



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2012

Ms. Carol Longoria
Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2012-17250

Dear Ms. Longoria:

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# 469210 (OGC# 145585).

The University of Texas Medical Branch at Galveston (the "university") received a request for information related to the Galveston County Indigent Health Care Program for a specified time period and the completed 2011 Texas Annual Survey of Hospitals. You state you will release some of the requested information, including the requested survey, to the requestor. You state you will withhold some of the requested information in accordance with Open Records Letter No. 2012-02814.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹See 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note you have marked information as not responsive to the instant request because the requestor has specifically excluded such information from her request. This ruling does not address the public availability of non-responsive information, and the university is not required to release non-responsive information in response to this request.

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 information protected by other statutes, such as section 161.032 of the Health and Safety Code, which provides, in relevant part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee, medical peer review committee, 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] a university medical school or health science center [or] a hospital district[.]” *Id.* § 161.031(a). Section 161.0315 provides that “[t]he governing body of a hospital, medical organization, university medical school or health science center [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., Mem’l 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 “documents generated by the committee in order to conduct open and thorough review” are confidential. *Mem’l Hosp.*, 927 S.W.2d at 10; *Jordan*, 701 S.W.2d at 647-48; *Doctor’s Hosp. v. West*, 765 S.W.2d 812, 814 (Tex. App.—Houston [1st Dist.] 1988). 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.*; see also Open Records Decision No. 591 (1991) (construing statutory predecessor to Health & Safety Code § 161.032). Additionally, 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 also *Mem’l Hosp.*, 927 S.W.2d at 10 (stating reference to statutory predecessor to section 160.007 of the Occupations Code in section 161.032 is clear signal records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business). The phrase “records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. See *Mem’l Hosp.*, 927 S.W.2d at 10 (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You state the information in Tabs 5 and 6 consists of records created or considered by the Casebook Committee (the “committee”), including two of its subcommittees. You inform us the committee “evaluates the training that physician residents at the [u]niversity receive” and reviews and selects additional cases for residents to participate in so as to ensure that the residents receive the training necessary to satisfy the criteria required by accrediting agencies. The committee decides whether the need for resident training justifies accepting a referred patient, and then the committee conducts a financial screening and analyzes the university’s budget to determine the financial impact to the university upon accepting a case. Based on the university’s representations and our review, we agree the committee constitutes a medical committee for the purposes of section 161.032 of the Health and Safety Code. Upon review, we determine the information in Tabs 5 and 6 constitutes confidential records of a medical committee under section 161.032 of the Health and Safety Code and was not created and is not maintained in the regular course of business. 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.³

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. See Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. See Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure

³As our ruling is dispositive for this information, we need not address the university’s remaining arguments against its disclosure.

after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990).

You state the university is currently negotiating a contract with Galveston County to partner in providing indigent health care, but a final contract has not yet been signed. Upon review, however, we find you have failed to demonstrate that release of the information in Tab 10 would cause harm to the university's interests in a particular competitive bidding situation. Accordingly, we conclude the university may not withhold the information in Tab 10 under section 552.104 of the Government Code.

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. Open Records Decision No. 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). 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. Finally, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), 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 in Tab 7 consists of communications between university attorneys and university employees. You state the communications were made for the purpose of facilitating the rendition of legal services to the university and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have

demonstrated the applicability of the attorney-client privilege to the information in Tab 7. Accordingly, the university may withhold the information in Tab 7 under section 552.107(1) of the Government Code.⁴

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. 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 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,

⁴Because our ruling is dispositive as to this information, we do not address your remaining arguments against disclosure of this information.

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.

You state the information in Tab 8 consists of internal deliberations relating to processes and procedures for evaluating patient referrals and patient care. You further state portions of the information at issue consists of drafts of documents intended for public release in their final form. Based on these representations and our review, we agree the information we have marked consists of advice, opinion, and recommendations of university attorneys and employees regarding policymaking matters of the university. Therefore, the university may withhold the information we have marked in Tab 8, including the submitted draft documents, under section 552.111 of the Government Code. However, we find the remaining information in Tab 8 is factual or you have not demonstrated it constitutes advice, opinion, or recommendations on a policymaking matter. Accordingly, the university may not withhold any of the remaining information at issue under section 552.111 of the Government Code on basis of the deliberative process privilege.

You assert information in Tab 9 is excepted by section 552.106 of the Government Code. This section excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106(a) is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, this section is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See* Open Records Decision Nos. 460 at 1-2, 367 (1983) (statutory predecessor applied to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act); *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances). Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

In this instance, you assert the information in Tab 9 contains recommendations, opinions, and advice that were prepared in response to requests and invitations from the lieutenant governor and legislators and legislative staff, and that will be used in the preparation of proposed legislation that is inextricably intertwined with the university and its policy mission. Upon review, we agree the information we have marked in Tab 9 constitutes recommendations, opinions, or advice used in the preparation of proposed legislation. Thus, the university may withhold this information under section 552.106. However, you have

failed to demonstrate how the remaining information constitutes recommendations, opinions, or advice for purposes of section 552.106. Therefore, no portion of the remaining information in Tab 9 may be withheld on this basis.

In summary, the university may withhold Tabs 5 and 6 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 in Tab 7 under section 552.107(1) of the Government Code. The university may withhold the information we have marked in Tab 8 under section 552.111 of the Government Code. The university may withhold the information we have marked in Tab 9 under section 552.106 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 469210

Enc. Submitted documents

c: Requestor
(w/o enclosures)