



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 6, 2013

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

OR2013-21262

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# 507930 (UT OGC# 152281).

The University of Texas M. D. Anderson Cancer Center (the "university") received a request for records created between September 1, 2011 and August 31, 2013, including a named individual's weekly schedule and all correspondence of two named individuals mentioning at least one of two specified terms. You state the university will redact information subject to section 552.117 of the Government Code pursuant to section 552.024(c) of the Government Code.¹ Further, you state the university will redact personal e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Letter No. 684 (2009).² You claim some of the requested information is not subject to the Act. You also claim portions of the requested information are excepted from disclosure under

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

²Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

sections 552.101, 552.107, and 552.111 of the Government Code. You further state some of the information may implicate the proprietary interests of several third parties. Accordingly, you state and provide documentation showing, you have notified these interested third parties of this request and of their right to submit comments to this office as to why the information at issue should not be released.³ *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments from AACR. We have considered the submitted arguments and reviewed the submitted representative sample of information.⁴

You assert a portion of the submitted information is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

³The interested third parties are: Metamark Genetics, Inc. ("Metamark"); Aveo Oncology ("Aveo"); and the American Association of Cancer Research ("AACR").

⁴We 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 that those records contain substantially different types of information than that submitted to this office.

Id. § 552.002. Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us some of the information you have marked consists of personal exchanges or notes maintained by university employees that have no connection with the university's business and constitute incidental personal use of university resources by a university employee. You state the university's policy allows for incidental use of official resources by university employees. You further state the use of university resources to create and maintain the marked information was *de minimis*. See Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Based on your representations and our review of the information at issue, we agree the information you marked does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. See Gov't Code § 552.002. Therefore, we conclude the calendar notes you have marked are not subject to the Act and need not be released in response to the present request for information.⁵

Section 552.101 of the Government Code exempts 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 the following:

(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].

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 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 in relevant part that “[t]he governing body of a hospital, medical organization, university medical school or health

⁵As our ruling is dispositive for this information, we do not address your remaining arguments against its release.

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., 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). Further, 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 also McCown*, 927 S.W.2d at 10 (stating reference to statutory predecessor to section 160.007 of the Occupations Code in section 161.032 of the Health and Safety Code 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 McCown*, 927 S.W.2d at 9-10.

You assert portions of the submitted information are made confidential by section 161.032 of the Health and Safety Code as records of a medical committee. You state the information consists of records of the university’s Conflict of Interest Committee (the “committee”), which is charged with receiving disclosures of potential conflicts of interest from university faculty, trainees, and other employees, pursuant to the university’s conflict of interest policy. You further state the committee 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 the university or that serve another scholarly purpose. Upon review, we agree the committee is a “medical committee” for purposes of section 161.031. You inform us the information at issue was created by or at the direction of the committee for committee purposes. Accordingly, the university must withhold the information you have marked pertaining to the committee records under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

You also state a portion of the information you have marked consists of records and reports that were prepared by the university’s Chief Compliance Officer and presented to the university’s executive management. You inform us these reports were made in accordance with the university’s compliance program. We understand these documents were not made or maintained in the regular course of business. *Cf. Texarkana Mem’l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular

course of business). Based on your representations and our review, we conclude the information at issue consists of records, information, or reports of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Accordingly, the university must withhold the information you have marked pertaining to records of a compliance officer under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.⁶

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. 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)(A)-(E). 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).

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You claim a portion of the remaining information is excepted from disclosure under section 552.107(1) of the Government Code. You state the information at issue consists of communications between the university's attorney and employees, in their capacities as clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the university and these communications 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 you have marked. Thus, the university may withhold the information at issue under section 552.107(1) of the Government Code.⁷

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Metamark or Aveo explaining why the submitted information should not be released. Therefore, we have no basis to conclude Metamark or Aveo has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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 any of the remaining information on the basis of the proprietary interests Metamark or Aveo may have in the information.

AACR raises sections 552.101 and 552.110 of the Government Code for its portion of the remaining information. Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (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).

AACR claims the information at issue consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find AACR has demonstrated the information at issue constitutes commercial or financial information, the release of which would cause substantial

⁷As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

competitive injury. Accordingly, the university must withhold this information, which we have marked, under section 552.110(b) of the Government Code.⁸

In summary, we find the information you have marked under section 552.002 of the Government Code is not subject to the Act and the university is not required to release it in response to this request for information. 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 you have marked under section 552.107 of the Government Code. The university must withhold the information we have marked under section 552.110 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lana L. Freeman
Assistant Attorney General
Open Records Division

LLF/akg

Ref: ID# 507930

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁸As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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