



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2011

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

OR2011-09233

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# 421991 (OGC# 136872).

The University of Texas Health Science Center at Houston (the "university") received a request for deleted e-mails related to five named individuals during specified periods. You state the university will release some of the responsive information. We note that you have redacted student identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA").¹ You claim some of the requested information is not subject to the Act. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.111, 552.117, 552.122, 552.136, and 552.137 of the Government

¹The 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>.

Code. We have considered your arguments and reviewed the submitted representative sample of information.²

Initially, we note the university has asked the requestor to clarify a portion of her request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You state the university has not received clarification. Accordingly, the university has no obligation to release any information that is responsive to the portions of the request for which the university has not received clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten business-day deadline to request an attorney general ruling is measured from the date the request is clarified or narrowed). However, if the requestor responds to the clarification request, then the university must again seek a ruling from this office before withholding any information responsive to the clarification.

You state portions of the responsive information are the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2011-08833 (2011), 2011-05012 (2011), 2009-09406 (2009), and 2009-06163 (2009). As we have no indication that the law, facts, or circumstances on which the prior rulings were based have changed, we conclude the university must continue to rely on these rulings as previous determinations and withhold or release any previously ruled upon information in accordance with the prior 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 a 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 will consider your arguments for the information not subject to the prior rulings.

We begin with your contention that some of the requested information is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as consisting of

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

²We 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 those submitted to this office.

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You state some of the requested information, which you have marked, consists of personal messages that have no connection with the university's business and are incidental uses of e-mail by university employees. You also state these communications were not collected or assembled and are not maintained pursuant to any law or ordinance or in connection with the transaction of university business. You explain the university has an Email and Internet Usage Policy that recognizes and allows incidental use of electronic mail by employees. Based on your representations and our review of the information at issue, we conclude the communications you have marked as personal correspondence do not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (Gov't Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, the information at issue is not subject to the Act and need not be released in response to this request for information.

Additionally, you contend a portion of the remaining information is not subject to the Act pursuant to section 181.006 of the Health and Safety Code. Section 181.006 states that "[f]or a covered entity that is a governmental unit, an individual's protected health information . . . is not public information and is not subject to disclosure under [the Act]." Health & Safety Code § 181.006. We will assume, without deciding, the university is a covered entity. Subsection 181.006(2) does not remove protected health information from the Act's application, but rather states this information is "not public information and is not subject to disclosure under [the Act]." We interpret this to mean a covered entity's protected health information is subject to the Act's application. Furthermore, this statute, when demonstrated to be applicable, makes confidential the information it covers. Thus, we will consider your submitted arguments for this 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. Section 552.101 encompasses section 161.032 of the Health and Safety Code, which provides:

(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].

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, “medical committee” includes “any committee, including a joint committee, of . . . a university medical school or health science center[.]” *Id.* § 161.031(a)(3). Additionally, section 161.0315 authorizes the governing body of a university medical school or health science center to form a medical committee, as defined by section 161.031, in order 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 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). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential, and the “privilege 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 things, statutory predecessor to section 161.032).

You state some of the information you have marked consists of records of two university committees—the Futures Committee, also known as the Vision Committee, and the Cardiovascular Cell Therapy Research Network Committee (the “network committee”). You explain that the Futures Committee identifies research opportunities and collaborations to be undertaken by the university’s Coordinating Center for Clinical Trials and ensures compliance with university protocols and state and federal regulations. You explain the network committee is an *ad hoc* committee of faculty members who work to accomplish the network’s mission of completing research that could lead to more effective treatments for patients with cardiovascular disease and sharing that knowledge with the healthcare community. You state the marked information “was submitted to and obtained by the . . . committees for the purposes of assessing the professional skill and care of faculty members and other [u]niversity employees.” Based on your representations and our review of the information at issue, we conclude 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.³

Section 552.101 also encompasses section 51.914 of the Education Code, which provides:

(a) 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:

(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[.]

...

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003.

Act of May 29, 2011, 82nd Leg., R.S., S.B. 5, § 6.04 (to be codified as Educ. Code § 51.914(a-b)). 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

³As we are able to make this determination, we need not address your other arguments against disclosure of the marked information.

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 51.194 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 contend the information you have marked falls within the scope of section 51.914. You state this information consists of drafts of research, research articles, and a manuscript that have been authored or co-authored by university employees. You state the manuscript, research, and articles have not yet been published. You explain that these materials were developed as a result of scientific research, and the results of such research have the potential for being sold, traded, or licensed for a fee to other researchers or third parties interested in the findings. Based on your representations and our review of the information at issue, we conclude the information we have marked is confidential under section 51.914 of the Education Code and must be withheld under section 552.101 of the Government Code. However, we find you have failed to demonstrate how the remaining information at issue is confidential under section 51.914. Accordingly, the university may not withhold the remaining information under section 552.101 of the Government Code on that basis.

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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* At 681–82. 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. This office has 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). Upon review, we find the information we have marked is highly intimate and embarrassing and of no legitimate concern to the public. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and not of legitimate concern to

the public. Accordingly, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses the doctrine of constitutional privacy, which 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. Open Records Decision No. 455 at 4 (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. *Id.* 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.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not demonstrated how constitutional privacy applies to any of the remaining information at issue. Accordingly, the university may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with constitutional privacy.

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." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to 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, 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, opinions, recommendations, and other material 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. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 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). Further, 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 has also 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.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* ORD 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You state the information you have marked under section 552.111 relates to various policymaking decisions that affect the university and institutions within the university. You explain that the submitted draft documents are publicly available in final form. You also explain that the university shares a privity of interest with Baylor College of Medicine ("Baylor") because the university and Baylor offer a dual-degree program, which is administered through both institutions. Further, we find the university shares a privity of interest with other institutions within the University of Texas System, and members of the network committee share a privity of interest with other members of the network who are from different institutions. Based on these representations and our review, we find the university may withhold the information we have marked under section 552.111 of the Government Code. However, we find you have not demonstrated how the remaining information consists of advice, opinion or recommendations on policymaking matters. Therefore, the university may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, emergency contact information, social security 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Thus, if the employees whose information is at issue each made a timely election under section 552.024, then the university must withhold each individual's information, which we have marked, under section 552.117 of the Government Code. If either of the employees did not make a timely election, then the university may not withhold the information that pertains to that individual under section 552.117.

Section 552.122 of the Government Code exempts from public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. Open Records Decision No. 626 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8. You explain the information you have marked contains questions and answers from an examination administered by a university faculty member to students who are enrolled in a joint-degree program offered by the university and Baylor. You argue the release of this information would compromise the effectiveness of future examinations. Upon review of the submitted information, we find the information we have marked consists of "test items" for purposes of section 552.122(b), and the answers reveal the questions themselves. The university may withhold the information we have marked under section 552.122 of the Government Code. However, you have not demonstrated how the remaining information constitutes a "test item" for the purposes of section 552.122. The university may not withhold any of the remaining information under section 552.122 of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). You state the information you have marked can be used to access the university's teleconferencing

accounts, and a person with access to this information could use it to make unauthorized long-distance telephone calls. Upon review, we agree the access code we have marked consists of an access device number for purposes of section 552.136 of the Government Code, and the university must withhold it on that basis. The telephone number you have marked does not constitute an access device number, and it may not be withheld on that basis.

Section 552.137 provides, "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 release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.⁴

In summary, the university must withhold the following information under section 552.101 of the Government Code: (1) the information you have marked in conjunction with section 161.032 of the Health & Safety Code; (2) the information we have marked in conjunction with section 51.914 of the Education Code; and (3) the information we have marked in conjunction with common-law privacy. The university may withhold the information we have marked under sections 552.111 and 552.122 of the Government Code. If the employees whose information is at issue made a timely election under section 552.024 of the Government Code, the university must withhold the information we have marked under section 552.117 of the Government Code. The university must withhold the information we have marked under section 552.136 of the Government Code, and the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners have affirmatively consented to their release. The remaining information must be released.

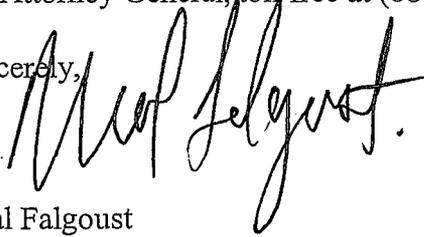
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁴We note this office has issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read "Neal Falgoust". The signature is written in a cursive style with a large, prominent initial "N".

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 421991

Enc. Submitted documents

c: Requestor
(w/o enclosures)