



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2012

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

OR2012-14201

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# 464626 (OGC Nos. 144523 and 144873).

The University of Texas System (the "system") received a request for eight categories of information related to the search and selection process that led to the hiring of two named individuals at the University of Texas MD Anderson Cancer Center ("MD Anderson"). You indicate the system is withholding information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.¹ You state the system is releasing some of the responsive information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.123 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Witt/Kieffer. Accordingly, you state, and provide documentation showing, you notified Witt/Kieffer of the request for information and of its right to submit arguments to this office as to why the information at issue should not be

¹Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See* Gov't Code § 552.024(c).

released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You also provide documentation showing you have notified MD Anderson of its right to submit comments to this office why some of the submitted 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 MD Anderson. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note MD Anderson argues against the release of information that was not submitted by the system. This ruling is limited to the information the system has submitted for our review, and does not address information related to MD Anderson beyond that submitted by the system. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Next, you state some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-10507 (2011). You state to the extent the law, facts, and circumstances on which the previous ruling was based have not changed, the system will rely on Open Records Letter No. 2011-10507 as a previous determination and withhold or release the identical information in accordance with that ruling. *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).

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. This section encompasses section 51.914 of the Education Code, which provides, in pertinent part:

(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all

²We 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.

technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

...

(3) the plans, specifications, blueprints, and designs, including related proprietary information, of a scientific research and development facility that is jointly financed by the federal government and a local government or state agency, including an institution of higher education, if the facility is designed and built for the purposes of promoting scientific research and development and increasing the economic development and diversification of this state.

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003 [of the Education Code].

Educ. Code § 51.914(a)(1), (3), (b). As noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular scientific information has "a potential for being sold, traded, or licensed for a fee." ORD 651 at 9-10. Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* at 10. Thus, this office has stated that in considering whether requested information has "a potential for being sold, traded, or licensed for a fee," we will rely on a governmental body's assertion that the information has this potential. *See id.* However, a governmental body's determination that information has a potential for being sold, traded, or licensed for a fee is subject to judicial review. *See id.*

You seek to withhold the information you have marked under section 51.914 of the Education Code. You state MD Anderson is an institution of higher education for purposes of section 61.003(8) of the Education Code. *See* Educ. Code § 61.003(8). You state the information at issue contains the details of research conducted by MD Anderson employees, including information regarding the specifics of research projects underway and equipment utilized and research protocols. You assert this information contains scientific information

as well as procedures and other information that relate to a product, device, or process developed by MD Anderson employees. You further state the marked information describes experimentation and research that has the potential for being further sold, traded, or licensed for a fee and is therefore confidential pursuant to section 51.914(a). You assert this information is excepted pursuant to section 51.914(b). Based on your representations and our review, we conclude the system has demonstrated the applicability of section 51.914 of the Education Code to a portion of the information at issue, which we have marked. Accordingly, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. However, we find you have not demonstrated how the remaining information is subject to section 51.914. Accordingly, the system may not withhold the remaining information you marked under section 552.101 in conjunction with section 51.914 of the Education Code

Section 552.101 of the Government Code 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 . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, a “medical committee” includes any committee, including a joint committee, of . . . a university medical school or health science center[.]” *Id.* § 161.031(a). The term also encompasses “a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” *Id.* § 161.031(b). Section 161.0315 provides in relevant part that “[t]he governing body of a . . . university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical peer review committee 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 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); *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977); *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977); *McAllen Methodist Hosp. v. Ramirez*, 855 S.W.2d 195 (Tex. App.—Corpus Christi 1993),

disapproved by, *Memorial Hosp—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Doctor's Hosp. v. West*, 765 S.W.2d 812 (Tex. App.—Houston [1st Dist.] 1988); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex. App.—Fort Worth 1988). 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 statutory predecessor to section 161.032 of the Health and Safety Code). We note that 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 system and MD Anderson both assert portions of the remaining information are made confidential by section 161.032 of the Health and Safety Code as records of a medical committee. The system states some of the information consists of records of the Special Committee for Conflict of Interest Review (“SCCOIR”), which is a committee created by the system and is authorized to evaluate the quality of medical and health care services offered at system health institutions. You inform us the SCCOIR operates under written bylaws approved by the system and is tasked with evaluating and making recommendations on issues relating to conflict of interest disclosures, management plans, and monitoring at these health institutions. Further, MD Anderson states some of the information at issue consists of records of its Institutional Compliance Committee (“ICC”), which is a committee that is tasked with various responsibilities related to compliance-related matters, including reviewing quarterly monitoring reports, hotline reports, educational materials, and recent developments with respect to compliance news. MD Anderson further states the ICC assists in maintaining MD Anderson’s commitment to providing quality health care services and conducting its business in compliance with local, state, and federal laws, rules, and regulations. MD Anderson also states some of the information consists of records of its Conflict of Interest Committee (“COIC”), which is a committee that is charged with receiving disclosures of potential conflicts of interest from MD Anderson’s faculty, trainees, and other employees, pursuant to MD Anderson’s conflict of interest policy. MD Anderson further informs us the COIC seeks to protect patient safety and welfare by requiring disclosure of all potential conflicts of interest during the pursuit of relationships with for-profit entities that further the mission of MD Anderson or that serve another scholarly purpose. Upon review, we agree the SCCOIR, the ICC, and the COIC constitute medical committees as defined by section 161.031 of the Health and Safety Code. The system and MD Anderson further state the information they have marked consists of records, information, or reports of or provided by the SCCOIR, the ICC, and the COIC. Thus, we agree the information the system and MD Anderson have marked must be withheld under

section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.³ See Health & Safety Code § 161.031(a).

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, 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 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, 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 state portions of the remaining information, which you have marked, consist of communications involving attorneys for the system and attorney representatives, and the system’s component institutions, including MD Anderson, in their capacities as clients. We

³As our ruling for this information is dispositive, we need not address the submitted arguments under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code or the submitted arguments under sections 552.107 and 552.111 of the Government Code against its disclosure.

note the system shares a common interest with its component institutions. You state these communications were made in furtherance of the rendition of professional legal services to the system and its component institutions. You state these communications were confidential, and you state the system has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked under section 552.107. Accordingly, the system may generally withhold the information you marked under section 552.107(1) of the Government Code.⁴ We note one of the individual e-mails contained in an otherwise privileged e-mail string is a communication with an individual whom you have not shown to be a privileged party. Thus, to the extent this non-privileged e-mail, which we have marked, exists separate and apart from the e-mail string in which it is included, it may not be withheld under section 552.107(1).

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 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.

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

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).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

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.

You state the remaining information you have marked under section 552.111 consists of communications between and among employees and officials of the system, its component institutions, and an outside consultant regarding policy matters affecting the system and its component institutions. A portion of the information at issue includes communications with Witt/Kieffer, which you state is an external executive search firm that was retained by the system to assist in a particular hiring process. Thus, you state the system shares a common deliberative process and privity of interest with Witt/Kieffer with regard to the matters discussed. We also note the system shares a common deliberative process and privity of interest with MD Anderson. You state the information at issue pertains to policymaking matters and personnel matters of broad scope that affect MD Anderson's policy mission. Thus, you state, the information at issue contains the deliberative process by which individuals provided input into and recommended review of policy issues. Further, you state certain documents consist of drafts that are intended for release in final form. Based on your representations and our review of the information at issue, we find the system has demonstrated most of the information at issue, which you marked, consist of advice, opinions, or recommendations on the policymaking matters of the system. However, one of the individual e-mails at issue consists of a communication with a party with whom you have not demonstrated the system shares a privity of interest or a common deliberative process.

This e-mail, which we marked as non-privileged, may not be withheld under section 552.111. Thus, except for the information we marked, the system may withhold the information you marked under section 552.111 of the Government Code.

Section 552.123 of the Government Code excepts from required public disclosure:

The name of an applicant for the position of chief executive officer of an institution of higher education, and other information that would tend to identify the applicant, . . . except that the governing body of the institution must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the person.

Gov't Code § 552.123. This office has previously held, and the legislature recently amended section 552.123 to explicitly provide, this exception permits the withholding of any information that would tend to identify candidates, not just their names. Examples of information identifying individuals might include, but are not limited to, resumes, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular applicant. *See* Open Records Decision No. 540 at 4 (1990) (construing statutory predecessor to section 552.123). In addition, the exception protects the identities of all persons being considered for the position of university chief executive officer, whether they are nominated or apply on their own initiative. *Id.* at 5.

As noted above, you state MD Anderson is an “institution of higher education” as defined by section 61.003(8) of the Education Code, and its President is the “chief executive officer” of MD Anderson. You state the system released the name of the chosen finalist, and you state the information you marked contains the identifying information of the remaining candidates for the position of President of MD Anderson. Based on your representations and our review of the submitted information, we conclude the system may withhold the information we have marked under section 552.123. However, we find you have failed to demonstrate how the remaining information you marked identifies or tends to identify particular candidates. Thus, the system may not withhold the remaining information you marked pursuant to section 552.123 of the Government Code.

We note the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code.⁵ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the system must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, to the extent the law, facts, and circumstances on which the previous ruling was based have not changed, the system may rely on Open Records Letter No. 2011-10507 as a previous determination and withhold or release the identical information in accordance with that ruling. The system must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code and the information you marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The system may generally withhold the information you marked under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mail exists separate and apart from the e-mail string in which it is included, it may not be withheld under section 552.107(1). The system may also withhold the information we marked under sections 552.111 and 552.123 of the Government Code. The system must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 464626

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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