ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2011

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

OR2011-14413

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# 433159 (OGC # 138311).

The University of Texas Health Science Center at San Antonio (the "university") received a request for a copy of (1) any complaints filed and investigations into a named individual, (2) any e-mails to and from the named individual for a specified time period, (3) any correspondence and documents involving the hiring and past employment of the named individual, and (4) the named individual's employment history.[1] You state the university has released the information responsive to items one, three, and four, as well as some of the information responsive to item two of the request, pursuant to an agreement reached with the requestor. You claim the submitted information responsive to item two is excepted from

[1] We note the university sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3 380,387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.[2]

Initially, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-04104 (2011). In that ruling, we concluded the university must release the memorandum as a sexual harassment investigation summary and the e-mail as the statement of the accused, redacting only the information that identifies witnesses, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). We note the requestor in the previous request was the alleged victim; therefore, she had a special right of access to her own information. However, we note the present request involves a different requestor with no special right of access to any of the information. Thus, we find that the circumstances have changed, and the university may not continue to rely on Open Records Letter No. 2011-04104 as a previous determination in this instance. *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).

Accordingly, although you inform us that you have redacted identifying information of the alleged victim of and the witnesses to sexual harassment from the released memorandum dated December 9, 2010 and the released e-mail pursuant to Open Records Letter No. 2011-04104, as previously noted, we find that the circumstances have changed, and the university may not continue to rely on Open Records Letter No. 2011-04104 as a previous determination in this instance. Ordinarily, a governmental body's failure to provide this office with the opportunity to review responsive information deprives us of the ability to determine whether the information is excepted from public disclosure, leaving this office with no alternative other than to order that the information be released. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"). However, as we are able to discern the types of information that you have redacted, our inability to review the details of that information does not deprive us of the ability to rule on the information in this specific instance. Accordingly, we will rule on the released memorandum dated December 9, 2010 and the released e-mail, as well as the submitted information at issue.

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[2] We assume the "representative sample" of information 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 those submitted to this office.

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:

> (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.
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> . . .
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> (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].
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> . . .
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> (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). Section 161.031(a) defines a "medical committee" as "any committee . . . of (3) a university medical school or health science center[.]" *Id.* § 161.031(a)(3). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital [or] 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 (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You assert the information you have marked consists of records of the university's Prehospital Medicine Research Committee (the "committee"). You inform us this committee is a medical committee that evaluates medical and health care services. You state the marked information was prepared by the committee for use by the committee. 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.

Section 552.101 of the Government Code 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. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in an employment context. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note that since 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, the

identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Upon review, we find *Morales v. Ellen* is applicable to the remaining information at issue, which consists of records of an investigation of alleged sexual harassment. We find the released memorandum dated December 9, 2010 is an adequate summary of the sexual harassment investigation and the released e-mail is a statement by the person accused of sexual harassment. Therefore, the released memorandum dated December 9, 2010 and the released e-mail are not confidential under common-law privacy. However, the university must withhold the identifying information of the victim and witnesses you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Furthermore, you must withhold, in their entirety, the additional e-mails pertaining to the sexual harassment investigation that you have marked under section 552.101 in conjunction with common-law privacy.

In summary, 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. The university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information at issue must be released to the requestor.

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,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 433159

Enc. Submitted documents

c: Requestor
(w/o enclosures)