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ATTORNEY GENERAL OF TEXAS

June 27, 2016

Ms. Ana Vieira Ayala
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Office of General Counsel
The University of Texas System
201 West Seventh Street, Suite 600
Austin, Texas 78701-2901

OR2016-14599

Dear Ms. Ayala:

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# 616019 (OGC# 169099).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for (1) a specified contract, letter of appointment, and orders; (2) information pertaining to the refusal to pay royalties to a specified company; (3) information pertaining to a specified trial; (4) the title and date of documents about the commercialization of the requestor's inventions submitted by a named individual; (5) reports and disclosures pertaining to a specified study; and (6) all billing invoices concerning two specified companies between 2012 and 2015.¹ You state you do not have some of the requested information.² You also state you will release some of the requested information. You inform us you will

¹We understand the university received clarification of the request for information. See Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

withhold some information in accordance with Open Records Letter No. 2013-08564 (2013). You claim the submitted information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code as well as privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. Additionally, you inform us release of the submitted information may also implicate the proprietary interests of The Henry M. Jackson Foundation, Parker Highlander, L.C.C., Apthera, Inc., Galena Biopharma, Inc., and Norton Rose Fulbright US L.L.P. You state, and provide documentation showing, you notified these parties of the university's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 the submitted arguments and reviewed the submitted information, some of which you inform us constitutes a representative sample.³

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) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the interested third parties have submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of these third parties. *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, 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), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interests the third parties may have in it.

Next we note some of the submitted information consists of attorney fee bills. You acknowledge, and we agree, the submitted attorney fee bills are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is confidential under the Act or other law. Gov't Code § 552.022(a)(16). You raise section 552.136 of the Government Code, rule 503 of the Texas Rules of Evidence, and rule 192.5 of the Texas Rules of Civil Procedure for the submitted attorney fee bills. The Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege

³We 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.

under Texas Rule of Evidence 503 and the attorney work-product privilege under Texas Rule of Civil Procedure 192.5 for the submitted attorney fee bills. Further, because information subject to section 552.022 may be withheld under section 552.136, we will consider your claim under this exception for the information at issue. We will also consider your argument for the submitted information not subject to section 552.022.

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 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, 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, 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). You argue some of the submitted information consists of medical committee documents subject to section 161.032 of the Health and Safety Code. Section 161.031(a) defines a “medical committee” as “any committee . . . of . . . a university medical school or health science center[.]” *Id.* § 161.031(a)(3). Section 161.0315 provides “[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).

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 “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,” but does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *See Jordan*, 701 S.W.2d at 647-48; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to Health and Safety Code § 161.032). Further, section 161.032 does not make confidential “records made or maintained in the regular course of business by a . . . university medical center or health science center[.]” Health & Safety Code § 161.032(f); *see also McCown*, 927 S.W.2d at 10 (stating reference to statutory predecessor to section 160.007 of the Occupations Code in section 161.032 of the Health and Safety Code 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 McCown*, 927 S.W.2d at 9-10.

You argue some of the information at issue consists of information prepared for or at the direction of two of the university’s medical committees, the Institutional Review Board (the “IRB”) and the Clinical Research Committee (the “CRC”). You state the IRB is a medical committee established pursuant to federal law in order “to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects.”⁴ 21 C.F.R. § 56.102(g). We have previously found the university’s IRB is a medical committee for purposes of section 161.032. You also inform us the CRC “reviews clinical trial protocols to ensure they are compliant with policy and state and federal regulations.” Thus, based on these representations and our review, we find the information at issue consists of records of medical committees. Accordingly, 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.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;
- (B) between the client’s lawyer and the lawyer’s representative;

⁴*See* 42 U.S.C. § 289(a) (providing that Secretary of Health and Human Services shall by regulation require that each entity which applies for grant, contract, or cooperative agreement for any project or program which involves conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to Secretary that it has established “Institutional Review Board” to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

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. *See* Open Records Decision No. 676 at 6-7 (2002). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See id.* Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert portions of the submitted fee bills reflect privileged attorney-client communications between the university's attorneys, university employees or officials, and a privileged third party. You state the communications at issue were made for the purpose of the rendition of legal services to the university. You inform us the communications at issue were not disclosed to non-privileged parties, and confidentiality has not been waived. Based on your representations and our review of the information at issue, we find you have established the information you marked constitutes attorney-client communications under rule 503. Accordingly, the university may withhold the information you have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.

We next address Texas Rule of Civil Procedure 192.5 for the remaining information you marked in the submitted attorney fee bills. Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10

(2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You claim some of the remaining information, which you marked, consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated the information at issue consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of trial. Thus, the university may not withhold the information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.136 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). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Accordingly, the university must withhold the information you have marked and we have marked under section 552.136 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 may withhold the information you have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The university must withhold the information you have marked and we have marked under section 552.136 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.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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/akg

Ref: ID# 616019

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)