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ATTORNEY GENERAL OF TEXAS

December 7, 2015

Ms. Cynthia Tynan
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-25605

Dear Ms. Tynan:

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# 589528 (OGC# 163934).

The University of Texas Health Science Center at Houston (the "university") received a request for all correspondence by and between employees of the Michael and Susan Dell Center for Healthy Living at the University of Texas citing specified terms during a specified time period. The university states it will redact e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).¹ You claim a portion of the submitted information is not subject to the Act. You claim the remaining submitted information is excepted from disclosure under sections 552.101, 552.104, 552.111, 552.139 of the Government Code. Additionally, you state release of some of the requested information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified MGM Resorts International, The Children's Museum of the Upstate, and the Cartoon Network of the request for information and of their rights to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see*

¹Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

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

Initially, you have marked some of the submitted information as not responsive to the instant request. We agree the information you marked is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the university is not required to release such information in response to this request.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from MGM Resorts International, The Children's Museum of the Upstate, or the Cartoon Network explaining why the information should not be released. Thus, we have no basis for concluding the responsive information constitutes proprietary information of these third parties, and the university may not withhold any portion of it on that basis. See Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

You argue a portion of the submitted 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

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

²We 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.

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.*; *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us the information you have marked consists of personal correspondence not related to the employees' official duties. You inform us the university has a policy that allows for incidental use of e-mail and the marked information has no connection with university business. Based on your representations and our review of the information at issue, we find the information you have marked does not constitute public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 4 (1995) (section 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, we conclude the information you have marked is not subject to the Act and need not be released in response to the present request for information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You state the university has a specific marketplace interest in the information at issue because the university competes against third parties in the educational childhood health and wellness program marketplace. You state the responsive information you have marked contains details of the university's strategic approach to marketing its programs, forming partnership with outside organizations, and funding. You state release of the information at issue would cause specific harm to the university. After review of the information at issue and consideration of the arguments, we find the university has established the release of the responsive information you have marked would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information at issue under section 552.104(a).³

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

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

Section 552.101 encompasses information protected by other statutes, such as section 51.914 of the Education Code, which provides, in pertinent part:

(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[.]

Educ. Code § 51.914(a)(1). As noted 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 generally* ORD 651 at 9-10. 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 governmental body’s assertion that the information has this potential. *See id.* However, a governmental body’s determination that information has a potential for being sold, traded, or licensed for a fee is subject to judicial review. *See id.* 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).

You state the university is an institution of higher education for purposes of section 61.003(5) and (8) of the Education Code. *See* Educ. Code § 61.003(5), (8). You have marked the information the university seeks to withhold under section 51.914. You explain this information consists of manuscripts authored by university employees. You state the manuscripts are expected to be, but have not yet been, published. Further, you state the information you have marked is related to research projects and contains scientific and other information that has the potential for being sold, traded, or licensed for a fee to other researchers or third parties interested in the information. Based on your representations and our review, we conclude the information you have marked is confidential under section 51.914 of the Education Code, and the university must withhold that information under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code, which provides, in relevant part, the following:

(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 university medical school or health science center [or] . . . a hospital district[.]” *Id.* § 161.031(a)(3), (6). Section 161.0315 provides “[t]he governing body of a hospital, medical organization, university medical school or health science center [or] hospital district . . . 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).

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 “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). Additionally, we note 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 also Mem’l Hosp.*, 927 S.W.2d at 10 (stating reference to statutory predecessor to section 160.007 of the Occupations Code in section 161.032 is clear signal records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business). The phrase “records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. *See Mem’l Hosp.*, 927 S.W.2d at 10 (discussing *Barnes*, 751 S.W.2d 493, and *Jordan*, 701 S.W.2d 644).

You state the remaining information you have marked was created by or for medical committees of the university. You state the university's Teaching Award Review Committee and President's Scholar Award for Research Committee both serve to assess faculty performance and professional skills. You state the core function of these committees is to evaluate the qualifications and professional achievements of medical faculty. We agree each of these committees is a "medical committee" for purposes of section 161.031. You inform us the remaining information at issue was prepared at the direction of the named university committees and for committee purposes. Upon review, we conclude the university must withhold the remaining information at issue under section 552.101 in conjunction with section 161.032 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find none of the remaining information is highly intimate or embarrassing information or is not of legitimate public interest. Therefore, none of the remaining responsive information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You assert section 552.111 of the Government Code for some of the remaining responsive information. Section 552.111 of the Government Code excepts from disclosure "[a]n 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 section 552.111 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, writ ref'd n.r.e.); 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 that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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).

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (Gov't Code § 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) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order 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 remaining information you marked consists of advice, recommendations, and opinion of university employees and those in privity with the university. You further state this information relates to policymaking matters of the university regarding existing and potential programs and partnerships. Upon review, we find the university may withhold the information we have marked under section 552.111 of the Government Code. However, we conclude the university has not established the remaining information consists of advice, opinion, or recommendations, or it is purely factual in nature. Accordingly, the university may not withhold any of the remaining responsive information under section 552.111 of the Government Code.

Section 552.139 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

- (1) a computer network vulnerability report;
- (2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You state the information you have marked relates to the creation and management of an e-mail system. You state "some of the information, if released, would provide a roadmap of the network security, including how to access the e-mail system." You explain the release of the information at issue would make the computer networks and programs of the university vulnerable to unauthorized access or harm. Based on your arguments and our review of the submitted information, we find you have established the information at issue is related to computer network security. Accordingly, the university must withhold the information you have marked under section 552.139 of the Government Code.

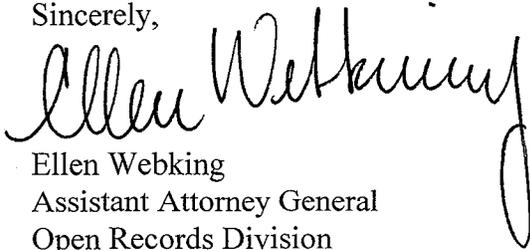
In summary, the information you have marked is not subject to the Act and need not be released in response to the present request for information. The university may withhold the information you have marked under section 552.104(a) of the Government Code. The university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code and section 161.032 of the Health and Safety Code. The university may withhold the information

we have marked under section 552.111 of the Government Code. The university must withhold the information you have marked under section 552.139 of the Government Code. The university must release the remaining responsive information.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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/akg

Ref: ID# 589528

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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⁴As our ruling is dispositive, we need not address your remaining arguments.

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