



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2011

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

OR2011-17681

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# 437419 (OGC# 139652; TMB# 21874).

The University of Texas Southwestern Medical Center at Dallas (the "university") received a request for all records regarding a named employee. You state the university will provide some of the requested information to the requestor with certain information withheld pursuant to section 552.024 of the Government Code.¹ You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code. You also state the university notified the Texas Medical Board (the "board") of the request for information and of its right to submit arguments to this office as to why some of the information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the board. We have

¹Section 552.024(c) of the Government Code authorizes a governmental body to redact from public release a current or former official's or employee's home address, home telephone number, emergency contact information, social security number, and information that reveals whether the person has family members without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. Gov't Code § 552.024(c); 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(a)).

considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you acknowledge the requestor has specifically excluded from her request for information the named employee's social security number, "IRS-related records[, and] personal banking information." Thus, any such information is not responsive to the request. Furthermore, you have marked portions of the submitted information as being non-responsive to the request. Upon review, we agree this information is not responsive to the request. Additionally, we have marked a portion of the submitted information that does not pertain to the named employee specified in the request. Thus, this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Section 552.107(1) of the Government Code 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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.*, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time,

²We assume the "representative sample" of records submitted to this office are 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.

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 seek to withhold the information you have marked under section 552.107(1). You state the information consists of communications between university attorneys and university officials made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the university may withhold the information you have marked under section 552.107(1) of the Government Code.³

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 made confidential by other statutes, such as the Family and Medical Leave Act (the “FMLA”). *See* 29 U.S.C. § 2601 *et seq.* Section 825.500 of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Section 825.500(g) states

[r]ecords and documents relating to 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

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

(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 seek to withhold the FMLA certification documents and related records you have marked in the remaining information. Upon review, we find these FMLA records are confidential under section 825.500 of title 29 of the Code of Federal Regulations. There is no indication any of the release provisions of the FMLA apply to this information. Thus, we conclude the university must withhold the FMLA records you have marked under section 552.101 of the Government Code in conjunction with the FMLA.⁴

Section 552.101 also encompasses section 161.032 of the Health and Safety Code, which 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, . . . and records, information, or reports provided by a medical committee, medical peer review committee, . . . to the governing body of a public hospital . . . 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) (footnote 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 “[t]he governing body of a hospital [or] university medical school or health science center . . . may form . . . a medical peer review committee, as defined by Section 151.002, Occupations Code, or 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., Memorial Hosp.—The Woodlands v. McCown*, 927

⁴As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

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 “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 also Open Records Decision No. 591 (1991) (construing statutory predecessor to Health and Safety Code § 161.032). Further, 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 also *McCown*, 927 S.W.2d at 10 (stating reference to statutory predecessor to section 160.007 of the Occupations Code in section 161.032 of the Health and Safety Code is clear signal 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.

You inform us most of the remaining information, which you have marked, consists of records of four university committees—a general medical peer review committee; the Clinical Competence Committee and the Credentialing and Privileges Committee, both of which are specific types of medical peer review committees; and the university’s Institutional Review Board (“IRB”). We have previously found, on multiple occasions, the university’s IRB is a medical committee for purposes of section 161.032. You explain all of these committees are tasked with “assessing the professional skill and care of physicians [and] ensuring that the highest quality of care is provided at the [u]niversity.” You state “the core function of each of these committees is to evaluate medical and health care services.” You also state the marked information was prepared for and submitted to the committees concerned. 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.⁵

You and the board assert some of the remaining information, which you have marked, is confidential under section 164.007 of the Occupations Code, which is also encompassed by section 552.101. Section 164.007(c) provides:

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

⁵As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

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). The information at issue consists of a letter with attachments from the board to the university requesting certain information regarding the individual named in the request. The board argues the letter and attachments are confidential under section 164.007(c) because the information is part of the board's investigative file regarding the named individual. By its terms, section 164.007(c) makes information confidential when in the possession of the board, its employees, or agents. In this instance, however, the letter and attachments at issue are in the possession of the university. Furthermore, the university is not acting as an employee or agent of the board in maintaining these records. Therefore, we conclude section 164.007(c) does not make the letter and attachments at issue confidential in this instance. Consequently, the university may not withhold this information under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code. As no further arguments against disclosure have been submitted for this information, the university must release it.

You assert the remaining information is confidential under both common-law and constitutional privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy 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 established. *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). We have marked personal financial information that we find is not of legitimate concern to the public. Therefore, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁶ You have not demonstrated, however, how the remaining information is highly intimate or

⁶As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

embarrassing. Consequently, the university may not withhold any of the remaining information on the basis of common-law privacy.

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. Open Records Decision No. 455 at 4 (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. *Id.* 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.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not demonstrated how constitutional privacy applies to the remaining information. Consequently, the university may not withhold the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, the university may withhold the information you have marked under section 552.107(1) of the Government Code. The university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the FMLA and with section 161.032 of the Health and Safety Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university must release the remaining responsive information.

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,



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Open Records Division

LBW/dls

Ref: ID# 437419

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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