



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2009

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

OR2009-09406

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# 348355.

The University of Texas Health Science Center at Houston (the "university") received a request for e-mails sent or received by five named individuals during specified time periods. You state you are releasing some of the requested information. You claim that some of the submitted information is not subject to the Act and the remaining information is excepted from disclosure under sections 552.101, 552.106, 552.107, 552.111, 552.117, 552.136, and 552.137 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested third party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it does not include any of the named employees.

¹We 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.

The university need not release nonresponsive information in response to this request and this ruling will not address that information.

Next, we address your contention that the e-mails you have marked are not public information subject to the Act. The Act is only applicable to "public information." *See id.* § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See Open Records Decision No. 462 (1987).*

Upon review of your arguments and the information at issue, we agree that the e-mails you have marked in are purely personal, and thus do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. *See Gov't Code § 552.021; see also Open Records Decision No. 635 (1995)* (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Thus, we conclude that these e-mails are not subject to the Act, and need not be released in response to this request.²

Section 552.101 of the Government Code exempts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You argue that a portion of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 51.914(1) of the Education Code. Section 51.914 of the Education Code provides in pertinent part as follows:

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

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

being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee[.]

Educ. Code § 51.914(1). 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.” Open Records Decision No. 651 at 9 (1997). 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 governmental body’s assertion that the information has this potential. *See id; but see id.* at 10 (stating that 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).

You explain that a portion of the remaining information consists of unpublished research authored and co-authored by university employees and researchers. You state that “[d]isclosure. . . would directly reveal the substance of the research and permit third parties to appropriate such research.” You further assert that the information at issue has the potential for being sold, traded, or licensed for a fee. Based on your representations and our review, we agree that parts of the information at issue, which we have marked, reveal the substance of the research at issue and are therefore confidential under section 51.914 of the Education Code and excepted under section 552.101 of the Government Code. However, the submitted information also contains general personnel information and other material tangential to the substance of the proposed research. We find that this information does not reveal the substance of the research at issue and is not confidential under section 51.914. Accordingly, this remaining information may not be withheld under section 552.101 on that basis.

You contend that a portion of the remaining 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); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986); *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977);

Texarkana Memorial Hosp., Inc. v. Jones, 551 S.W.2d 33 (Tex. 1977); *McAllen Methodist Hosp. v. Ramirez*, 855 S.W.2d 195 (Tex. App.—Corpus Christi 1993), *disapproved 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); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex. App.—Fort Worth 1988). 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 hospital[.]” Health & Safety Code § 161.032(f); *see Memorial Hosp.—The Woodlands*, 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).

You state that some of the remaining documents are records of the university’s Appointment, Promotion, and Tenure committee, which is authorized by university bylaws and charged with the evaluation of patient health care services as well as rendering professional judgments regarding university faculty. You assert the information at issue was created for the Appointment, Promotion, and Tenure committee and reviewed by the committee for the purposes of assessing faculty members’ qualifications and professional achievement. Therefore, based on your representations and our review, we agree the Appointment, Promotion, and Tenure committee constitutes a medical peer review committee as defined by section 161.031. Furthermore, after review of the information at issue, we find that it consists of records of a medical committee. Accordingly, the university must withhold the peer review documents you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find a portion of the submitted information is highly intimate or embarrassing information that is

not of legitimate public interest. Accordingly, the university must withhold the information we have marked, under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate how any of the remaining information is either highly intimate or embarrassing and of no legitimate public interest. Accordingly, none of the remaining information may be withheld on the basis of common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the submitted e-mails you have marked constitute communications between and amongst university staff and a university attorney that were made for the purpose of providing legal advice to the university. You have identified the parties to the communications. You state that these communications were made in confidence and have

maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the university may withhold the information you have marked under section 552.107.

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” and encompasses the deliberative process privilege. Gov’t Code § 552.111. Section 552.111 resembles section 552.106 in that both exceptions protect advice, opinions, and recommendations on policy matters in order to encourage frank discussion during the policymaking process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision Nos. 538 at 1-2 (1990), 460 at 3 (1987). 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* ORD 615 at 5. A governmental body’s policymaking functions include administrative and personnel matters of broad scope that affect the governmental body’s policy mission, but do not include routine internal administrative or personnel matters, as disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See* Open Records Decision No. 631 at 3 (1995); *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000). Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. However, if factual information is so inextricably intertwined with material involving advice, opinions, or recommendations 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).

We also have 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 state that the information you have marked under section 552.111 contains the advice, opinions, and recommendations of university employees with respect to various policy issues such as compensation plans, spending of earmark funds, and university research impediments. You state the university will release the final versions of the submitted draft

documents to the extent they exist. Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to some of the information for which you claim this exception. Therefore, the university may withhold the information we have marked under section 552.111. However, you have failed to demonstrate, and the information does not reflect on its face, that the remaining information for which you claim this exception consists of advice, recommendations, or opinions that pertain to policymaking.. Accordingly, the university may not withhold any of the remaining information under the deliberative process privilege of section 552.111.

Next, we address your claim of section 552.106 of the Government Code. Section 552.106(a) excepts from required public disclosure “[a] draft or working paper involved in the preparation of proposed legislation [.]” Gov’t Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.*

After reviewing the remaining information at issue, we find that you have not established that this information consists of a draft or working paper involved in the preparation of proposed legislation for purposes of section 552.106. Therefore, we conclude that none of the remaining information is excepted from disclosure under section 552.106.

You raise section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, personal cellular telephone numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). We note, however, the protection afforded by section 552.117 does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) (“We are... of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981). We also note that section 552.117(a)(1) encompasses cellular telephone and pager numbers if the employee personally pays for the cell or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, to the extent

that the employees at issue timely elected confidentiality for the information under section 552.024, except for where we have marked for release, the university must withhold the information you have marked pursuant to section 552.117(a)(1).

Section 552.136 states “[n]otwithstanding 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. An access device number is one that 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, and includes an account number. *Id.* § 552.136(a). Upon review, we find the university must withhold the information we have marked in the remaining information under section 552.136 of the Government Code. You have failed to demonstrate, however, how any of the remaining information you have marked consists of access device numbers used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Accordingly, none of the remaining information may be withheld under section 552.136 of the Government Code.

Section 552.137 of the Government Code provides 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 [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 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 personal e-mail addresses that must be withheld under section 552.137, unless the owner of an e-mail address has consented to its disclosure.

Finally, we note that a portion of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person 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 (1990).

In summary, the information you have marked in Tab 5 pursuant to section 552.002 is not subject to the Act. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code, section 161.032 of the Occupations Code, and common-law privacy. The university may withhold the information you have marked under section 552.107 of the

Government Code and the information we have marked under section 552.111 of the Government Code. To the extent that the employees at issue timely elected confidentiality for the information under section 552.024, except for where we have marked for release, the university must withhold the information you have marked pursuant to section 552.117(a)(1) of the Government Code. The university must withhold the information we have marked under section 552.136 of the Government Code and the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure. The remaining responsive information must be released, but any copyrighted information may only be released in accordance with copyright law.

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

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eb

Ref: ID# 348355

Enc. Submitted documents

cc: Requestor
(w/o enclosures)