest or common deliberative process. You state the communications at issue deal with policymaking issues regarding “resource allocation for the coming term” and “proposed financial impacts.” You further state “[t]he documents at issue were created to assist decision makers with . . . the policy decision to stop employing [university] medical students to work in the psychiatry emergency room.” Based on these representations and our review, we agree the information we have marked consists of advice, opinion, and recommendations of the district regarding policymaking matters. Therefore, the district may withhold the marked information under section 552.111 of the Government Code. However, the remaining information is purely factual or administrative, and you have not demonstrated this information consists of advice, opinion, or recommendations relating to the policymaking processes of the district. Thus, the district may not withhold the remaining information under section 552.111 of the Government Code. As no further exceptions to disclosure are raised, 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,

A handwritten signature in black ink, appearing to read "Sarah Casterline", with a long horizontal flourish extending to the right.

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/akg

Ref: ID# 429360

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Leah A. Hurley
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(w/o enclosures)