



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 11, 2007

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2007-00489

Dear Ms. Longoria:

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# 268931.

The University of Texas Medical Branch at Galveston ("UTMB") received a request for ten categories of information concerning the UTMB Institutional Biosafety Committee; notifications of use involving biosafety considerations; records of occupational exposures and/or laboratory-acquired infections; Dr. Stanley Lemon's participation on the National Science Advisory Board for Biosecurity; meetings of the New England biodefense regional center of excellence; correspondence with the Southwest Foundation for Biomedical Research and with Dr. Rick Lyons; research contracts with other institutions; and other matters.¹ You inform us that UTMB will release some of the requested information. You state that UTMB will withhold social security numbers under section 552.147 of the Government Code.² You also state that some of the responsive information is the subject of prior open records letter rulings. You have submitted information that UTMB seeks to

¹You inform us that UTMB sought and obtained clarification of portions of this request. *See* Gov't Code § 552.222(b); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which communications with requestor to clarify or narrow request for information toll governmental body's deadlines under Gov't Code § 552.301). We note that item number 10 of the request has been withdrawn.

²Section 552.147 provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147. Section 552.147(b) authorizes a governmental body to withhold a living person's social security number from public release without the necessity of asking this office from a decision under the Act.

withhold under sections 552.101, 552.111, 552.117, and 552.137 of the Government Code. You also believe that some of the submitted information implicates the interests of third parties. You notified the interested parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.³ We received correspondence from Ambion, Inc. (“Ambion”); Baylor College of Medicine (“Baylor”); and the Southwest Foundation for Biomedical Research (“SFBR”).⁴ We also received comments from the requestor.⁵ We have considered all of the submitted arguments and have reviewed the submitted information.⁶

You inform us that some of the requested information is the subject of Open Records Letter Nos. 2006-7158 (2006), 2006-5968 (2006), and 2003-3283 (2003). Provided that there has been no change in the law, facts, and circumstances on which the previous rulings are based, we conclude that UTMB may continue to rely on Open Records Letter Nos. 2006-7158, 2006-5968, and 2003-3283 with respect to the requested information that is the subject of those rulings. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov’t Code § 552.301(a)).

Baylor asserts that certain information is not responsive to this request. Baylor contends that the request does not encompass information concerning a grant application that Baylor submitted to UTMB. UTMB represents to this office, however, that the submitted information is responsive to the request, as clarified and narrowed. *See* Open Records Decision No. 561 at 8-9 (1990) (governmental body must make good-faith effort to relate request to information that is within its possession or control). Therefore, to the extent that UTMB has submitted any records that relate to the grant application in question, we will address the public availability of such information.

We next note that an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, this office has

³*See* Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov’t Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

⁴We note that Baylor and the Foundation have submitted information that they seek to have withheld from disclosure. This decision addresses only the information that UTMB submitted to this office. *See* Gov’t Code § 552.301(e)(1)(D).

⁵*See* Gov’t Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

⁶This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes UTMB to withhold any information that is substantially different from the submitted information. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

received no correspondence from the Canadian Science Centre for Human and Animal Health; the National Institute of Allergy and Infectious Diseases; the National Institutes of Health; the Swedish Institute for Infectious Disease Control; the Tulane National Primate Research Center; the University of Maryland School of Medicine Center for Vaccine Development; Dr. C. Richard Lyons of the University of New Mexico; or the University of Texas at Austin Department of Chemistry and Biochemistry. Thus, none of those parties has demonstrated that any of the submitted information is confidential or proprietary for the purposes of the Act, and UTMB may not withhold any of the information at issue on the basis of any interest that any of those parties may claim in the information. *See* Gov't Code §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We also note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Education Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.⁷ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). Among other things, you have submitted a redacted education record for our review. We will consider the submitted arguments against disclosure of that document and the rest of the submitted information.⁸

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." Gov't Code § 552.101. UTMB asserts that information encompassed by item 6 of the request is confidential under section 2634.604 of title 5 of the Code of Federal Regulations.⁹ Part 2634 of subchapter B of chapter XVI of title 5 relates to executive branch financial disclosure. Section 2634.604 provides in part:

(b) The reports filed pursuant to subpart I of this part are confidential. No member of the public shall have access to such reports, except pursuant to the order of a federal court or as otherwise provided under the Privacy Act.[]

⁷A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

⁸In the future, if UTMB does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

⁹We note that a federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

5 C.F.R. § 2634.604(b); *see also id.* § 2634.901(d) (reports required to be filed pursuant to subpart I are required to be withheld from public pursuant to section 107(a) of Ethics in Government Act); 5 U.S.C. App. 4 § 107(a)(2) (“Any information required to be provided by an individual under [section 107(a)] shall be confidential and shall not be disclosed to the public.”); *Glascoe v. U.S. Dep’t of Justice*, ___ F.Supp.2d ___, 2005 WL 1139269 (D.D.C. May 15, 2005) (noting confidentiality of conflict of interest certification under 5 C.F.R. § 2634.604(b) and section 107(a) of Ethics in Government Act). Based on your arguments and our review of the information in question, we agree that the submitted “Executive Branch Confidential Financial Disclosure Report” is made confidential by federal law and must be withheld from disclosure under section 552.101 of the Government Code. We have marked that information accordingly.

UTMB also claims that information encompassed by item 5 of the request is confidential under section 552.101 in conjunction with sections 402.083 through 402.092 of the Labor Code.¹⁰ Section 402.083(a) of the Labor Code provides that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Division of Workers’ Compensation of the Texas Department of Insurance (the “division”)] except as provided by this subtitle[.]” Labor Code § 402.083(a). In Open Records Decision No. 533 (1989), the City of Brownsville had received a request for similar information. This office construed the predecessor to section 402.083(a) to apply only to information that the governmental body obtained from the Industrial Accident Board, subsequently the Texas Workers’ Compensation Commission and now the division. *See* Open Records Decision No. 533 at 3-6; *see also* Labor Code § 402.086 (transferring confidentiality conferred by Labor Code § 402.083(a) to information that other parties obtain from division files). Accordingly, information in the possession of UTMB that was not obtained from the division may not be withheld on the basis of section 402.083(a). You do not indicate, and it does not otherwise appear to this office, that UTMB obtained any of the information at issue from the division. Therefore, UTMB may not withhold any of that information under section 552.101 of the Government Code in conjunction with section 402.083(a) of the Labor Code.

Section 402.092 of the Labor Code provides confidentiality and exceptions to confidentiality for the division’s investigation files. Section 402.092 provides in relevant part:

- (a) In this section, “investigation file” means any information compiled or maintained by the division with respect to a division investigation under this subtitle or other workers’ compensation law.[.]
- (b) Information maintained in the investigation files of the division is confidential and may not be disclosed except [in five specified situations].

¹⁰UTMB also cites to section 503.002 of the Labor Code. Chapter 503 of the Labor Code provides for workers’ compensation insurance coverage for employees of the University of Texas System and institutions of the system. Section 503.002 provides that other provisions of the Labor Code, including chapter 402, are generally applicable to and included in chapter 503.

Labor Code § 402.092(a)-(b). You do not indicate, and it does not otherwise appear to this office, that any of the information that UTMB seeks to withhold is maintained in the division's investigation files. Therefore, none of the information at issue is confidential under section 402.092 of the Labor Code, and UTMB may not withhold any of the information on that basis under section 552.101.¹¹

We note, however, that some of the information in question is confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(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(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the submitted information that is confidential under the MPA. UTMB must not release that information unless it has authorization under the MPA to do so. *See* Open Records Decision No. 598 (1991).¹²

UTMB also contends that some of the submitted information is confidential under section 161.032 of the Health and Safety Code. Section 161.032(a) makes confidential the

¹¹Although UTMB also seeks to withhold the information encompassed by item number 5 of the request under sections 402.084, 402.085, 402.086, 402.087, 402.088, 402.089, 402.090, and 402.091 of the Labor Code, you do not indicate how or why any of those statutes makes information confidential for the purposes of section 552.101 of the Government Code. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why stated exception to disclosure applies).

¹²We note that the requestor does not seek access to the names of the individuals who are the subjects of the remaining information at issue. Therefore, we need not consider whether any of the remaining information would otherwise be protected by common-law privacy under section 552.101. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976); Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

“records and proceedings of a medical committee.” Health & Safety Code § 161.032(a). A “medical committee” is defined as any committee, including a joint committee of a hospital, medical organization, university medical school or health science center, health maintenance organization, or extended care facility. *See id.* § 161.031(a). The term also encompasses “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.” *Id.* § 161.031(b).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996)(orig. proceeding); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988)(orig. proceeding); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986)(orig. proceeding); *Hood v. Phillips*, 554 S.W.2d 160 (Tex.1977); *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977) (orig. proceeding); *McAllen Methodist Hosp. v. Ramirez*, 855 S.W.2d 195 (Tex. App. – Corpus Christi 1993, orig. proceeding), *overruled on other grounds by, Memorial Hosp.-The Woodlands v. McCown*,927 S.W.2d 1 (Tex. 1996); *Doctor’s Hosp. v. West*, 765 S.W.2d 812 (Tex.App.—Houston [1st Dist.] 1988) (orig. proceeding); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex.App. – Fort Worth 1988) (orig. proceeding). 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 things, statutory predecessor to Health & Safety Code § 161.032).

UTMB claims that section 161.032(a) encompasses information that is responsive to items 8 and 9 of the request. You state that the information in question consists of records of medical committees. Having considered your arguments and reviewed the information in question, we conclude that you have not demonstrated that any of the information was “prepared by or at the direction of [a medical committee of UTMB] for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. Therefore, the information at issue is not confidential under section 161.032 of the Health and Safety Code and may not be withheld on that basis under section 552.101.

UTMB also raises section 552.101 in conjunction with section 51.914 of the Education Code. Section 51.914 provides in relevant part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be 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[.]

Educ. Code § 51.914(1)-(2). 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.” 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.* 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 university’s assertion that the information has this potential. *See id.* *But see id.* at 10 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.194 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 (1988). Moreover, section 51.914 is applicable only to information “developed in whole or in part at a state institution of higher education.” Educ. Code § 51.914(1).

UTMB seeks to withhold information encompassed by items 4, 8, and 9 of the request on the basis of section 51.914. You inform us that the information at issue concerns procedures, scope of work, and testing locations that relate to a product, device, or process developed by UTMB researchers. You assert that the information at issue reveals the substance of the research. You state that such information has the potential for being sold, traded, or licensed for a fee. Based on your representations and our review of the information in question, we conclude that some of the information falls within the scope of the statute. That information, which we have marked, is confidential under section 51.914 and must be withheld under section 552.101.

Along with SFBR, UTMB also contends that some of the submitted information is confidential under section 552.101 in conjunction with section 418.178 of the Government Code. Section 418.178, as added to chapter 418 of the Government Code as part of the Texas Homeland Security Act, provides as follows:

(a) In this section, “explosive weapon” has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Gov’t Code § 418.178. The fact that information may generally relate to biological toxins does not make the information *per se* confidential under section 418.178. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting section 418.178 must adequately explain how the responsive records fall within the scope of that provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

UTMB asserts that section 418.178 is applicable to information encompassed by items 4, 8, and 9 of the request. You contend that some of the information in question reveals the location of biological agents or toxins that have potential for use in terrorist plots and thus is protected by section 418.178(b)(2)(B). You also argue that section 418.178(b)(2)(B) encompasses responsive information that relates to antidote research for exposure to certain bio-toxins. SFBR contends that the names of biological agents and/or toxins and of employees conducting research concerning potential vaccines are protected by section 418.178(b)(2). We note that section 418.178 is applicable only to (1) information that is more than likely to assist in the construction or assembly of an explosive weapon or weapon of mass destruction and (2) information indicating the specific location of certain materials that are potentially useful in constructing or assembling such a weapon or of unpublished information relating to a potential vaccine or a device that detects biological agents or toxins. We have marked information revealing the location of toxins that is confidential under section 418.178 of the Government Code and must therefore be withheld under section 552.101. As neither UTMB nor SFBR has explained how or why section 418.178 encompasses any of the remaining information at issue, UTMB may not withhold any other information on that basis.

UTMB, Ambion, and SFBR also assert that some of the submitted information is protected by the federal Freedom of Information Act (“FOIA”). UTMB seeks to withhold information encompassed by items 8 and 9 of the request on the basis of section 52h of title 42 of the Code of Federal Regulations. Section 52h.6 provides in part that

[d]ocuments made available to, or prepared for or by peer review groups that contain trade secrets or commercial or financial information obtained from a person that is privileged or confidential, and personal information concerning individuals associated with applications or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, are exempt from disclosure in accordance with [FOIA].

42 C.F.R. § 52h.6(b). Ambion asserts that certain information should be withheld under section 2305 of title 10 of the United States Code, which provides in part that “a proposal in the possession or control of an agency named in section 2303 of this title may not be made available to any person under [FOIA].” 10 U.S.C. § 2305(g). SFBR argues that grant applications are protected by FOIA under regulations found at part 5 of subtitle A of title 45 of the Code of Federal Regulations. *See* 45 C.F.R. § 5.1 (“This part contains the rules that the Department of Health and Human Services (HHS) follows in handling requests for records under [FOIA].”). In Open Records Decision No. 561 (1990), we noted that as a general rule, FOIA is applicable only to federal agencies and does not apply to records held by agencies of the State of Texas. *See id.* at 6; *see also Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Attorney General Opinion MW-95 (1979) (neither FOIA nor the federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (fact that information held by federal agency is exempted under FOIA does not necessarily mean that same information is exempted under the Act when held by Texas governmental body). Therefore, having considered the parties’ arguments and reviewed the information in question, we conclude that UTMB may not withhold any of that information on the basis of FOIA.

Along with Baylor, Ambion also raises section 552.104 of the Government Code. Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the interests of governmental bodies such as UTMB and not those of third parties such as Ambion and Baylor. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Moreover, section 552.104 is a discretionary exception to disclosure that a governmental body may waive. *See* Gov’t Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to Gov’t Code § 552.104 subject to waiver). Because UTMB has not claimed an exception to disclosure under section 552.104, it may not withhold any of the submitted information on the basis of that exception.

Both Ambion and Baylor also raise section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential

by statute or judicial decision,” and (2) “commercial 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(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.¹³ *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret, and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

¹³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) 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. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having considered the parties arguments, we conclude that neither Ambion nor Baylor has demonstrated that any of the submitted information constitutes a trade secret under section 552.110(a). Likewise, neither Ambion nor Baylor has demonstrated that any of the submitted information is protected by section 552.110(b). Therefore, UTMB may not withhold any of the submitted information under section 552.110.

Baylor also argues that certain salary information is protected by the common-law right to privacy under section 552.101 of the Government Code. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body). Baylor has not demonstrated that any of the submitted information is protected by common-law privacy under section 552.101, and UTMB may not withhold any information on that basis.

Next, we address UTMB's claim under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's

policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See Open Records Decision No. 631 at 3 (1995)*. Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See Open Records Decision No. 615 at 5*. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See Open Records Decision No. 313 at 3 (1982)*.

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See Open Records Decision No. 559 at 2 (1990)* (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

UTMB argues that section 552.111 is applicable to information encompassed by item 6 of the request. You inform us that the information at issue relates to communications involving Dr. Stanley Lemon, UTMB's Director of the Institute for Human Infections and Immunity, in his capacity as a voting member of the National Science Advisory Board for Biosecurity (the "NSABB"). You explain that this information "captures exchanges whereby advice, recommendations and opinions are generated between NSABB board members, including Dr. Lemon, as part of their function to assist in the creation of broad-based public policy." We note that section 552.111 "is intended to protect from public disclosure advice and opinions on policy matters and to encourage frank discussion within an agency, or between agencies, in connection with the decision making process." *See Open Records Decision No. 561 at 9 (1990)*. Having considered your arguments, we conclude that you have failed to demonstrate that the information at issue relates to a policymaking process within UTMB or with another entity with which UTMB shares a common deliberative process or privity of interest. *See id.* (statutory predecessor to Gov't Code § 552.111 not applicable to communication between Federal Bureau of Investigation and City of Pearland). We therefore conclude that UTMB may not withhold any of the submitted information under section 552.111.

UTMB also raises section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental

body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential.

You raise section 552.117 with respect to information encompassed by item 9 of the request. We note, however, that the information in question does not relate to officials or employees of UTMB. Therefore, section 552.117(a)(1) is not applicable to any of that information. However, UTMB may be required to withhold the information that we have marked at Tabs 5 and 7 under section 552.117(a)(1). To the extent that it consists of the home address, home telephone number, or family member information of a UTMB official or employee who timely requested confidentiality under section 552.024, the marked information must be withheld under section 552.117(a)(1).

UTMB also raises section 552.137 of the Government Code. This section states in part that "[e]xcept as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter." Gov't Code § 552.137(a). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the owner of the e-mail address has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked samples of the types of e-mail addresses that UTMB must withhold under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its public disclosure.

Lastly, we note that some of the remaining information is protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) provided that there has been no change in the law, facts, and circumstances on which the previous rulings are based, UTMB may continue to rely on Open Records Letter Nos. 2006-7158, 2006-5968, and 2003-3283 with respect to the requested information that is the subject of those rulings; (2) UTMB must withhold the marked "Executive Branch Confidential Financial Disclosure Report" under section 552.101 of the Government Code in conjunction with federal law; (3) UTMB must not release the marked information that is confidential under the MPA unless it has authorization under the MPA to do so; (4) UTMB must withhold the information that is confidential under section 552.101 in conjunction with section 51.914 of the Education Code and section 418.178 of the Government Code; (5) UTMB must withhold the information that we have marked under section 552.117(a)(1) of the Government Code, to the extent that it consists of the home address, home telephone number, or family member information of a UTMB official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code; and (6) UTMB must withhold the types of e-mail addresses that we have marked under section 552.137 of the Government Code unless the owner of an e-mail address has affirmatively consented to its disclosure. The rest of the submitted information must be released. Information that is protected by copyright must be released in accordance with copyright law.¹⁴ This ruling does not address the applicability of FERPA to the submitted information. Should UTMB determine that all or portions of the submitted information consists of "education records" subject to FERPA, UTMB must dispose of that information in accordance with FERPA, rather than the Act.

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

¹⁴As we are able to make these determinations, we need not address the other submitted arguments against disclosure.

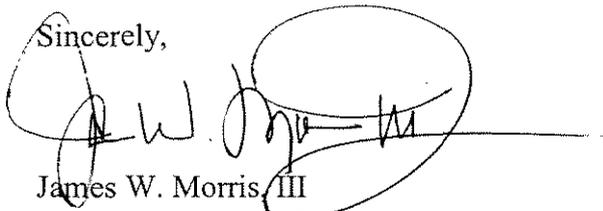
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', is written over a horizontal line. The signature is enclosed in a large, hand-drawn oval.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jww

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