



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 25, 2009

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-03868

Dear Ms. Chatterjee:

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# 338083.

The University of Texas Medical Branch at Galveston ("UTMB") received a request for four categories of information related to the use of animals in research conducted by named doctors including (1) all research protocols approved by UTMB's Institutional Animal Care and Use Committee (the "IACUC"); (2) all protocol revision request forms submitted to the IACUC; (3) all photographic and videographic records; and (4) all noncompliance complaints, morbidity/mortality reports, and IACUC investigation notes and reports. You inform us that UTMB has no videographic records that are responsive to item 3 of the request.¹ You state that UTMB will release the morbidity/mortality reports that are responsive to part of item 4 of the request. You also state that you are redacting responsive

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).

documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).² You claim that the remaining responsive information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.³ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, we note, and you acknowledge, that you have redacted names and research protocol identifying numbers from the information submitted in Tab 5D. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). You state these redactions correspond to redactions that were required by the Office of Lab and Animal Welfare ("OLAW"), however, OLAW's requirements do not authorize UTMB to withhold this information from our office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000) (a previous determination by this office is the single exception to the requirements set forth in section 552.301(a)). As such, this type of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure; thus, a copy of the original document without any redactions should have been submitted for our review. Because we are able to discern the nature of the redacted information, we will address its public availability. In the future, UTMB should refrain from redacting responsive information that it submits to this office in connection with a request for an open records ruling. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

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

²The United States Department of Education Family Compliance Office has informed this office that FERPA 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 review in the open records ruling process under the Act. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education record.

³We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

confidential, such as 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 requestor argues that a “medical committee” is a committee that functions to improve human health services and does not apply to the IACUC. We disagree. In reviewing the statute, we see no evidence that the protections of section 161.032 are limited only to those committees that relate to human health services. *See Nat’l Liability & Fire Ins. Co. v. Allen*, 15 S.W.3d 525 (Tex. 2000) (stating that in construing statute, one must ascertain the legislature’s intent from language it used in statute and not look to extraneous matters for intent that statute does not state). As previously noted, the definition of “medical committee” includes *any* committee of a university medical school or health science center, as well as any committee established under state or federal law or rule or under the bylaws or rules of the organization or institution at issue. Health & Safety Code § 161.031(a),(b) (emphasis added). After reviewing the arguments and the submitted information, we conclude that the IACUC is a “medical committee” for purposes of section 161.031 of the Health & Safety Code.

We note, however, that the requestor also argues that even if the IACUC is a “medical committee” for purposes of section 161.031, the records at issue are not confidential because they fall outside the scope of the provision. 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). We note that section 161.032 does not make confidential “records made or

maintained in the regular course of business by a . . . university medical center or health science center[.]” Health & Safety Code § 161.032(f); *see McCown*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business). The phrase “records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. *See McCown*, 927 S.W.2d at 9-10 (Tex. 1996) (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You state that the submitted information contains records of the IACUC. As previously discussed, we agree that the committee is a “medical committee” for the purposes of subchapter D of chapter 161 of the Health and Safety Code, and we find that the information at issue in Tabs 5A, 5B, and 5D constitutes records of that committee or records obtained by the committee for its deliberative process. *See* Health & Safety Code § 161.031(a); *see also Jordan*, 701 S.W.2d at 648 (court found privilege extends to minutes of committee meetings, correspondence between members relating to deliberation process, and any final committee product). Therefore, the information at issue in Tabs 5A, 5B, and 5D is confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. However, we find that the submitted photographs in Tab 5C were created in the regular course of UTMB’s business; therefore, the photographs are not confidential under section 161.032 and may not be withheld on this basis.

Section 552.101 also encompasses 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 51.194 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).

You seek to withhold the photographs in Tab 5C under section 51.914. However, the requestor has provided our office with evidence that the photographs have been published in a scientific journal.⁴ This office has determined that section 51.914 does not protect information relating to scientific research that has been published. *See* ORD 497 at 7 (addressing statutory predecessor). Therefore, section 51.914 is inapplicable in this instance and the photographs may not be withheld under section 552.101 of the Government Code.

In summary, the information at issue in Tabs 5A, 5B, and 5D is confidential pursuant to section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. The photographs in Tab 5C must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

⁴*See* Ludwik K. Branski, et al., *A porcine model of full-thickness burn, excision and skin autographing*, Burns (2008), doi: 10.1016/j.burns.2008.03.013.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ana Carolina Vieira', written in a cursive style.

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/dls

Ref: ID# 338083

Enc. Submitted documents

c: Requestor
(w/o enclosures)