



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2011

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

OR2011-04299

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# 412734 (OGC# 13485).

The University of Texas Southwestern Medical Center at Dallas (the "university") received a request for all e-mails, memos, and other documents created by or received by any member of the OB-GYN faculty at the university that use one or more specified terms from November 18, 2010 to the date of the request.¹ You state you will release some of the requested information. You state the university has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.² You claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, and 552.111 of the Government Code. You also state that you notified the Accreditation Council for Graduate Medical Education ("ACGME") and McGraw-Hill Professional ("McGraw-Hill") of the request for information and of their right to submit

¹We note the university sought and received clarification of the request. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general decision is measured from the date request is clarified or narrowed).

²The United States Department of Education Family Policy Compliance Office (the "DOE") 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 purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received arguments from ACGME and McGraw-Hill. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address ACGME and McGraw-Hill's assertions that some of the submitted information is not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information," which is defined by section 552.002 of the Government Code 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." Gov't Code § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988).

ACGME states it is a private, not for profit corporation that sets accreditation standards and accredits graduate medical education programs. ACGME further states it maintains medical speciality review committees, such as the Review Committee for Obstetrics and Gynecology (the "committee"). ACGME explains that the committee is not part of the university and the committee operations are not part of the official business of the university. ACGME further explains that the chair of the committee is a university physician who communicates with ACGME staff regarding operations of the committee using his university e-mail address. Although the submitted e-mails were sent using a university e-mail account, ACGME states the information at issue was created and used by the committee's chair and ACGME staff in their "roles as representatives of ACGME, not as representatives or employees of [the university]." Thus, ACGME argues these communications were not "collected, assembled, or maintained in connection with official business" of the university. After reviewing ACGME's arguments and the information at issue, we agree that the information we have marked does 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). Therefore, we conclude that the information we have marked is not subject to the Act and need not be released in response to this request.³

³As our ruling for this information is dispositive, we need not address the remaining arguments against disclosure.

McGraw-Hill argues the submitted draft manuscripts, chapters, and related correspondence for the new editions of a medical textbook do not constitute public information subject to disclosure under the Act. McGraw-Hill states this information has not been “collected, assembled, or maintained under a law or ordinance” and is not related to official university business. We note, however, the textbook is authored by university faculty. Further, the university informs us that it receives payment for its efforts in authoring the manuals. Thus, upon review, we find McGraw-Hill has failed to demonstrate that the textbook was not collected, assembled, or maintained in connection with university business. Therefore, this information is subject to the Act and we will address the remaining arguments against the disclosure of this and the remaining 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. Section 160.007 of the Occupations Code provides, in relevant part:

- (a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Occ. Code § 160.007(a). “Medical peer review” is defined by the Medical Practice Act, subtitle B of title 3 of the Occupations Code, to mean “the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners.” *Id.* § 151.002(a)(7). A medical peer review committee is “a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]” *Id.* § 151.002(a)(8). Section 161.032 of the Health and Safety Code further provides, in relevant part:

- (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

- (c) Records, information, or reports of a medical committee, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code § 161.032(a), (c), (f). For purposes of this confidentiality provision, a medical committee “includes any committee, including a joint committee, of . . . a hospital [or] a medical organization [or] a university medical school or health science center [or] a hospital district [.]” *Id.* § 161.031(a). Section 161.0315 provides that “[t]he governing body of a hospital, medical organization, university medical school or health science center [or] hospital district . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services[.]” *Id.* § 161.0315(a).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See, e.g., Mem’l 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). 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, among other statutes, statutory predecessor to section 161.032).

The university asserts the marked information was submitted to and obtained by medical committees for the purposes of assessing the professional skill and care of residents and faculty members. You explain that the Organization of Obstetrical Professors serves as a steering committee to address issues and make recommendations on operational, patient care, and resident matters for the benefit of patients and providers on the Parkland Obstetrical Service. You state the Best Practices Committee deals with professionalism, quality assurance, and peer review issues. You explain that the Quality Improvement Council reviews the Surgical Care Improvement Project reports for performance evaluation purposes and reports findings and recommendations to the Medical Executive Committee Board. You state the MS3 Curriculum Committee reviews assignments submitted by medical students and evaluates the medical school curriculum. Finally, you explain the Graduate Medical Education Committee assists the residency and fellowship training programs with accreditation issues and reviews all communications submitted to and received from ACGME regarding accreditation issues. Upon review, we agree these committees are committees established by the university and constitute medical committees as defined by section 161.031. *See generally, Mem’l Hosp.—The Woodlands*, 927 S.W.2d at 8 (term “medical committee” is broadly defined). Further, we agree the marked information relates to these committees and is confidential under section 161.032 of the Health and Safety Code

as records of a medical committee. Therefore, the university must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.⁴

Section 552.101 of the Government Code also encompasses section 51.914 of the Education Code, which provides in relevant 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, 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 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 the information has this potential. *See id.* *But see id.* at 9 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note 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).

⁴As our ruling for this information is dispositive, we need not address your remaining argument under section 552.111 of the Government Code for a portion of the information.

You state the information you have marked under section 51.914 includes unpublished research articles and unpublished portions of a textbook authored and/or co-authored by university employees and correspondence related to these documents. You explain that these unpublished documents contain findings of various research projects that contain scientific information as well as procedures and other information that relates to a product, device, or process developed by university employees. You further state the marked information has the potential for being sold, traded, or licensed for a fee. Based on your representations and our review, we conclude the information we have marked is confidential under section 51.914 and must be withheld under section 552.101 of the Government Code.⁵ However, the remaining information you have marked does not reveal the specifics of any actual research. Thus, we determine the remaining information you have marked may not be withheld under section 51.914(1) of the Education Code.

Section 552.104 of the Government Code protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987).

The university states the remaining e-mail related to the draft of the medical textbook is protected under section 552.104. You explain that the university is a marketplace competitor with respect to "producing leading research and scholarly work, attracting and educating talented healthcare professionals, and providing quality health care services to patients." You have not, however, explained, or otherwise demonstrated, how release of the remaining information you seek to withhold would harm the university's interests in a particular competitive situation. Therefore, we find you have failed to demonstrate release of the information at issue would cause specific harm to the university's marketplace interests. Consequently, the university may not withhold the remaining information you have marked under section 552.104 of the Government Code.

The university raises section 552.110 of the Government Code for the remaining e-mail related to the draft of the medical textbook. We note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the university's arguments under section 552.110 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body

⁵As our ruling for this information is dispositive, we need not address the remaining arguments submitted by the university and McGraw-Hill.

has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* 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. *See* 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. *See In re Tex. 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 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, and lawyer representatives. *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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 the information you have marked consists of documents created by attorneys for the university to provide legal advice within the course and scope of their employment. You explain these communications were made in confidence and have remained confidential. You have identified the privileged parties to these communications. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the marked information. Accordingly, the university may withhold the marked information under section 552.107(1) of the Government Code.

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).⁶ See Gov't Code § 552.137(a)-(c). We have marked e-mail addresses within the remaining information that are subject to section 552.137(a). Accordingly, the university must withhold the e-mail addresses we have marked pursuant to section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.⁷

In summary, the information we have marked is not subject to the Act. The university must withhold the information you have marked, in addition to 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 university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with 51.914 of the Education Code. The university may withhold the information you have marked under section 552.107 of the Government Code. The university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure. 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, toll free at (888) 672-6787.

Sincerely,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁷We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 412734

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Erin M. Sine
The McGraw-Hill Companies
1221 Avenue of the Americas
New York, New York 10020
(w/o enclosures)

Mr. Douglas Carlson LLC
Attorney
225 West Wacker Drive, Suite 3000
Chicago, Illinois 60606
(w/o enclosures)