



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2013

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-09852

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# 489921 (OGC# 149266).

The University of Texas at Austin (the "university") received a request for a specified protocol of the university's Institutional Review Board ("IRB"). You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, you inform us some of the submitted information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2012-13958 (2012) and 2012-15013 (2012). In these rulings, we determined the university must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 57.971 of the Education Code. You also inform us some of the submitted information may have been addressed in Open Records Letter Nos. 2012-19336 (2012) and 2012-20421 (2012). In Open Records Letter No. 2012-19336 we determined the university (1) need not release certain information because it is not subject to the Act; (2) must withhold certain information under section 552.101 of the Government

¹We 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.

Code in conjunction with section 51.971(c) of the Education Code; (3) must withhold the information we marked under section 552.101 in conjunction with common-law privacy; (4) must withhold the information we marked under section 552.117(a)(1) of the Government Code if the information consists of the home telephone number or personal cellular telephone number of an individual who timely requested confidentiality under section 552.024 of the Government Code; (5) must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release or subsection 552.137(c) applies; and (6) must release the remaining information, but any information protected by copyright may only be released in accordance with copyright law. In Open Records Letter No. 2012-20421, we determined the university must withhold the e-mail addresses we marked under section 552.137, unless their owners affirmatively consent to their release, and must release the remaining information. We are unaware of any change in the relevant law, facts, or circumstances on which the rulings at issue were based. Accordingly, we conclude the university must rely on Open Records Letter Nos. 2012-13958, 2012-15013, 2012-19336, and 2012-20421 as previous determinations and withhold the identical information in accordance with these rulings. *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). As to the information we previously ordered released, you now raise section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code for this information.

Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the university may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. As section 552.101 can make information confidential under the Act, we will now address your argument against disclosure of the information previously released by the university and any information not subject to the prior rulings.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 161.032 of the Health and Safety Code, which provides in part:

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

...

(c) Records, information, or reports of a medical committee, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code § 161.032(a), (c), (f) (footnote omitted). 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, 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 at issue consists of records prepared for, by, or at the direction of the IRB. You also inform us the IRB is a medical committee established pursuant to federal law in order “to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects.”² 21 C.F.R. § 56.102(g). We have previously found, on multiple occasions, the IRB is a medical committee for purposes of section 161.032. You explain this committee “is tasked with reviewing and approving research involving human subjects” at the university. Based on your representations and our review, we conclude the university must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

In summary, the university must rely on Open Records Letter Nos. 2012-13958, 2012-15013, 2012-19336, and 2012-20421 as previous determinations and withhold the identical information in accordance with these rulings. The university must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

²See 42 U.S.C. § 289(a) (providing that Secretary of Health and Human Services shall by regulation require that each entity which applies for grant, contract, or cooperative agreement for any project or program which involves conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to Secretary that it has established “Institutional Review Board” to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

Ref: ID# 489921

Enc. Submitted documents

c: Requestor
(w/o enclosures)