ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2009

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

OR2009-14318

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# 356477.

The University of Texas Medical Health Science Center (the "university") received a request for information pertaining to investigations conducted by a named university employee during a specified period of time. You state you will withhold portions of the responsive information pursuant to section 552.117 of the Government Code.[1] You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]We note a governmental body may withhold the social security number, home address and telephone number, and family member information of its employees without requesting a ruling from this office, providing the individual to whom the information pertains timely elected to keep the information private. Gov't Code §§ 552.024(c-1), 552.117(a)(1).

[2]We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we have marked, is not responsive to this request because it was not created within the time period specified by the requestor. This ruling does not address the public availability of non-responsive information, and the university is not required to release non-responsive information in response to this request. Accordingly, we will address your arguments with regard to the responsive information.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You inform us portions of the submitted information pertain to completed investigations. Section 522.022(a)(1) makes this information expressly public unless it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you seek to withhold the information subject to section 552.022(a)(1) under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 76 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other laws that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold the information subject to section 552.022 under section 552.103, section 552.107, or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of the attorney-client privilege under rule 503 for the information subject to section 552.022. In addition, you claim this information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. Because sections 552.101 and 552.137 constitute other laws for purposes of section 552.022, we will address the applicability of these exceptions to the submitted information.

Next, we will address you assertion of the attorney client privilege for portions of the documents that are subject to section 552.022 of the Government Code. Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
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> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You claim the documents you have marked in the remaining submitted information are privileged attorney-client communications. You state the information documents 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 these communications

were intended to be and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the university may withhold the information we have marked under rule 503.

You claim the entirety of the remaining information is excepted from disclosure under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. 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. Section 552.101 encompasses confidentiality provisions such as section 161.032, which provides in relevant part:

> (c) Records, information, or reports of a . . . compliance officer and records, information, or reports provided by a . . . compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].
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> . . .
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> (e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services.
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> (f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital, . . . university medical center or health science center, [or] hospital district[.]

Health & Safety Code § 161.032(c), (e), (f). You inform us the university's Office of Internal Compliance (the "OIC") and the Human Resources Department (the "HRD") are responsible for investigation of reports of behavior that may constitute a violation of criminal, civil, or administrative law. You state "[m]any of [the requested] investigations pertain to investigations initiated as a result of complaints submitted to the OIC Hotline." You have marked such an example in Tab 5. Upon review of the submitted arguments and the submitted information, we find you have demonstrated the investigation that was initiated as a result of a complaint to the OIC Hotline consists of records, information, or reports of a compliance office that is subject to section 161.032. Accordingly, the university must withhold the information we have marked under section 161.032(c) in conjunction with section 552.101. You further state some of the requested investigations were initiated by the HRD and then reported to the OIC. As you state, the HRD is also charged with responding to all incidents of suspected noncompliance. In this instance, the request is for investigations

conducted by a HRD employee. You have not explained how the HRD investigative records consists of records, information, or reports of a compliance officer or records, information, or reports provided by a compliance officer to the governing board of a public hospital for the purposes of section 161.032(c). You also have not explained how the HRD investigative records consists of information that was received, created, or maintained by the OIC in the exercise of a proper function of a compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services. *Id.* § 161.032(e). Accordingly, you have failed to demonstrate the remaining information is confidential under section 161.032 of the Health and Safety Code, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs the public availability of medical records. 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.

Occ. Code § 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) the 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 documents in the remaining responsive information that constitute medical records under the MPA. Accordingly, the medical records we have marked may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 51.971 of the Education Code, which provides in part:

> (a) In this section:

(1) "Compliance program" means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

(D) auditing.

. . .

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

(e) Information produced in a compliance program investigation the release of which would interfere with an ongoing compliance investigation is excepted from disclosure under Chapter 552, Government Code.

Act of June 3, 2009, 81st Leg., R.S., ch. 1015, § 3, 2009 Tex. Sess. Law Serv. 2629, 2629-30 (Vernon) (to be codified at Educ. Code § 51.971). You state that in response to the complaints to which the submitted information pertains, the university "initiated its internal process of review to assess and ultimately, ensure that its employees complied with all applicable laws, rules, regulations and policies." Thus, we agree portions of the remaining information pertain to the university's compliance program for purposes of section 51.971.

See Educ. Code § 51.971(a). You state none of the individuals who made reports to the compliance program office, participated in investigations conducted under the compliance program, or were alleged to have committed the activities that are the subject of the complaints have consented to release of their information. *See id.* § 51.971(d).

You seek to withhold the information you have marked in its entirety under section 51.971(e). This section requires (1) there be an ongoing compliance program investigation, and (2) release of the records at issue would interfere with such investigation. *Id.* § 51.971(e). You inform this office the information you have marked pertains to an unresolved compliance investigation that is ongoing by the university. You assert release of this information at this time will interfere with this investigation. Accordingly, we conclude the university must withhold this information, which we have marked, in its entirety under section 552.101 in conjunction with section 51.971(e) of the Education Code.

You assert the remaining responsive information contains identifying information that is confidential under subsections 51.971(c)(1) and (2). Section 51.971(c)(1) makes confidential information that identifies individuals as complainants, as having sought guidance from a compliance program, or as participants in an investigation conducted under a compliance program. *Id.* § 51.971(c)(1). Section 51.971(c)(2) makes confidential information that identifies individuals alleged to have committed the activities that are the subject of a complaint made to a compliance program office if the office determines the report is unsubstantiated. *Id.* § 51.971(c)(2). You represent the investigations to which the remaining information pertains concluded in determinations that the complaints were unsubstantiated or without merit. Accordingly, we marked the identifying information of the individuals who complained, the individuals who participated in the investigations, and the individuals who are the subjects of the investigations in the remaining information. Thus, the university must withhold this information under section 552.101 in conjunction with section 51.971(c). However, you do not explain how the remaining information identifies individuals who complained, individuals who participated in the investigations, or individuals who are the subjects of the investigations conducted pursuant to section 51.971 of the Health and Safety Code. Consequently, you failed to show the remaining information is confidential under section 51.971(c), and this information may not be withheld under section 552.101 on that basis.

You claim some of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with constitutional and common-law privacy. Common-law privacy 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. In addition, this office has found 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 No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

Federal constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village*, Tex., 765 F.2d 490 (5th Cir. 1985)).

Upon review, we agree portions of the remaining information are highly intimate or embarrassing and not of legitimate public interest. However, the identities of the individuals to whom this information relates must be withheld pursuant to section 51.971 of the Education Code. Thus, the privacy interests of these individuals is not implicated by release of this information. Accordingly, the university may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy. Further, you have failed to demonstrate how any portion of the remaining information falls within the zones of privacy or implicates privacy interests for purposes of constitutional privacy. Therefore, the university may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). You state the university has received consent for release of the submitted e-mail addresses. Accordingly, the university must withhold the e-mail addresses you have marked, as well as an additional e-mail address we have marked, in the remaining responsive information under section 552.137 of the Government Code.

In summary, the university may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code. The medical information we have marked may only be released in accordance with the MPA. The university must withhold the

information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 51.971 of the Health and Safety Code. The marked e-mail addresses within the remaining responsive information must be withheld under section 552.137 of the Government Code. The remaining responsive 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, toll free, at (888) 672-6787.

Sincerely,

Karen E. Stack
Assistant Attorney General
Open Records Division

KES/cc

Ref: ID# 356477

Enc. Submitted documents

c: Requestor
(w/o enclosures)