

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2007

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

OR2007-06539

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# 280214.

The University of Texas Medical Branch at Galveston ("UTMB") received a request for four categories of information involving a specified time interval and concerning (1) notifications of use involving biosafety considerations; (2) possible or actual occupational exposures and/or laboratory-acquired infections with RG2 or higher agents; (3) Dr. Stanley Lemon's participation on the National Science Advisory Board for Biosecurity; and (4) meetings of the New England biodefense regional center of excellence. You inform us that UTMB has no information that is responsive to item 4.¹ You state that UTMB will release information that is responsive to item 2. You claim that information encompassed by items 1 and 3 is excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

information you submitted.² We also have considered the comments that we received from the requestor.³

We begin with section 552.103 of the Government Code, as it is the most inclusive exception you raise. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You base your claim under section 552.103 on a pending lawsuit styled *The University of Texas Medical Branch at Galveston and the University of Texas System v. Greg Abbott*, No. GV-07-000146, 419th District Court, Travis County (“*UTMB v. Abbott*”). In *UTMB v. Abbott*, UTMB and the University of Texas System are challenging an open records letter

²This letter ruling assumes that the submitted representative sample of information is 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).*

³*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).*

ruling that was previously issued to UTMB by this office. You contend that section 552.103 is applicable to the submitted information because *UTMB v. Abbott* was pending when UTMB received the instant request for information and because you contend that the submitted information is “identical in nature” to the information at issue in the lawsuit. You do not claim, however, that any of the submitted information is actually at issue in *UTMB v. Abbott*. Likewise, you have not otherwise explained how or why any of the submitted information is related to *UTMB v. Abbott* for the purposes of section 552.103. See Gov’t Code § 552.103(a); Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation for purposes of Gov’t Code § 552.103), 511 at 2 (1988) (information “relates” to litigation for purposes of Gov’t Code § 552.103 if its release would impair governmental body’s litigation interests). Therefore, having considered your arguments, we conclude that UTMB may not withhold any of the submitted information under section 552.103 of the Government Code.

Next, we address the other exceptions you claim. 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. This exception encompasses information that other statutes make confidential. You contend 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 “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*, *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 statutory predecessor to Health & Safety Code § 161.032).

You have marked the submitted information that UTMB seeks to withhold under section 161.032. You state that the marked information consists of records of UTMB's Institutional Animal Care and Use Committee (the "IACUC"). You explain that the IACUC oversees and approves certain research protocols. Based on your representations, we agree that the IACUC is a "medical committee" for the purposes of section 161.032. Therefore, having considered your arguments and reviewed the marked information, we conclude that UTMB must withhold that information under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.

You also raise section 552.101 in conjunction with section 51.914 of the Education Code, which provides in 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 51.914 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 (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).

You have marked the information that UTMB seeks to withhold under section 51.914. You state that the marked information relates to a product, device, or process developed by UTMB researchers that has the potential for being sold, traded, or licensed for a fee. You assert that the marked information reveals the substance of the research. Based on your representations and our review of the marked information, we conclude that UTMB must withhold that information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

You also seek to withhold some of the submitted information under 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).

You have marked the information that UTMB seeks to withhold under section 418.178. You state that the marked information reveals the specific location of biological toxins that have the potential for use in the construction or assembly of a weapon of mass destruction. Based on your representations and our review of the marked information, we conclude that UTMB must withhold that information, as well as one other item of information that we have marked, under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code.

Section 552.111 of the Government Code 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, 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.

You seek to withhold the information at Tab 8 under section 552.111. 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 assert 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." You argue that

NSABB members have an obligation to vet concerns or questions that may arise as a result of proposed policies. When UTMB has an affiliation through an investment of time, money and/or staff in these same processes, we also have an interest to protect; thus we share a privity of interest with the goals promulgated by the NSABB.

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." Open Records Decision No. 561 at 9 (1990). Having considered your arguments, we conclude that you have failed to demonstrate that the information at Tab 8 relates to a policymaking process within UTMB. Likewise, we conclude that you have failed to demonstrate that UTMB shares a common deliberative process or privity of interest with the NSABB for the purposes of section 552.111. *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 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from 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 indicate that some of the remaining information is related to current or former UTMB employees who requested confidentiality for the information under section 552.024. However, you do not indicate whether or to what extent the employees in question did so prior to UTMB's receipt of the instant request for information. Nevertheless, we have marked information that UTMB must withhold under section 552.117(a)(1) to the extent that the marked information relates to employees who timely requested confidentiality for that information under section 552.024.

We note that section 552.137 of the Government Code is applicable to some of the remaining information.⁴ Section 552.137 states in part that "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," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(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 the types of e-mail addresses that UTMB must withhold under section 552.137 unless the owner of the e-mail address has affirmatively consented to its public disclosure.

We also note that some of the remaining information appears to be 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) UTMB must withhold the information that you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code; (2) UTMB must withhold the information that you have marked under section 552.101 in conjunction with section 51.914 of the Education Code; (3) UTMB must withhold the information that you have marked, along with the information that we have marked, under section 552.101 in conjunction with section 418.178 of the Government Code;

⁴Unlike other exceptions to disclosure, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(4) UTMB must withhold the information that we have marked under section 552.117(a)(1) of the Government Code to the extent that the marked information relates to employees who timely requested confidentiality for that information under section 552.024 of the Government Code; and (5) 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 the e-mail address has affirmatively consented to its public disclosure. The rest of the submitted information must be released. Information that is protected by copyright must be released in accordance with copyright law.

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).

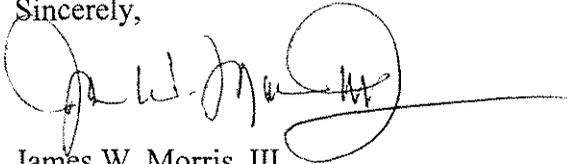
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a long horizontal line extending to the right.

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

JWM/ma

Ref: ID# 280214

Enc: Submitted documents

c: Mr. Edward Hammond
The Sunshine Project
1920 Stuart Street
Berkeley, California 94703
(w/o enclosures)

THE UNIVERSITY OF TEXAS MEDICAL
BRANCH AT GALVESTON AND THE
UNIVERSITY OF TEXAS SYSTEM,
Plaintiffs,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF THE STATE OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§
§ 201ST JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas
MAY 27 2010 TH
2:10 P.M.
At Amalia Rodriguez-Mendoza, Clerk

FINAL JUDGMENT

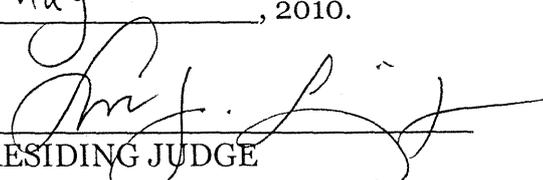
On this date, the Court heard Plaintiffs' motion for summary judgment. Plaintiffs The University of Texas Medical Branch at Galveston and the University of Texas System and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys. Defendant does not oppose the motion for summary judgment and has not filed a response. This cause is an action under the Public Information Act (PIA), Chapter 552 of the Government Code. Plaintiffs provided notice of the hearing to the requestor. After considering the motion and summary judgment evidence, the Court is of the opinion that Plaintiffs are entitled to summary judgment, as there is no issue of disputed fact and Plaintiffs are entitled to judgment as a matter of law.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Plaintiffs' motion for summary judgment is granted;
2. The information at issue in this lawsuit and the subject of Plaintiffs' motion for summary judgment is not "public information" under the PIA, and Plaintiffs are not required to disclose it to the requestor;
3. All costs of court are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and

5. This Final Judgment finally disposes of all claims between Plaintiffs and Defendant and is a final judgment.

SIGNED this the 27th day of May, 2010.


PRESIDING JUDGE

APPROVED AS TO FORM AND SUBSTANCE:


ANN HARTLEY
Assistant Attorney General
Financial Litigation Division
Office of the Attorney General of Texas
William P. Clements Building, 6th Floor
300 West 15th Street
Austin, Texas 78701
Telephone: 936-1313
Fax: 477-2348
State Bar No. 09157700

ATTORNEY FOR PLAINTIFFS


BRENDA LOUDERMILK
Chief, Open Records Litigation
Administrative Law Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: 475-4292
Fax: 320-0167
State Bar No. 12585600

ATTORNEY FOR DEFENDANT