



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2011

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

OR2011-13213

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# 429766 (OGC # 138183).

The University of Texas Southwestern Medical Center at Dallas (the "university") received a request for a named doctor's personnel records. You state the university will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you state the requestor excluded from his request social security numbers, bank account information, and dates of birth. Thus, these types of information in the submitted documents are not responsive to the request for information, and the university is not required to release this information in response to this request.

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.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as the Family Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the [Americans with Disabilities Act (the “ADA”)], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You have marked information that is confidential under section 825.500 of title 29 of the Code of Federal Regulations. We find none of the release provisions of the FMLA apply to this information. Thus, we conclude the university must withhold the information you have marked under section 552.101 in conjunction with the FMLA.²

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code. Section 161.032 provides, in relevant part:

- (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

²As our ruling for this information is dispositive, we need not address your remaining argument against its release.

...

(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).

The university asserts the marked information was submitted to and obtained by medical committees. You explain the Medical Executive Committee is responsible for making final recommendations to its governing body on matters of peer review, credentialing and privileging of physicians, approval of hospital rules and regulations, bylaws changes, and quality and safety. You state the Credentialing and Privileges Committee makes recommendations to the university’s Medical Services Research and Development Board and Hospital Board regarding “whether particular health care providers may be given privileges and credential to provide services at the [u]niversity’s hospitals[.]” You inform us the

Promotion and Tenure Committee considers recommendations from university staff regarding faculty promotions and awards of tenure for all university faculty. Additionally, you state, within the Department of Pediatrics, Division of Hematology-Oncology, an ad hoc peer review committee conducts peer evaluations, assesses the qualifications of faculty, and tracks faculty performance. You explain this committee makes recommendations to the Promotions and Tenure Committee and provides information to the Privileges and Credentialing Committee, as well as the Medical Executive Committee, as appropriate. Upon review, we agree these committees are committees established by the university and constitute medical committees as defined by section 161.031 of the Health and Safety Code. *See generally, Mem'l Hosp.—The Woodlands*, 927 S.W.2d at 8 (term “medical committee” is broadly defined). Further, we agree the marked information relates to these committees and is confidential under section 161.032 of the Health and Safety Code as records of a medical committee. Therefore, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 161.032.³

Next, you claim some of the remaining information is confidential pursuant to common-law privacy and constitutional privacy, which are also encompassed by section 552.101 of the Government Code. The common-law right to privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found a public employee’s allocation of part of the employee’s salary to a voluntary investment, health, or other program offered by the employer is a personal investment decision that is highly intimate or embarrassing. *See Open Records Decision Nos. 600* (1992) (finding personal financial information to include designation of beneficiary of employee’s retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history).

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, 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.

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

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)).

Upon review, we find some of the remaining information at issue is highly intimate or embarrassing information of no legitimate concern to the public. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing information of no legitimate public interest. Consequently, none of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy. Furthermore, we conclude you have not shown the remaining information at issue comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444 (1986), 423 at 2 (1984). Accordingly, the university may not withhold any of the remaining information at issue under section 552.101 in conjunction with constitutional privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who requests that the 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 the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or 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 the information. You have marked information in the remaining documents the university will redact under section 552.024, which authorizes a governmental body to redact from public release information subject to section 552.117 without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 1 (to be codified as an amendment to Gov’t Code § 552.024). We have marked additional information the university must also withhold under section 552.117(a)(1), to the extent the employee concerned timely elected to keep such information confidential under section 552.024.

In summary, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the FMLA and section 161.032 of the Health and Safety Code, as well as the information we have marked under section 552.101 in conjunction with common-law privacy. The university must also withhold the information you have marked for redaction in addition to the information we

have marked under section 552.117(a)(1) of the Government Code, to the extent the employee concerned timely elected to keep such information confidential under section 552.024 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, tollfree, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 429766

Enc. Submitted documents

c: Requestor
(w/o enclosures)