



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 18, 2012

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

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

OR2012-09387

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# 455453 (OGC Ref. No. 142754).

The University of Texas Southwestern Medical Center (the "university") received a request for e-mails sent or received by four named individuals regarding the master services agreement governing staffing at a specified hospital during a specified period of time. You state you have released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You state the release of a portion of the submitted information may implicate the interests of Parkland Health and Hospital System ("Parkland"). Accordingly, you state you notified Parkland of the request and 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 comments from Parkland. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup>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.

Initially, we must address the university's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). As of the date of this letter, the submitted information reflects you have not submitted a copy of the correct written request for information.<sup>2</sup> Consequently, we find the university has failed to comply with the requirements of section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise sections 552.107 and 552.111 of the Government Code for some of the submitted information, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 12 (2002) (claim of attorney-client privilege under section 552.107 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Thus, in failing to comply with section 552.301, the university has waived its arguments under sections 552.107 and 552.111 of the Government Code. However, because the university's assertion of section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will consider the applicability of that exception.

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

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<sup>2</sup>Since the university has not submitted a copy of the correct request, we take our description of the requested information from the information provided in the submitted brief.

Code § 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.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(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). 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 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 . . . 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 inform us the information you have marked was prepared for the purpose of presentation to the board of the Medical Service, Research and Development Faculty Practice Plan (“MSRDP”). You state the purpose of the MSRDP is to “promote excellence in teaching, research, clinical service and administration through clinical practice and compensation strategies that will contribute to and safeguard the [university’s] continued growth in excellence.” You state the board of the MSRDP meets on a monthly or bi-weekly basis to make decisions and recommendations on a variety of issues, including clinical innovation, productivity, research, teaching, and administrative excellence. You explain multiple standing committees of the board also report to the board at these meetings. Based on your representations, we agree the MSRDP board and its standing committees are “medical committees” under section 161.031 of the Health and Safety Code. Accordingly, the information you have marked is confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code.

We note the university has submitted information for which it does not raise any exceptions to disclosure. Parkland, however, seeks to withhold this information under sections 552.107 and 552.111.<sup>3</sup> Accordingly, we will address Parkland’s arguments. 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* ORD 676 at 6-7. 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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

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<sup>3</sup>Although Parkland also raises section 552.101, Parkland has not submitted arguments in support of that exception; therefore, we assume Parkland has withdrawn it. *See* Gov’t Code §§ 552.301, .302.

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, no pet.). Moreover, because the client may elect to waive the privilege at any time, 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).

Parkland raises section 552.107 for a portion of the submitted information. Parkland states the information it has marked consists of communications between its in-house deputy general counsel and its staff, in collaboration with university staff. Parkland explains that the university and Parkland work as a partnership with respect to certain research and training for medical students. Further, Parkland states these communications were made in furtherance of the rendition of professional legal services and their confidentiality has been maintained. Based on these representations and our review, we find Parkland has demonstrated the applicability of the attorney-client privilege to the information it has indicated, which we have marked. Accordingly, the university may withhold the marked information under section 552.107(1) of the Government Code.<sup>4</sup>

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency 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 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 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, opinions, and other material 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

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<sup>4</sup>Because this ruling is dispositive, we need not address the remaining argument against disclosure of this information.

among agency personnel. *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). 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the entities between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. See *id.* 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.

Parkland raises section 552.111 for a portion of the remaining information. Parkland states the information at issue consists of communications, discussions, and recommendations among its executive leaders and staff, and the university, regarding personnel, service, and policy matters. Parkland explains the communications were necessary to assist Parkland and the university in policymaking decisions that have mutual budgetary and operational consequences. Parkland also explains the university and Parkland have collaborative clinical operations which share a common mission and vision of excellence in health care. Based on these representations and our review of the information at issue, we find Parkland has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters that may be withheld under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative matters and purely factual information. Thus, we find Parkland has failed to show how the remaining information at issue consists of advice, opinions, or recommendations on policymaking matters. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

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 may withhold the information we have marked under sections 552.107 and 552.111 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](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,



Tamara H. Holland  
Assistant Attorney General  
Open Records Division

TLHA/som

Ref: ID# 455453

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Mr. Thao La  
Senior Attorney  
Parkland Health & Hospital  
5201 Harry Hines Boulevard  
Dallas, Texas 75235  
(w/o enclosures)

Filed in The District Court  
of Travis County, Texas

DEC 17 2014

At 1:46pm M.  
Amalia Rodriguez-Mendoza, Clerk

Cause No. D-1-GV-12-000903

|                               |   |                                    |
|-------------------------------|---|------------------------------------|
| THE UNIVERSITY OF TEXAS       | § | IN THE DISTRICT COURT              |
| SOUTHWESTERN MEDICAL CENTER,  | § |                                    |
| <i>Plaintiff,</i>             | § |                                    |
|                               | § |                                    |
| v.                            | § | 98 <sup>th</sup> JUDICIAL DISTRICT |
|                               | § |                                    |
| GREG ABBOTT, ATTORNEY GENERAL | § |                                    |
| OF TEXAS,                     | § |                                    |
| <i>Defendant.</i>             | § | TRAVIS COUNTY, TEXAS               |

**AGREED FINAL JUDGMENT**

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which the University of Texas Southwestern Medical Center (UT Southwestern), sought to withhold certain information from public disclosure. All matters in controversy between Plaintiff, UT Southwestern and Greg Abbott, Attorney General of Texas, arising out of this lawsuit have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent a certified letter to the requestor, Mr. Reese Dunklin, on November 24, 2014, informing him of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that UT Southwestern may withhold the redacted portions of the information at issue. The requestor was also informed of his right to intervene in the suit to contest the withholding of this information. A copy of the certified mail receipt is attached to this judgment as Exhibit "B."

Cause No. D-1-GV-12-000903

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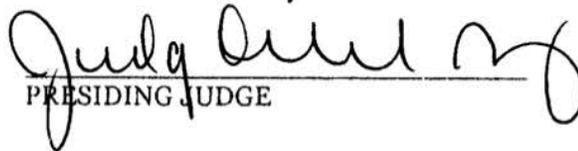
The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. UT Southwestern and the Attorney General have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue, specifically the marked portions of submitted documents, are excepted from disclosure pursuant Sections 552.107 and 552.111 of the Texas Government Code. The Attorney General has provided UT Southwestern a copy of the information at issue with the agreed upon redactions marked. Redactions on the released documents will be consistent with this copy. These redactions are in addition to the redactions marked by the Open Records Division during the letter ruling phase of the process.
2. UT Southwestern may withhold and redact from the requestor the information described in Paragraph 1 of this order.
3. All court cost and attorney fees are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between UT Southwestern and the Attorney General and is a final judgment.

SIGNED the 17 day of December, 2014.

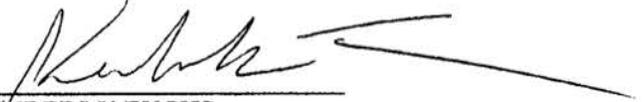
  
PRESIDING JUDGE

AGREED:



**ERIKA R. SAMS**  
State Bar No. 24083784  
Financial Litigation, Tax, and Charitable  
Trusts Division  
P.O. Box 12548  
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**Attorney for Plaintiff**



**KIMBERLY FUCHS**  
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**Attorney for Defendant**

**A**

Cause No. D-1-GV-12-000903

|                               |   |                                    |
|-------------------------------|---|------------------------------------|
| THE UNIVERSITY OF TEXAS       | § | IN THE DISTRICT COURT              |
| SOUTHWESTERN MEDICAL CENTER,  | § |                                    |
| <i>Plaintiff,</i>             | § |                                    |
|                               | § |                                    |
| v.                            | § | 98 <sup>th</sup> JUDICIAL DISTRICT |
|                               | § |                                    |
| GREG ABBOTT, ATTORNEY GENERAL | § |                                    |
| OF TEXAS,                     | § |                                    |
| <i>Defendant.</i>             | § | TRAVIS COUNTY, TEXAS               |

**SETTLEMENT AGREEMENT**

This Settlement Agreement (Agreement) is made by and between the University of Texas Southwestern Medical Center (UT Southwestern) and Greg Abbott, Attorney General of Texas. This Agreement is made on the terms set forth below.

**Background**

On March 16, 2012, UT Southwestern received a written request for information from Mr. Reese Dunklin of the Dallas Morning News under the Public Information Act (PIA). The request was for e-mails regarding staffing at Parkland Hospital.

UT Southwestern asked for an open records ruling from the Attorney General, pursuant to the PIA, Tex. Govt. Code Section 552.301.

The Attorney General issued Letter Ruling OR2012-09387 (2012) in response to UT Southwestern's request. The ruling concluded, in pertinent part, that UT Southwestern had failed to comply with statutory requirements, and therefore, the information must be disclosed to the requestor.

UT Southwestern disputed the ruling and filed a lawsuit, styled Cause No. D-1-GN-12-000903, *The University of Texas Southwestern Medical Center v. Greg*

*Abbott, Attorney General of Texas*, in the 98th Judicial District Court of Travis County, Texas (this lawsuit), to preserve its rights under the PIA. Specifically, UT Southwestern argued that the procedural requirements of 552.301 of the Texas Government Code were met and challenged the release of communications which it considered to be confidential under Section 552.107 of the Texas Government Code as attorney-client privileged and the release of materials protected from disclosure by Section 552.111 of the Texas Government Code.

UT Southwestern submitted additional information to the Attorney General identifying privileged parties and establishing some additional information at issue is excepted from disclosure by Sections 552.107 and 552.111 of the Texas Government Code. UT Southwestern also demonstrated that although it had attached the incorrect request for information in its briefing, it had identified the correct request within its briefing, and the incorrect attachment was an inadvertent error.

Tex. Govt. Code Section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

### **Terms**

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Portions of the information at issue, specifically the marked portions of the submitted documents, are excepted from disclosure pursuant to Sections 552.107 and 552.111 of the Texas Government Code. The Attorney General has provided UT

Southwestern a copy of the information at issue with the agreed upon redactions marked. Redactions on the released documents will be consistent with this copy. These redactions are in addition to the redactions marked by the Open Records Division during the letter ruling phase of the process.

2. UT Southwestern may withhold and redact from the requestor the information described in Paragraph 1 of this Agreement.

3. UT Southwestern and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The agreed final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor. The Court, in entering final judgment, will attach this Settlement Agreement as Exhibit "A".

4. The Attorney General agrees that he will also notify the requestor, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of his right to intervene to contest UT Southwestern's right to withhold the information.

5. If the requestor intervenes to contest the withholding, a final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

6. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

7. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this

Agreement.

8. UT Southwestern warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that UT Southwestern has against the Attorney General arising out of the matters described in this Agreement.

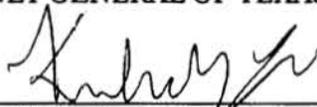
9. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against UT Southwestern arising out of the matters described in this Agreement.

10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

UNIVERSITY OF TEXAS  
SOUTHWESTERN MEDICAL CENTER

GREG ABBOTT,  
ATTORNEY GENERAL OF TEXAS

By:   
Name: Erika Sams  
Title: AAG, Financial Litigation, Tax,  
and Charitable Trusts Division

By:   
Name: Kimberly Fuchs  
Title: AAG, Administrative Law  
Division

Date: 11/24/14

Date: 11/24/14