



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2012

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

OR2012-02179

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# 445230 (OGC # 141090).

The University of Texas Southwestern Medical Center (the "university") received a request for all records pertaining to a named individual. You state you are releasing some 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.¹ In addition, you state you will redact personal e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).² You claim that the submitted information is excepted from disclosure under

¹Section 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. 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 id.* § 552.024(c)(2).

²This office issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including personal 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.

sections 552.101, 552.102, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

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 information made confidential by other statutes, such as the Family and Medical Leave Act (the “FMLA”). *See* 29 U.S.C. § 2601 *et seq.* Section 825.500 of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Section 825.500(g) states

[r]ecords and documents relating to certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the [Americans with Disabilities Act (the “ADA”)], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You have marked information that is confidential under section 825.500 of title 29 of the Code of Federal Regulations. We find none of the release provisions of the FMLA apply to this information. Thus, we conclude the university must

³We assume the “representative sample” of records submitted to this office are 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.

withhold the information you have marked under section 552.101 in conjunction with the FMLA.⁴

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code. Section 161.032 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

⁴As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

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 six medical committees. You state the Credentialing and Privileges Committee makes recommendations to the university’s Medical Services Research and Development Board and Hospital Board regarding “whether particular health care providers may be given privileges and credentials to provide services at the [u]niversity’s hospitals[.]” You inform us, within the Anesthesiology and Pain Management Department, an ad hoc peer review committee monitors and evaluates faculty performance and reviews and responds to complaints and quality of care issues in the department. Further, the Anesthesiology and Pain Management Department Clinical Competence Committee reviews resident performance and makes recommendations to the residency program director regarding resident promotion, performance improvement, and discipline. You also state the Graduate Medical Education Committee assists the residency and fellowship training programs with accreditation and curriculum issues and reviews all communications to and from the American Council for Graduate Medical Education regarding accreditation. Additionally, the Quality Improvement Committee is established by Dallas County Hospital District d/b/a Parkland Health & Hospital System (“Parkland”) and includes university faculty as members. This committee is charged with evaluating, prioritizing, and executing performance improvement activities at Parkland and reports its findings to Parkland’s Board of Managers. Lastly, the Committee on Practitioner Peer Review and Assistance conducts peer reviews, assesses qualifications, and monitors potentially impaired faculty, residents, and fellows. You explain this committee makes recommendations to department chairs and administrators, hospital executive committees, the Promotions and Tenure Committee, residency program clinical competence committees, and provides information to the Privileges and Credentialing Committee, as appropriate. Upon review, we agree these committees constitute medical committees as defined by section 161.031 of the Health and Safety Code. *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 information you have marked under section 552.101 of the Government Code in conjunction with section 161.032.⁵

Next, you claim some of the remaining information is confidential pursuant to common-law privacy and constitutional privacy, which are also encompassed by section 552.101 of the Government Code. The common-law right to privacy 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.*

⁵As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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. *See id.* at 681-82. This office has found a public employee's allocation of part of the employee's salary to a voluntary investment, health, or other program offered by the employer is a personal investment decision that is highly intimate or embarrassing. *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), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history).

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, 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 find some of the remaining information at issue is highly intimate or embarrassing information 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.⁶ However, we find none of the remaining information is highly intimate or embarrassing information of no legitimate public interest. Consequently, none of the remaining information at issue may be withheld under section 552.101 in conjunction with common-law privacy. Furthermore, we conclude you have not shown the remaining information at issue comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444 (1986), 423 at 2 (1984). Accordingly, the university may not withhold any of the remaining information at issue under section 552.101 in conjunction with constitutional privacy.

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

⁶As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

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 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). 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.*, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 seek to withhold the information you have marked under section 552.107(1). You state the information consists of communications between university attorneys and university officials made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the university may withhold the information you have marked under section 552.107(1) of the Government Code.⁷

⁷As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

In summary, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the FMLA and section 161.032 of the Health and Safety Code, as well as the information we have marked under section 552.101 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, 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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/ag

Ref: ID# 445230

Enc. Submitted documents

c: Requestor
(w/o enclosures)