ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 12, 2012

Ms. Tamra J. English
Attorney
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2012-16351

Dear Ms. English:

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# 466513 (OGC No. 145016).

The University of Texas Southwestern Medical Center (the "university") received a request for all documentation regarding the Dallas County Indigent Care Corporation ("DCICC") from January 1, 2009 to the date of the request. You state the university will release some of the requested information. You claim some of the submitted information is not subject to the Act. In addition, you claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Dallas Medical Resources ("Dallas Medical"), J. Taylor & Associates, L.L.C. ("J. Taylor"); and DCICC of the request for information and of each party's right to submit arguments to this office as to why the submitted information should not be 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). We have considered the submitted arguments and reviewed the submitted representative sample of information.[1] We have also

[1]We 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.

received and considered comments from a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address your contention that a portion of the submitted information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

You state a portion of the submitted information consists of "executed agreements between third parties in which [the university] is not a party." You assert this information was not collected, assembled, or maintained in connection with the official business of the university, but rather was "prepared for or by a third party." However, the information that you state is not subject to the Act consists of an analysis of the master services agreement ("MSA") between the university and the DCICC. Thus, the information at issue pertains to the university's relationship with DCICC and, thus, relates to official business of the university. Further, the executive summary of the analysis states the university has a right of access to the analysis "as contemplated in MSA Section 14.4." Accordingly, we find the information at issue was collected or assembled or is maintained in connection with the transaction of official university business; and, thus, it constitutes "public information" as defined by section 552.002(a). Accordingly, the information at issue is subject to the Act and must be released, unless it falls within an exception to public disclosure under the Act. *See* Gov't Code § 552.305(b). Accordingly, we will address your arguments against disclosure under the Act for the entirety of the submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this decision, we have not received correspondence from any of the interested third parties. Thus, none of the interested third parties have demonstrated that they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted

information on the basis of any proprietary interests these third parties may have in the information.

Next, we note a portion of the submitted information is subject to section 552.022(a)(1) of the Government Code and the requestor asserts portions of the submitted information are subject to sections 552.022(a)(3) and 552.022(a)(5) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code "or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[,]" while section 552.022(a)(5) of the Government Code provides for the required public release of "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]" *Id.* §§ 552.022(a)(3), (5). We find the analysis of the MSA, which we have marked, is a completed report made for the university for purposes of section 552.022(a)(1). However, upon review, we find none of the submitted information consists of information in an account voucher or contract relating to the receipt or expenditure of public or other funds by a governmental body. Further, we find none of the submitted information consists of working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body. Accordingly, none of the submitted information is subject to required public disclosure under sections 552.022(a)(3) or 552.022(a)(5) of the Government Code.

Although you assert the information subject to section 552.022(a)(1) is excepted from disclosure under sections 552.107 and 552.111, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 663 at 5 (1999) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the university may not withhold the information subject to section 552.022 under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your claim under Texas Rule of Evidence 503 for the information subject to section 552.022.

We first address your argument for the information subject to section 552.022(a)(1). Texas Rule of Evidence 503 enacts the attorney-client privilege and provides in part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> (B) between the lawyer and the lawyer's representative;
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> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
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> (D) between representatives of the client or between the client and a representative of the client; or
>
> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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). 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. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information subject to 552.022(a)(1) is a privileged attorney-client communication. However, you have not demonstrated how any of the information at issue, which consists of an analysis of the MSA between the university and the DCICC written by a third-party contractor and provided to the DCICC as well as the university, constitutes a privileged attorney-client communication for purposes of Texas Rule of Evidence 503. Accordingly, the university may not withhold any portion of the information at issue under Texas Rule of Evidence 503. As you raise no further exceptions for this information, it must be released.

We now address your arguments for the information not subject to section 552.022. Section 552.107(1) of the Government Code protects information coming 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. 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. 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. *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 a 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. 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. *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 the information you have marked under section 552.107 consists of communications involving university attorneys, legal staff, and university employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the university. You assert these communications were confidential, and you state the university has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have generally demonstrated the applicability of the attorney-client privilege to the e-mails we have marked.

However, we note some of the communications at issue consist of e-mails, and e-mail strings including attachments, received from or sent to non-privileged parties, including attorneys and staff for various DCICC participants, as well as attorneys and staff for Parkland Health and Hospital System ("Parkland"). We find you have failed to demonstrate how any of the DCICC participants or Parkland shared a common interest with the university that would allow the attorney-client privilege to apply to the communications. *See* Tex. R. Evid. 503(b)(1)(c); *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (discussing the "joint-defense" privilege incorporated by rule 503(b)(1)(C)). Accordingly, the university may not withhold the e-mails sent directly to the DCICC participants or Parkland under the attorney-client privilege.

Further, if the e-mails and attachments received from or sent to these non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the instant requests for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear, then the university may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. Otherwise, the university may withhold the e-mails we have marked under section 552.107(1) of the Government Code.[2]

Next, we address your argument under section 552.111 of the Government Code for the remaining information at issue, including the communications and attachments we have marked if they exist separate and apart from the otherwise attorney-client privileged e-mail chains. Section 552.111 excepts from disclosure "an 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); *see also* 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 that section 552.111 excepts only those internal communications that consist of advice, opinions, recommendations 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. *See id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351

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

(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. *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).

This office has also concluded that 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 of section 552.111). 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 id.*

You state the information you have marked consists of communications between university attorneys, university employees and officials, and attorneys and employees of DCICC participants. You state these communications relate to policymaking matters. You also inform us some of the information you have marked consists of drafts that are indented for release in their final form. Based on your representations and our review, we find the university may withhold the communications between university employees and officials, which we have marked, and the draft document we have marked under section 552.111 of the Government Code. However, we note the remaining information at issue includes communications between university employees and officials and DCICC participants and their attorneys, as well as communications with Parkland. As previously noted, we find the university does not share a privity of interest or common deliberative process with regard to this information. Furthermore, we find the remaining information at issue to be general administrative information or purely factual in nature. You have not demonstrated the remaining information at issue contains advice, opinion, or recommendations pertaining

to policymaking. Consequently, the university may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

We now address your argument under section 552.101 of the Government Code for the remaining information at issue, including the communications and attachments we have marked if they exist separate and apart from the otherwise attorney-client privileged e-mail chains. 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 exception encompasses information other statutes make confidential. Section 161.032 of the Health and Safety Code provides in part:

> (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.
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> . . .
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> (c) Records, information, or reports of a medical committee . . . 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.
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> . . .
>
> (f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code § 161.032(a), (c), (f). 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).

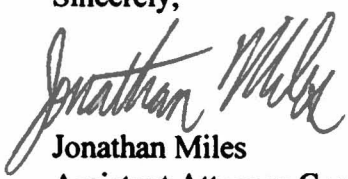
You inform us the information you have marked was prepared for the purpose of presentation to the board of the Medical Service, Research and Development Faculty Practice Plan ("MSRDP"). You state the purpose of the MSRDP is to "promote excellence in teaching, research, clinical service and administration 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. However, upon review, we find you have failed to demonstrate how the remaining information at issue was not created in the regular course of business. *See McCown,* 927 S.W.2d at 10 (regular course of business means "records kept in connection with the treatment of . . . individual patients as well as the business and administrative files and papers apart from committee deliberations" and privilege does not prevent discovery of material presented to hospital committee if otherwise available and "offered or proved by means apart from the record of the committee." (quoting *Texarkana Memorial Hosp.*, 551 S.W.2d at 35-6)). Therefore, we find you have not established the remaining information is confidential under section 161.032, and the university may not withhold it under section 552.101 on that basis.

In summary, the university may generally withhold the information we have marked under section 552.107(1) of the Government Code, but may not withhold the non-privileged communications and attachments we have marked if they are maintained by the university separate and apart from the otherwise privileged e-mail strings in which they appear. The university may withhold the information we have marked under section 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, 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,



Jonathan Miles
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JM/bhf

Ref: ID# 466513

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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