



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2013

Ms. Ana Vieira
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-22231

Dear Ms. Vieira:

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# 509765 (OGC# 152537).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for e-mails sent and received by a named individual from January 1, 2009, to the date of the request. You claim portions of the submitted information are not subject to the Act. Alternatively, you claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, 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

¹We 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.

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.

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 e-mails that have no connection with the university's business and constitute incidental use of e-mail by university employees. You state the university's policy allows for incidental use of e-mail by employees and officials. 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 personal correspondence you have marked is not subject to the Act and need not be released in response to the present request for information.

Next, you contend that, pursuant to section 181.006 of the Health and Safety Code, the information you have marked is not subject to the Act. Section 181.006 states "for a covered entity that is a governmental unit, an individual's protected health information . . . is not public information and is not subject to disclosure under [the Act]." Health & Safety Code § 181.006(2). We will assume, without deciding, the university is a covered entity. Section 181.006(2) does not remove protected health information from the Act's application,

but rather states this information is “not public information and is not subject to disclosure under [the Act].” *Id.* We interpret this to mean a covered entity’s protected health information is subject to the Act’s application. Furthermore, this statute, when demonstrated to be applicable, makes the information it encompasses confidential. Thus, we will consider your arguments against disclosure of the information at issue.

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 the information you have marked consists of communications between university attorneys and university staff, in their capacity as clients. You state these communications were made in furtherance of the rendition of professional legal services to the university. You further state these communications have been kept confidential. Based on your

representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the university may withhold the information you have marked under section 552.107(1) of the Government Code.²

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 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, 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). You inform us you have marked information that relates to a complaint that was made to the university’s Director of Compliance who conducted an investigation into billing compliance matters in accordance with the university’s compliance program. You state the information at issue was created for and is part of the compliance file for the complaint at issue and is not 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 you have marked consists of records, information, or reports of a compliance officer acting under subchapter D of chapter 161 of the Health and Safety Code. Therefore, the university must withhold this

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

information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.³

You also argue the remaining information you have marked consists of medical committee documents subject to section 161.032 of the Health and Safety Code. Section 161.031(a) defines a “medical committee” as “any committee . . . of . . . a university medical school or health science center[.]” Health & Safety Code § 161.031(a)(3). Section 161.0315 provides “[t]he governing body of a hospital [or] university medical school or health science center . . . may form . . . a medical peer review committee, as defined by Section 151.002, Occupations Code, or 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 “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,” but does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *See Jordan*, 701 S.W.2d at 647-48; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to Health and Safety Code § 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 argue the remaining information you have marked consists of information prepared for or at the direction of the university’s Institutional Review Board (the “IRB”). The university states 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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

human subjects.”⁴ 21 C.F.R. § 56.102(g). We have previously found, on multiple occasions, the university’s IRB is a medical committee for purposes of section 161.032. Based on these representations and our review, we conclude 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.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which governs access to medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have also found when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Upon review, we find the remaining information consists of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by

⁴*See* 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).

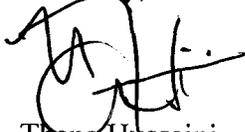
a physician or someone under the supervision of a physician. Therefore, the remaining information is subject to the MPA and must be withheld under section 552.101 of the Government Code.⁵

In summary, the personal correspondence you have marked is not subject to the Act and need not be released. The university may withhold the information you have marked under section 552.107(1) of the Government Code. The university must withhold the compliance officer information and medical committee 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 must withhold the remaining information under section 552.101 of the Government Code in conjunction with the MPA.

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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 509765

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.