



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 12, 2014

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

OR2014-04175

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# 516943 (University OGC# 153759).

The University of Texas of Southwestern Medical Center at Dallas (the "university") received a request for specified information pertaining to an investigation of the requestor's client. The university states it has made some of the requested information available to the requestor, but claims the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. The university also states, and provides documentation showing, it notified the Children's Health Services of Texas and the Children's Medical Center Research Institute at the university ("CRI") of the university's receipt of the request for information. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the university's claimed exceptions and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by CRI and the requestor. *See id.*

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.

Initially, we address CRI's assertion the submitted information is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 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.

Id. § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* ORD 499.

CRI states it is a private, not-for-profit corporation that specializes in the delivery of health care services to children. CRI further states it is not part of the university or the University of Texas System and physicians who practice at CRI do so as members of the independently organized CRI medical staff. CRI asserts "[a]ny documents created for CRI by [university] faculty members are created *solely* in their capacities as Members of CRI, not as employees or agents of [the university]." However, the university states the information implicated by the request "belongs only" to the university. Further, upon review, we find the submitted information relates to the transaction of official university business. Thus, we find the submitted information constitutes "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(a). Therefore, we conclude the submitted information is subject to the Act and the university must release it, unless the information falls within an exception to public disclosure under the Act.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Id. § 552.101. This section encompasses section 51.914 of the Education Code, which provides, in pertinent part, the following:

(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

...

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003 [of the Education Code].

Educ. Code § 51.914(a)(1)-(2), (b). As noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular scientific information has "a potential for being sold, traded, or licensed for a fee." ORD 651 at 9-10. Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* at 10. Thus, this office has stated in considering whether requested information has "a potential for being sold, traded, or licensed for a fee," we will rely on a governmental body's assertion that the information has this potential. *See id.* However, a governmental body's determination

that information has a potential for being sold, traded, or licensed for a fee is subject to judicial review. *See id.* We note section 51.914 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7.

You state the university is an institution of higher education for purposes of section 61.003(4) and (8) of the Education Code. *See* Educ. Code § 61.003(4), (8). You also state the information you have marked under section 51.914 contains the details of research conducted by university faculty, including information regarding the findings of the research. You assert this information contains scientific information as well as procedures and other information that relate to a product, device, or process developed by university employees. You further explain the information at issue describes experimentation and research that has the potential for being further sold, traded, or licensed for a fee and is, therefore, confidential pursuant to section 51.914(a). Additionally, you state the information at issue reveals data that is not yet published and may be or has been commercialized. You assert this information is excepted pursuant to section 51.914(b). Based on your representations and our review, we find you have demonstrated the applicability of section 51.914 of the Education Code to the information at issue. Accordingly, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.²

Section 552.101 of the Government Code also encompasses 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].

...

(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.

²As our ruling is dispositive, we do not address your other arguments to withhold this information.

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 university medical school or health science center [or] . . . a hospital district[.]” *Id.* § 161.031(a)(3), (6). Section 161.0315 provides “[t]he governing body of a hospital, medical organization, university medical school or health science center [or] hospital district . . . 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., 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. 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 section 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 contend the remaining information constitutes confidential records of the Investigative Committee for Scientific Misconduct (the “committee”), which is an ad hoc committee of the university. You explain the committee was created under the authority of the Dean of the university to investigate allegations of scientific misconduct by the requestor’s client. You explain the committee includes an associate dean, an assistant vice president of information security, and professors of the university. You also inform us the remaining information was prepared for or by the committee. Based on your representations and our review, we find you have established the committee constitutes a medical committee for purposes of section 161.032 of the Health and Safety Code. Accordingly, we find the remaining information constitutes records of a medical committee that are confidential under section 161.032 of the Health and Safety Code. Therefore, 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.³

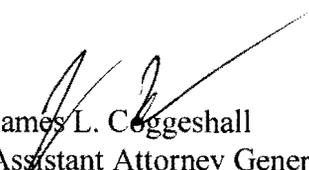
³As our ruling is dispositive, we need not address your remaining argument for this information.

To conclude, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. 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.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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 516943

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jeff Vawrinek
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(w/o enclosures)