ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2009

Mr. Kevin Williams
Associate General Counsel
Texas Tech University System
3601 4th Street, STOP 6246
Lubbock, Texas 79430-6246

OR2009-10383

Dear Mr. Williams:

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# 348725.

The Texas Tech University Health Sciences Center (the "university") received a request for the consent forms authorizing the release or transfer of brain tissue to the university by Autopsy Associates. You state the university has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

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 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

[1]We note that although you raise section 552.115 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information.

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).

We understand the university's Institutional Review Board (the "IRB") is a committee established pursuant to federal law.[2] Federal regulations define an IRB as

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

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

The precise scope of this provision has been the subject of a number of judicial decisions. *See, e.g.*, *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. However, this 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 section161.032). We note that section 161.032 does not make confidential "records made

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[2] *See* 42 U.S.C. § 289(a) (providing that Secretary of Health and Human Services shall by regulation require that each entity which applies for grant, contract, or cooperative agreement for any project or program which involves conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to Secretary that it has established "Institutional Review Board" to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

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).

Although we find that the IRB is a medical committee, we conclude that the information at issue constitutes records made or maintained by the IRB in the regular course of business, and therefore may not be withheld under section 161.032. Accordingly, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with 161.032 of the Health and Safety Code.

You also raise section 552.101 in conjunction with section 21.403 of the Labor Code, which provides for the confidentiality of genetic information. Labor Code § 21.403. "Genetic information" is defined as information that is "obtained from or based on a scientific or medical determination of the presence or absence in an individual of a genetic characteristic" or "derived from the results of a genetic test performed on, or a family health history obtained from, an individual." *See id.* § 21.401(4). Section 21.403 states in relevant part:

> (a) Except as provided by Section 21.4031, genetic information is confidential and privileged regardless of the source of the information.
>
> (b) A person who holds genetic information about an individual may not disclose or be compelled to disclose, by subpoena or otherwise, that information unless the disclosure is specifically authorized as provided by Section 21.4032.
>
> (c) This section applies to a redisclosure of genetic information by a secondary recipient of the information after disclosure of the information by an initial recipient.
>
> . . .

Id. § 21.403(a)-(c). The submitted information consists of completed "Autopsy Authorization/Brain Removal" forms authorizing the removal and transfer of the brains of deceased individuals who suffered from Alzheimer's or some other form of dementia. You argue that the submitted information constitutes genetic information subject to section 21.403 because it reveals that individuals suffered from Alzheimer's or some other form of dementia, and the onset of Alzheimer's is associated with four specified genes. However, we note that section 21.403 does not apply to information that simply reveals the presence of a medical condition with a genetic component. In this instance, although the authorization

forms reveal information pertaining to Alzheimer's patients and their families, you have failed to explain how any information in the authorization forms at issue was obtained or derived from a medical determination of the presence or absence in an individual of a genetic characteristic or is information derived from a genetic test or family health history. Accordingly, we conclude that you have failed to demonstrate that any of the submitted information meets the definition of genetic information for purposes of section 21.403 of the Labor Code. Thus, we find that the submitted information is not confidential under section 21.403 and it may not be withheld under section 552.101 on this basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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 type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under 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). We note that because it is a personal right that lapses at death, the common-law right to privacy does not encompass information that relates only to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

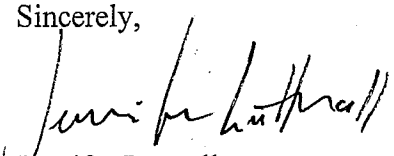
Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the university must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The university has failed to demonstrate, however, how the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the university may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy. As no further exceptions to disclosure have been raised, the remaining information 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 information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 348725

Enc. Submitted documents

c: Requestor
(w/o enclosures)