



THE UNIVERSITY OF TEXAS SYSTEM

Office of General Counsel

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Public Information Coordinator

July 25, 2003

Honorable Greg Abbott
Attorney General of Texas
Open Records Division
Price Daniel Building
209 W. 14th Street, 6th Floor
Austin, Texas 78701

7 188021

Re: Responsive Documents for Review with Open Records Request From Edward Hammond to the University of Texas Medical Branch at Galveston

Dear General Abbott:

On July 18, 2003, the University of Texas System (U. T. System or "System") submitted to your office, on behalf of our component institution the University of Texas Medical Branch at Galveston (UTMB or "University"), an open record request from Edward Hammond. As noted in our initial brief, the University asserts that Section 552.101, *Texas Government Code* is applicable to all the requested information.

Under Section 552.101 of the Act, information is excepted from disclosure if it is "information considered to be confidential by law, either constitutionally, statutorily or by judicial decision." UTMB asserts that under Section 51.914(1), *Texas Education Code*, and Section 161.032 of the *Texas Health and Safety Code*, the information responsive to this request is confidential by law and, therefore, excepted from disclosure in accordance with Section 552.101 of the Act.

UTMB interpreted Item 1 of Mr. Hammond's request for "Notifications for Use of Biological Agents" received by the "IBC" to mean the specific UTMB documents with this title, internally referred to as "NOU's." Additionally, for clarification, UTMB refers to its Institutional Biosafety Committee as the "Biological Safety Committee" or "BSC," not as "IBC."

The subject NOU's are also responsive to Item 2 of Mr. Hammond's request for "all approvals, denials, and stop work actions issued by the UTMB IBC." These forms are generated specifically for the BSC so that ultimate approval or denial for use of these biological agents is decided by committee members and documented on the NOU (TAB 5).

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It is the position of UTMB that **all records generated by the BSC** are confidential by statute. The BSC is a university medical center or health science center committee established to oversee biological research activities pursuant to 45 C.F.R. Section 46.103; therefore documents generated in conjunction with this committee, including the requested NOU's, **are protected from disclosure** under Section 161.032, *Health and Safety Code*, and Section 552.101, *Texas Government Code*.

In response to another request from Mr. Hammond your office issued OR2003-3283 upholding our position and establishing that UTMB's BSC is a medical committee for purposes of Subchapter D of Chapter 161 of the *Health and Safety Code*. Because we have demonstrated and your office agrees that the BSC is a medical committee, it follows that the requested NOU's, created for and used within BSC meetings, are "records and proceedings of a medical committee, including meeting minutes, not subject to court subpoena and protected from disclosure under the Act." See OR2001-0912 and OR2002-6791.

Additionally, all discussion, final approval or denial of NOU's takes place within the BSC committee meetings as illustrated on the enclosed copy of the July 6, 2003 BSC Meeting Minutes that document committee discussions about NOU approval or amendments (TAB 6). These documents are not responsive to this request; in fact OR2003-3283 specifically excepts BSC meeting minutes from disclosure; however, we include these minutes simply to sustain our position and provide your office with adequate background information in support of our arguments.

We also reference Section 51.914(1) of the *Texas Education Code* which makes confidential by law certain information falling within *either* of the following two groups: (i) technological and scientific information; *or* (ii) information that relates to a product, device, or process (or the application or use of such a product, device, or process). To be afforded protection under this provision, the information at issue must have been developed by an institution of higher education and have a potential for being sold, traded, or licensed for a fee (*regardless* of whether it is patentable or capable of being registered under copyright or trademark laws).

UTMB is an institution of higher education (as defined in *Texas Education Code* Section 61.003(8)). It is a multi-faceted medical institution incorporating outstanding integrated programs in patient care, research, education, and prevention. The goal of Section 51.914(1) is to protect the actual or potential value of proprietary information of institutions of higher education, such as UTMB. *Tex. Educ. Code Ann. § 51.914*.

To the extent that these NOU's detail any specific of procedures, data, and other information that relate to a product, device, or process (or the application of such) developed by UTMB and/or in collaboration with other researchers and institutions, this information falls within both groups of information protected under Section 51.914(1) of the *Texas Education Code*. Please note that portions of this information are also protected under Section 51.914(2) of the *Texas Education Code*, particularly any details that directly reveal the substance of the research and permit third

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parties to appropriate such research. *See*, Tex. Att'y Gen. ORD- 497; Tex. Att'y Gen. ORD-557.

The type of information reflected in the responsive material does have the potential for being sold, traded, or licensed for a fee. Research discoveries and inventions are a product of the data collected and developed by the researchers. In addition to conducting its own research using the subject information, UTMB can potentially sell or license this information for a fee to other researchers, or third parties interested in similar studies. (*See*, Tex. Att'y Gen. ORD-651).

The data included as part of these NOU's is precisely the information from which research discoveries are made in conjunction with the scientific information, products, devices, and processes developed by UTMB's sponsored and cooperative research activities. For these reasons, the University asserts that all such information is made confidential by statute under Section 51.914(1) of the *Texas Education Code* and, therefore, excepted from disclosure in accordance with Section 552.101 of the Act.

Since is the second time that Mr. Hammond has sought access to BSC documents, even after your office ruled that the BSC is a medical committee whose documents are protected from disclosure by law, UTMB respectfully asks that your office review your determination in OR2003-3283 and take notice of the similarity to this request. In both instances Mr. Hammond seeks access to documents either generated for, as part of, or as a result of BSC committee meetings. Considering your previous ruling, clearly, this is redundant.

This requestor has in the last several months submitted 4 requests to UTMB, which in and of itself is a perfectly acceptable use of the Public Information Act. It is only because the requestor's focus seems to center on issues that have already been addressed by your office, that UTMB would like the attorney general to issue a decision that gives the University a little more latitude and discretion with regard to responding to any future requests for information pertaining to BSC documents.

Please consider this a request for your office to render a "previous determination" in accordance with ORD No. 673 (2001). UTMB requests that the attorney general allow us to use this decision as a guideline for withholding BSC documents that are protected from release by statute. We would like to do this without seeking an attorney general opinion.

Any previous determination that arises from this request will apply specifically in instances where a requestor seeks access to documents created for, by or as a result of UTMB's BSC meetings.

Determinations will be followed to the letter and any issues that do not mirror the same exact situation will, of course, be submitted to your office for review. UTMB simply wants the ability to weed out requests that belabor the same points and further tax personnel resources for both our agency and the OAG.

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As you can see when comparing Mr. Hammond's current request with OR2002-3283, the same exceptions are applicable and we fully expect your office to issue the same response allowing UTMB to withhold the requested BSC information because it is confidential by law. We simply want to preserve the right to reassert that the BSC is a medical committee whose documents are protected from disclosure by statute, without the redundancy of having to seek an AG opinion over and over. The rendering of a previous determination on this issue will reallocate time, resources and funds to address open record requests for which you have not already issued an applicable ruling.

In summary, the University of Texas Medial Branch at Galveston submits this addendum and responsive documents to our July 18, 2003 submittal on the Edward Hammond open record request, and asks your office to issue a previous determination as it relates to BSC documents protected under Section 552.101, *Texas Government Code*.

If you need additional information, please do not hesitate to contact me at (512) 499-4521. All interested parties are listed below.

Sincerely,



Carol Longoria

Enclosures

INTERESTED PARTIES:

Component:

Ms. Betty Marks
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cc: Requestor:

Mr. Edward Hammond
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(w/o attachments)