



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2012

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2012-00088A

Dear Ms. Chatterjee:

This office issued Open Records Letter No. 2012-00088 (2012) on January 3, 2012. We have examined this ruling and determined that an error was made in its issuance. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on January 3, 2012. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 448273.

The University of Texas Southwestern Medical Center (the "university") received a request for any emails, correspondence, or reports between the district administration/psychiatric staff and a named physician regarding the safety of psychiatric departments that were generated from December 1, 2010 to the date of the request. You claim some information is not subject to the Act. You also claim a portion of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. Although you take no position, you state that the release of the remaining information may implicate the proprietary interests of a certain third party. Accordingly, you provided notice of the request to The Dallas County Hospital District d/b/a Parkland Health and Hospital System (the "district"), notifying it of its right to submit arguments to this office explaining why its information 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 arguments from the district. The district asserts its information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have also received comments submitted by the requestor. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

We note the requestor has excluded from his request personal information that would identify patients. Thus, these types of information are not responsive to this request. This ruling does not address the public availability of any information that is not responsive to the request, and the university need not release such information.

Initially, we address the university's argument that the submitted responsive information is not subject to the Act. You contend that, pursuant to section 181.006 of the Health and Safety Code, the submitted information is not subject to the Act. Section 181.006 states that: [f]or a covered entity that is a governmental unit, an individual's protected health information:

- (1) includes any information that reflects that an individual received health care from the covered entity; and
- (2) is not public information and is not subject to disclosure under [the Act].

Health & Safety Code § 181.006. Subsection 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 the submitted arguments for the submitted responsive information.

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. Both the university and the district raise section 552.101 in conjunction with section 160.007 of the Occupations Code and section 161.032 of the Health and Safety Code. Section 160.007 of the Occupations Code provides in part:

¹We 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.

- (a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Occ. Code § 160.007(a). Medical peer review is defined by the Medical Practice Act, subtitle B of title 3 of the Occupations Code to mean “the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners.” *Id.* § 151.002(a)(7). A medical peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]” *Id.* § 151.002(a)(8).

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.

...

- (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] hospital district[.]” *Id.* § 161.031(a). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical organization [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., 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.” *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). We note section 161.032 does not make confidential “records made or maintained in the regular course of business by a hospital[.]” Health & Safety Code § 161.032(f); *see Memorial Hosp.–The Woodlands*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to section 160.007 in section 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 university states the information it has marked was submitted to and obtained by university medical committees for the purpose of assessing the professional skill and care of physicians, and is therefore encompassed by the “peer review” exception of section 161.032 of the Health and Safety Code. The university states the district, with which the university’s faculty physicians and residents work under contract, underwent a comprehensive survey by the Center for Medicare/Medicaid Services (“CMS”) during July 2011 through September 2011. The university explains the Psychiatric Emergency Department Ad Hoc CMS Survey Committee prepared Psychiatric Emergency Department staff for the CMS survey and reviewed areas identified for improvement. The university also provides detail as to each of the functions and roles of the following: Psychiatric Improvement Committee, Pharmacy and Therapeutics Committee, Emergency Operations Committee, Medicine Services Chiefs Committee, Medical Advisory Council, and Professional Liability Committee (collectively, the “committees”). The university states these committees each assess the professional skill and care of physicians.

Upon review, we determine the information the university has marked constitutes confidential records of medical peer review committees under section 161.032 of the Health and Safety Code and was not created and is not maintained in the regular course of business. *See Mem’l Hosp.*, 927 S.W.2d at 8-11 (records maintained by medical committee in connection with credentialing process are not maintained in the regular course of business and are confidential under section 161.032). Thus, this information is within the scope of section 161.032 of the Health and Safety Code and must be withheld from disclosure under section 552.101 of the Government Code.²

²As our ruling is dispositive, we need not address the university’s remaining arguments against disclosure of this information.

Next, we will consider the district's arguments under section 160.007 of the Occupations Code and section 161.032 of the Health and Safety Code for its information at issue. The district states its board of managers (the "board") is appointed by the Dallas County Commissioners Court and is charged with the responsibility of managing, controlling, and administering the district. The district states the board is required to "establish, support, and oversee a system-wide performance improvement program" according to the district's bylaws. The district further states the board sits and acts as the Medical Review Committee for the district and that one of the board's responsibilities is "[t]o establish and maintain the process for credentialing, privileging, and evaluating the medical and allied health professional staff." The district informs us that, in furtherance of this duty, the board maintains overall responsibility for the implementation and maintenance of quality assurance and psych-related committees.

The district explains the board provides authority to its committees, hospital administrative leaders, and medical staff members to execute the procedures necessary to carry out quality and performance improvement activities. Further, the district states the committees established by the board ask assigned employees to gather and analyze the information relevant to the adverse event, and then recommend necessary steps to prevent a recurrence. The district states portions of the submitted information were internally prepared in the course of various committees, including the Psychiatric Improvement Committee, and that the preparation and collection of this information was performed "in a sequence of activity wholly within the purview of duly established medical committees as defined by statute." Based on the district's representations and our review, we agree the information at issue consists of confidential records subject to section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code.³

Next, we address the district's arguments for its remaining responsive information. The district raises section 552.103 of the Government Code for its remaining information. Section 552.103 provides, in part, as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

³As our ruling is dispositive, we need not address the district's remaining arguments against disclosure of this information.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, the district states it underwent an audit by the CMS which revealed several deficiencies. The district states the Department of Justice (the "DOJ") is monitoring the district's responsiveness to the audit for possible civil and criminal litigation. The district states the DOJ has advised the district not to destroy any relevant documents related to the DOJ request as pending decisions for claims are under consideration. However, the district

⁴This office also has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

has not informed us, nor do the submitted documents indicate, that the DOJ has actually threatened litigation or otherwise taken any concrete steps toward the initiation of litigation. *See* ORD 331. Therefore, we find the district has not established it reasonably anticipated litigation when the request for information was received. Accordingly, the district has failed to demonstrate the applicability of section 552.103 of the Government Code to the remaining information. Accordingly, the university may not withhold any of the district's remaining information on this basis.

The district also raises section 552.108 for its remaining responsive information. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108(a)(1) as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

As previously noted, the district states it received a letter from an Assistant United States Attorney notifying the district that the DOJ is monitoring the district's responsiveness to the CMS audit for possible civil and criminal litigation. The district states the release of the remaining responsive information could interfere with the pending monitoring and potential claims. Upon review, we find the district has failed to establish the information at issue relates to a pending criminal case. Further, the district has not provided our office with any representation from a law enforcement agency indicating that the agency wishes to withhold the submitted information under section 552.108(a)(1) of the Government Code. Accordingly, the university may not withhold any of the remaining information on that basis.

Section 552.111 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 exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this privilege 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 re-examined the statutory

predecessor to section 552.111 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 that consist 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 routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). 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 Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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 data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

The district states the remaining responsive information consists of communications between district officials and their counterparts at the university. The district explains it has a master service agreement with the university, which provides that the university shall provide doctors and other services to the district. Thus, we conclude the district and the university share a privity of interest or common deliberative process. The district asserts its remaining information consists of communications between district employees, including committee members and medical staff, regarding advice, recommendations, and opinions reflecting policymaking processes or matters that affect the district's policy mission. Based on the district's representations and our review of the information at issue, we conclude the university may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining information consists of factual information. Therefore, we conclude the district has failed to demonstrate this remaining responsive information constitutes internal communications containing advice, recommendations, or

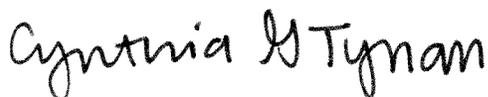
opinions reflecting the policymaking processes of the district. Consequently, the district may not withhold any of the remaining responsive information under section 552.111 of the Government Code.

In summary, the university must withhold its submitted information, as well as the district's information we have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code. The university may withhold the information we have marked under section 552.111 of the Government Code.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 448273

Enc. Submitted documents

c: Requestor
(w/o enclosures)