



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 15, 2011

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

OR2011-13351

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# 430097 (OGC# 138299).

The University of Texas Southwestern Medical Center at Dallas (the "university") received a request for all personnel records related to a named individual. You state you will release most of the requested information. You also state that, as permitted by section 552.024(c) of the Government Code, you will redact information subject to section 552.117 of the Government Code.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. You have notified two interested third parties of the request for information and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or

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<sup>1</sup>Section 552.117 of the Government Code excepts 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. 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)). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Gov't Code § 552.024(c), Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2.

should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note, and you acknowledge, the requestor has excluded from his request social security numbers, dates of birth, and personal banking and account information. Thus, these types of information are not responsive to this request. This ruling does not address the public availability of any information that is not responsive to the request, and the university need not release such information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses information protected by other statutes, such as section 161.032 of the Health and Safety Code, which 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 . . . and records, information, or reports provided by a medical committee . . . 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] hospital district[.]” *Id.* § 161.031(a). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital, medical

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<sup>2</sup>We assume that 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.

organization [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., 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. 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.*; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to section 161.032). We note that section 161.032 does not make confidential “records made or maintained in the regular course of business by a hospital[.]” Health & Safety Code § 161.032(f); *see Memorial Hosp.—The Woodlands*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business).

You state the Credentialing and Privileges Committee (the “committee”) makes recommendations to the University Hospital Board regarding “whether particular health care providers should receive credentials and privileges at the [u]niversity’s hospitals[.]” Based on your representation and upon our review, we agree the committee constitutes a medical committee for the purposes of section 161.032 of the Health and Safety Code. You also state a portion of the information at issue was prepared by, submitted to, obtained by, or reviewed by the committee for the purpose of assessing the named individual seeking credentialing and privileges at the university’s hospitals. We understand the committee utilizes this information in making its recommendations to the Medical Services Research and Development Board and the University Hospital Board. Upon our review of the information, we determine this portion of the information at issue constitutes confidential records of a medical committee under section 161.032 of the Health and Safety Code and was not created and is not maintained in the regular course of business. *See Mem’l Hosp.*, 927 S.W.2d at 8-11 (records maintained by medical committee in connection with credentialing process are not maintained in the regular course of business and are confidential under section 161.032). Thus, this information, which you have marked, is within the scope of section 161.032 of the Health and Safety Code and must be withheld from disclosure under section 552.101 of the Government Code.

You assert the submitted peer evaluations are performed at the directive of each residency program’s clinical competence committee, which is tasked with ensuring that faculty members’ residency training requirements meet the American Council for Graduate Medical Education (“ACGME”) standards. Thus, we agree this committee constitutes a medical committee for the purposes of section 161.032 of the Health and Safety Code. You further

assert the submitted evaluations were submitted to and reviewed by the residency program director and the clinical competence committee to ensure compliance with the standard of care and training set forth by the ACGME for accreditation purposes. Based on your representations and our review, we determine the resident evaluations you have marked constitute confidential records of a medical committee under section 161.032 of the Health and Safety Code and must be withheld from disclosure under section 552.101 of the Government Code.<sup>3</sup>

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 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. *See id.* at 683. This office has found that information pertaining to certain personal financial decisions is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). Upon review, we agree portions of the remaining submitted information are highly intimate or embarrassing and not of legitimate public concern. 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 you have failed to demonstrate how any of the remaining information at issue is highly intimate or embarrassing or not of legitimate public interest.<sup>4</sup> Accordingly, the university may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. You also assert the remaining information at issue is protected by 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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 the information at issue. Accordingly, the information at issue may not be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. 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. 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. *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 a 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 a portion of the remaining information, which you have marked, constitutes communications among university attorneys and employees that were made for the purpose

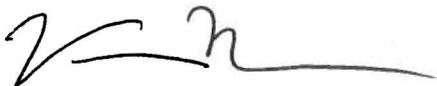
of providing legal services to the university. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the university may withhold the information you have marked under section 552.107(1) of the Government Code.

In summary, 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 have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The university may withhold the information you have marked under section 552.107(1) of the Government Code. 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](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,



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Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 430097

Enc. Submitted documents

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(w/o enclosures)

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