



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 17, 2016

Ms. Ana Vieira Ayala
Assistant General Counsel & Public Information Coordinator
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2016-25639

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# 634619 (OGC# 171545).

The University of Texas Southwestern Medical Center (the "university") received a request for fourteen categories of information, including specified policies and procedures and information relating to a named employee. You state the university has no information responsive to a portion of the request.¹ We understand the university will redact information protected by section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code, access device numbers pursuant to section 552.136(c) of the Government Code, personal e-mail addresses subject to section 552.137 of the Government Code pursuant to the previous determination in Open

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Records Decision No. 684 (2009), and university employees' dates of birth pursuant to Open Records Letter No. 2016-16782 (2016).² You claim some of the requested information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of the National Football League (the "NFL"). Accordingly, you state, and provide documentation showing, you notified the NFL of the request for information and of its right 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 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 reviewed the submitted arguments and the submitted representative sample of information.³ We have received comments from the NFL. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We note some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2016-04226 (2016) and 2016-07695 (2016). In Open Records Letter No. 2016-04226, we determined: 1) the information the university marked is not subject to the Act and need not be released in response to the request for information; 2) the university must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code; and 3) the university must release the remaining responsive information. In Open Records Letter No. 2016-07695, we determined:

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision. Open Records Letter No. 2016-16782 is a previous determination issued to the university authorizing it to withhold the dates of birth of living current and former employees of the university under section 552.102(a) of the Government Code without the necessity of requesting a decision from this office.

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 those records contain substantially different types of information than that submitted to this office.

1) the information the university marked under section 552.002 of the Government Code is not subject to the Act and need not be released in response to the present request for information; 2) the university must withhold the information it marked under section 552.101 of the Government Code in conjunction with the Medical Practice Act; 3) except for the information we marked for release, the university may withhold the information it marked under section 552.111 of the Government Code; 4) if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, then the university must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service; and 5) the university must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law. Accordingly, in our previous rulings, we determined, among other things, the university must release some of the NFL's information. We understand the university did so. However, the NFL now argues portions of its information are excepted from disclosure under section 552.104 of the Government Code. Although the university notified the NFL pursuant to section 552.305 of the Government Code when the university received the previous requests for information, the NFL did not timely submit comments objecting to the release of its information in the previous rulings. Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See Gov't Code § 552.007*. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, to the extent any of the submitted information was previously released pursuant to Open Records Letter Nos. 2016-04226 and 2016-07695, the university may not withhold the NFL's previously released information under section 552.104. However, we will consider the NFL's arguments under section 552.104 of the Government Code for the NFL's information that was not at issue in the previous rulings.

You assert the information you marked under section 552.002 of the Government Code is not subject to the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, .021. Section 552.002(a) defines "public information" as:

information 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;

(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. Information is “in connection with the transaction of official business” if it is “created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body.” *Id.* § 552.002(a-1). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You inform us the named employee serves as a co-chair of the NFL's Head, Neck, and Spine Committee (“HNSC”), an unpaid and volunteer role. You inform us the named individual began to serve in this position prior to his employment with the university and his duties as co-chair are outside the scope of his employment with the university. You inform us the information at issue consists of e-mail correspondence and attachments sent to or received by the named employee in his capacity as co-chair of HNSC and not related to his official university duties. You assert this information has no connection with the university's business and is an incidental use of e-mail by a university employee. You state the university's policy allows for incidental use of official resources by university employees. You further state the use of university resources to create and maintain the marked information was *de minimis*. See Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Based on your representations and our review of the information at issue, we agree the information you marked under section 552.002 does not constitute “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the university. See Gov't Code § 552.002. Therefore, we conclude the information you marked under section 552.002 is not subject to the Act and need not be released in response to the present request for 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. Section 552.101 encompasses information made confidential by statute, such as 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(2). Section 181.001(b)(2)(A) defines "covered entity," in part, as any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). The university asserts it is a covered entity for purposes of section 181.006 of the Health and Safety Code. However, in order to determine whether the university is a covered entity, we must address whether the university engages in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. Section 181.001 states that "[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards ["HIPAA"]." *Id.* § 181.001(a). Accordingly, as chapter 181 does not define "protected health information," we turn to HIPAA's definition of the term. HIPAA defines "protected health information" as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines "individually identifiable health information" as information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. You state the information you marked consists of treatment records and related billing records. Further, you state the information at issue identifies patients and includes protected health information. Upon review, we find the information the university has marked consists

of protected health information for purposes of section 181.006 of the Health and Safety Code. The university indicates the university collects and stores this information for the purpose of providing health care-related services. Therefore, with respect to this information, the university is a health care entity that is in the practice of collecting, using, and storing protected health information, and is a covered entity for purposes of section 181.006 of the Health and Safety Code. Accordingly, the university must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code.⁴

Section 552.101 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. 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 the information you marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the university must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy.

The NFL claims portions of the submitted information are subject to section 552.104 of the Government Code. 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). A private third party may invoke this exception. *Boeing*, 466 S.W.3d 831. 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.” *Id.* at 841. The NFL states it has competitors in seeking highly qualified medical experts. In addition, the NFL states release of the information it marked concerning financial terms and agreements would harm the NFL’s ability to attract the most highly qualified individuals for its Unaffiliated Neuro-Trauma Consultant program. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000)

⁴As our ruling is dispositive, we need not address the NFL’s argument against disclosure of this information.

(federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 839. After review of the information at issue and consideration of the arguments, we find the NFL has established the release of the information at issue would give advantage to a competitor or bidder. Thus, to the extent the information at issue was not previously ruled upon in Open Records Letter Nos. 2016-04226 and 2016-07695, we conclude the university may withhold the information at issue under section 552.104(a) of the Government Code.⁵

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. 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, writ ref’d n.r.e.); 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, orig. proceeding). We determined 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of the submitted information.

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.

You state information you marked consists of draft letters and a draft presentation. You state this information contains the advice and recommendations of university employees regarding the university's Institute for Brain Injury and Repair. Thus, you represent the information at issue consists of advice, opinions, and recommendations of employees pertaining to the policymaking functions of the university. We understand the final versions of the information at issue will be made available to the public. Based on your representations and our review of the information at issue, we find the university may withhold the information you marked under section 552.111 of the Government Code.

In summary, the information you marked under section 552.002 is not subject to the Act and need not be released in response to the present request for information. The university must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 181.006 of the Health and Safety Code. The university must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law. To the extent the information at issue was not previously ruled upon in Open Records Letter Nos. 2016-04226 and 2016-07695, the university may withhold the information the NFL marked under section 552.104(a) of the Government Code. The university may withhold the information it marked under section 552.111 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,

A handwritten signature in black ink, appearing to read "Ian Lancaster", with a stylized flourish at the end.

Ian Lancaster
Assistant Attorney General
Open Records Division

IML/akg

Ref: ID# 634619

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)