ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2011

Ms. Zeena Angadicheril
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-08936

Dear Ms. Angadicheril:

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# 421381 (OGC# 136835).

The University of Texas Health Science Center at Houston (the "university") received a request for certain records held by the university's Department of Internet Technology. You state the university is releasing some responsive information to the requestor. You state some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[1] You claim portions of the remaining responsive information are not subject to the Act. You claim the remaining responsive information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.[2]

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[1]The 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.

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

Initially, you state the university requested clarification regarding two portions of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You also state the university has not received a response to that request. Accordingly, the university has no obligation at this time to release any information that might be responsive to these portions of the request. However, if the university receives clarification and wishes to withhold any of the information encompassed by the clarified request, then you must request another decision. *See id.* §§ 552.006, .301(a), .302.

Next, you state some of the responsive information was the subject of prior requests for information, as a result of which this office issued Open Records Letter Nos. 2009-09785 (2009) and 2009-10022 (2009). In Open Records Letter No. 2009-09785, this office determined the university: (1) need not release the e-mails that are not subject to the Act; (2) must withhold the information marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code, section 161.032 of the Health and Safety Code, and section 160.007 of the Occupations Code; (3) may withhold the information marked under section 552.107 of the Government Code; (4) must withhold the information marked under section 552.117 of the Government Code if the employees at issue timely requested confidentiality for that information, but may only withhold the cellular telephone number if the cellular service was not paid for by the university; (5) must withhold the information marked under section 552.136 of the Government Code; (6) must withhold the marked e-mail addresses under section 552.137 of the Government Code unless their owners consent to their release; and (7) must release the remaining information. In Open Records Letter No. 2009-10022, we determined the university may withhold the submitted information under section 552.107 of the Government Code. As you state there has not been any change in the law, facts, or circumstances on which these previous rulings were based, we conclude the university must rely on Open Records Letter Nos. 2009-09785 and 2009-10022 as previous determinations and continue to withhold or release the information at issue in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we address your contention that the e-mails you have marked are not public information subject to the Act. The Act is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act 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). Virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You claim the e-mails you marked are personal in nature and were not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official university business. Upon review, we agree these e-mails are unrelated to any university business. Based on your representations and our review, we agree that these e-mails were not "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). Because this information is not subject to the Act, it need not be released in response to this request for 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 section encompasses information protected by other statutes. Section 161.032 of the Health and Safety Code provides in relevant part:

> (c) Records, information, or reports of a medical committee, medical peer review committee, ... and records, information, or reports provided by a medical committee, medical peer review committee, ... to the governing body of a public hospital ... are not subject to disclosure under Chapter 552, Government Code.
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> . . .
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> (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 and Safety Code § 161.032(c), (f). Section 161.031(a) defines a "medical committee" as "any committee . . . of (3) a university medical school or health science center[.]" *Id.* § 161.031(a)(3). Section 161.031(b) provides that the "term includes 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). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital [or] university medical school or health science center . . . may form a medical peer review committee, as defined by Section 151.002, Occupations Code, or a medical committee, as defined by Section 161.031, to evaluate medical and health care services . . . " *Id.* § 161.0315(a).

You state the information you marked constitutes records of the university's Promotion and Tenure committee (the "committee"), which is authorized by university bylaws and charged

with evaluating and rendering professional judgments regarding university faculty. You also state the information at issue was submitted to and used by the committee for the purpose of assessing faculty members' qualifications and professional achievement. Based on your representations and our review, we agree the committee constitutes a medical peer review committee as defined by section 161.031. *Id.* § 161.031(b). Additionally, after review of the information at issue, we find that it consists of records of a medical committee. Accordingly, the university must withhold the documents you marked under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.[3]

Section 552.101 of the Government Code 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 is confidential and is not subject to disclosure under [the Act], or otherwise:
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> > (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[.]

Act of May 29, 2011, 82nd Leg., R.S., S.B. 5, § 6.04 (to be codified as Educ. Code § 51.914(a)). As stated 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." *See* ORD 651 at 9. Furthermore, whether particular scientific information has such a potential is a question of fact this office is unable to resolve in the opinion process. *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. *Id.*

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[3]As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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 51.194 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 have marked the information you contend is made confidential by section 51.914. You state the marked documents include unpublished research articles, research proposals, and correspondence regarding such research. You state this information contains scientific information that relates to a product, device, or process, or the application of such, developed by university employees. You also state the marked information describes research, innovation, and the results of experimentation and research and has the potential of being sold, traded, or licensed for a fee. Based on your representations and our review of the information at issue, we conclude 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. We conclude you have not demonstrated the remaining information actually reveals the details of any of the research for purposes of section 51.914, and it may not be withheld on that basis under section 552.101.

You also raise section 552.111 of the Government Code, which 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." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this privilege is to protect advice, opinion, and recommendation in the decisional process and encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, 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. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation 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).

This office also has concluded a preliminary draft of a document 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 contend some of the remaining information, which you have marked, falls within the scope of section 552.111. You state the marked information relates to communications involving employees of the university recommending changes and revisions to university policy. You claim these communications pertain to policymaking matters. You also inform us the submitted draft document has been or will be made available to the public in its final form. Based on your representations and our review of the information at issue, we conclude the university may withhold the information we have marked under section 552.111 of the Government Code. We find the remaining information at issue is factual in nature or pertains to routine internal administrative matters. Thus, we find you failed to demonstrate how this information constitutes advice, opinion, or recommendations that implicate the university's policymaking processes, and it may not be withheld under section 552.111.

In summary, the university must rely on Open Records Letter Nos. 2009-09785 and 2009-10022 as previous determinations and continue to withhold or release the information at issue in accordance with those rulings. The university need not release the submitted information that is not subject to the Act. The university must withhold the information you 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 marked under section 552.101 in conjunction with section 51.914 of the Education Code. The university may withhold the information we marked under section 552.111 of the Government Code. The remaining information must be released.[4]

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,

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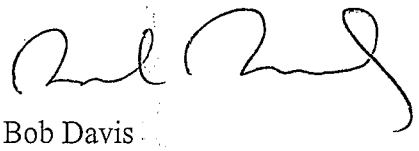
[4]The remaining information includes an e-mail address of a member of the public you state the university will withhold under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009). *See* ORD 684 (previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137).

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eb

Ref: ID# 421381

Enc. Submitted documents

c: Requestor
(w/o enclosures)