



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2014

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

OR2014-17413

Dear Ms. Tynan:

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# 537887 (UT OGC# 156984).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for reports, final conclusions and recommendations, employee statements, and other documents that were reviewed as part of a specified internal investigation related to employee complaints, and all documents relating to the external audit or investigation of clinical trials performed at the university during a specified time period. 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 information. Additionally, we have considered comments from an interested third party. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released).

Initially, you inform us, and provide documentation showing, the university asked the requestor to clarify the portion of the request seeking all documents relating to the external audit or investigation of clinical trials performed at the university during a specified time period. *See id.* § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date

request is clarified). You state the university has not received a response to the request for clarification. Therefore, the university is not required to release any responsive information for which it sought clarification. But if the requestor responds to the clarification request, the university must seek a ruling from this office before withholding any responsive information from the requestor. *See Gov't Code § 552.222; City of Dallas, 304 S.W.3d at 387.*

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:

(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(c), (f). You state the information you have marked pertains to complaints directed to the university's Office of Institutional Compliance (“OIC”), which conducted an internal compliance investigation in accordance with the university's compliance program. You state the information at issue was created, received, or maintained as part of the OIC's compliance file for the complaints at issue and it 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. Accordingly, the university must withhold the information you have marked under section 552.101 in conjunction with section 161.032.¹

Section 552.101 of the Government Code also encompasses section 51.971 of the Education Code. Section 51.971 provides, in relevant part, the following:

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(a) In this section:

(1) "Compliance program" means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

(D) auditing.

(2) "Institution of higher education" has the meaning assigned by Section 61.003.

...

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)-(d). You state the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You explain the remaining information consists of a completed compliance investigation conducted by the university's Office of Human Resources pertaining to ethical questions and the standard of conduct by certain university employees. You further state the investigation was initiated

in response to allegations of retaliation against a university employee in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based upon your representations, we find the information at issue relates to an investigation conducted under the university's compliance program for the purposes of section 51.971. *See id.* § 51.971(a).

You state the investigation at issue concluded in a determination the complaint was unsubstantiated. Upon review, we agree portions of the information at issue directly or indirectly identify an individual as a complainant in the compliance program investigation and identify individuals alleged to have committed the activity that is the subject of the unsubstantiated complaint. *See id.* § 51.971(c). You state these individuals have not consented to release of their information. Accordingly, we conclude the university must withhold the information we have marked under section 552.101 in conjunction with section 51.971(c).² However, you have failed to demonstrate how the remaining information identifies a complainant, an individual who sought guidance from the compliance program office, a participant in the investigation, or an individual alleged to have planned, initiated, or participated in the activity which is the subject of the complaint for purposes of section 51.971(c). Consequently, no portion of the remaining information may be withheld under section 552.101 in conjunction with section 51.971(c).

Section 552.101 of the Government Code also encompasses the doctrines of constitutional and common-law privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

Common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.,*

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

Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

You assert the remaining information is protected under constitutional and common-law privacy. Upon review, however, we find you have not demonstrated the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interests for the purposes of constitutional privacy. We also find you have failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern. We therefore conclude the university may not withhold the remaining information under section 552.101 of the Government Code in conjunction with constitutional or common-law privacy.

In summary, 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 must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code. The university must release the remaining information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 537887

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)