



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2005

Mr. Jeffrey S. Young
Associate General Counsel
Texas Tech University System
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OR2005-10421

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 236490.

Texas Tech University Health Sciences Center (the "center") received a request for information pertaining to the financial investigation of the obstetrics and gynecology department, including information pertaining to a former employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.116, 552.117, and 552.130 of the Government Code.¹ You also state that the release of some of the submitted information may implicate the proprietary interests of GSK, Ortho-McNeil Pharmaceuticals, Inc. ("Ortho-McNeil"), Personal Products Company "Personal Products"), PharmaNet, Inc. ("PharmaNet"), and TAP Pharmaceutical Products, Inc. ("TAP"). You inform us that you have notified these interested third parties of the center's receipt of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

¹You have marked a portion of the submitted information that you state is not responsive to the request. Thus, this decision is not applicable to this information and you need not release it.

We note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, GSK, Ortho-McNeil, Personal Products, PharmaNet, and TAP have not submitted to this office their reasons explaining why the requested information relating to them should not be released. Consequently, these companies have provided this office with no basis to conclude that their responsive information is excepted from disclosure. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that you may not withhold any portion of the submitted information relating to these companies on the basis of their proprietary interests.

We note that some of the requested information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The center must release the information that is subject to section 552.022(a)(3) unless it is expressly confidential under other law. You argue that this information is excepted from disclosure under section 552.108 of the Government Code. However, section 552.108 is discretionary and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the center may not withhold the information subject to section 552.022 under section 552.108 of the Government Code. You also seek to withhold the information that is subject to section 552.022 under section 552.101. Section 552.101 constitutes other law for purposes of section 552.022; therefore, we will address whether this section requires you to withhold any of the information at issue.

The center raises the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, for some of the information subject to section 552.022. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued

as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has previously addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the center may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. Gov’t Code § 552.101. You contend that the information subject to section 552.022 is confidential pursuant to section 51.914 of the Education Code, which provides in pertinent part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, 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[.]

(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[.]

Educ. Code § 51.914(1), (2). The purpose of section 51.914(1) is to protect the “actual or potential value” of technological and scientific information developed in whole or in part at a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting statutory predecessor to section 51.914). 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* Open Records Decision No. 651 (1997). Thus, this office has stated that 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 representation that the information has this potential. *See id.*

In this case, you represent that the information at issue pertains to several clinical research studies being conducted by the center. We understand you to assert that the information gained from these studies has the potential to be sold, traded, or licensed for a fee. We note, however, that the information at issue is tangential to the proposed research. You have not explained, nor can we discern, how the release of this information would reveal the details of the research at issue. *See* Open Records Decision No. 497 (1988) (stating that information related to research is not protected if it does not reveal details about research). Accordingly, the center may not withhold the information at issue under section 552.101 in conjunction with section 51.914.

You also raise section 552.101 in conjunction with section 161.032 of the Health and Safety Code for some of the information subject to section 552.022. Section 161.032 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 . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

....

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital

Health & Safety Code § 161.0315(a), (c), (f). Section 161.031(a) defines a “medical committee” as “any committee . . . of (3) a university medical school or health science center” Health & Safety Code § 161.031(a). Section 161.031(b) provides that the “term includes 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.” Health & Safety Code § 161.031(b). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical organization [or] university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services” Health & Safety Code § 161.0315(a).

You inform us that the center’s Institutional Review Board (the “IRB”) is a committee established pursuant to federal law.² Federal regulations define an IRB as

any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects. The primary purpose of such review is to assure the protection of the rights and welfare of the human subjects

21 C.F.R § 56.102(g). Thus, we conclude that the center’s IRB is a medical committee created pursuant to federal law, and consequently, the IRB falls within the definition of “medical committee” set forth in section 161.031 of the Health and Safety Code.

Although we find that the IRB is a medical committee, we conclude that the information at issue constitute records made or maintained by the center in the regular course of business, and therefore may not be withheld under section 161.032. *See Memorial Hosp. - The Woodlands v. McCown*, 927 S.W.2d (Tex. 1996) (holding that statutory language “records made or maintained in the regular course of business” meant “records kept in connection with the treatment of [a hospital’s] individual patients as well as the business and administrative files and papers apart from committee deliberations.”). Accordingly, no

² 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).

portion of the information at issue may be withheld under section 552.101 of the Government Code in conjunction with 161.032 of the Health and Safety Code.

The center additionally asserts that some of the information subject to section 552.022 constitutes medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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.

Occ. Code § 159.002(b),(c). After reviewing your arguments and the information at issue, we find that you have not demonstrated that any of the records were created by a physician or by someone under the supervision of a physician. *See* Occ. Code § 159.002(b). Thus, we conclude that the center may not withhold any of the information at issue pursuant to the MPA.

The center also raises section 552.101 of the Government Code in conjunction with common law privacy for some of the information subject to section 552.022. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that the center must withhold under section 552.101 in conjunction with common law privacy. The center may not withhold the remaining information that is subject to section 552.022 under section 552.101 on this basis.

We note that the remaining information subject to section 552.022 contains account numbers which are excepted from disclosure under section 552.136 of the Government Code.³ Section 552.136 in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. The center must withhold the account number information that we have marked in the information at issue pursuant to section 552.136 of the Government Code.

We now turn to your arguments under sections 552.108 and 552.116. Section 552.116 provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

- (1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

³The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the center is both a state agency and an institution of higher education as defined by section 61.003 of the Education Code. You explain the information in Exhibit G consists of audit working papers and other documents that were obtained or prepared in connection with an audit of the accounting and financial practices of a named individual and that the audit deals with quality assurance and economy/efficiency components. Finally, you state the center's Office of Audit Services conducted the audit and that the documents at issue were prepared or obtained pursuant to section 2102.007(a) of the Government Code. Accordingly, we conclude that the information in Exhibit G constitutes audit working papers under section 552.116(b)(2) and is, thus, excepted from disclosure pursuant to section 552.116 of the Government Code.

Finally, section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Gov't Code § 552.108(a)(1). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. The center is not a law enforcement agency. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement agency wishes to withhold the information.

In this case, you state that the remaining information not subject to section 552.022 pertains to an ongoing criminal investigation. You have provided a letter from the Amarillo Police Department stating that it does not want any information about this investigation released at this time. Based on these representations and our review, we find that release of the information at issue would interfere with the detection, investigation, or prosecution of crime. We therefore conclude that the center may withhold this information pursuant to section 552.108(a)(1) of the Government Code. As our ruling is dispositive, we need not address your remaining claims for this information.

In summary, the center must withhold the information we have marked under section 552.101 on the basis of common law privacy and section 552.136. The center may withhold the information in Exhibit G under section 552.116. The center may withhold the remaining information that is not subject to section 552.022 pursuant to section 552.108. The remaining information subject to section 552.022 must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

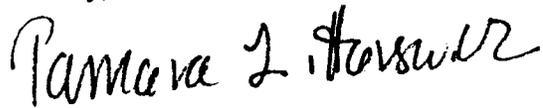
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Tamara L. Harswick
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Open Records Division

TLH/sdk

Ref: ID# 236490

Enc. Submitted documents

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