



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

August 4, 1989

Mr. J. Robert Giddings
Attorney
The University of Texas System
201 West 7th Street
Austin, Texas 78701

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6261; this decision is OR89-236.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The University of Texas has received a written request for information concerning grants awarded to the university for animal research since January, 1988, by the National Institute of Health, the National Science Foundation, or any other entity. The requestor has specifically asked for copies of the grant proposals, the amounts awarded by grant, and the agencies involved. You state that the university is prepared to comply with part of the request by allowing access to information showing the amounts of the individual grants and the funding entity, but that it objects to disclosure of the individual grant proposals.

The university bases its objection on section 3(a)(1) of the Open Records Act, which excepts from mandatory public disclosure

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

V.T.C.S. art. 6252-17(a), § 3(a)(1). This provision embraces information made confidential by statute.

The university claims that grant proposals are confidential by virtue of section 51.911 of the Education Code, which provides the following:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-17a, Vernon's Texas Civil Statutes), 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; or

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties. (Emphasis added.)

In Open Records Decision No. 497 (1988), this office determined that section 51.911 protects all scientific and technical information developed at a state institution of higher education that has the potential for being sold, traded, or licensed for a fee, including research data and any information that enables a person to appropriate such research. The decision also concluded, however, that section 51.911 does not prohibit disclosure of information that does not reveal details about research otherwise protected by the section, such as information concerning licensing, contracting, equity deals, and government funding. Nor does it protect information previously published elsewhere, e.g., articles published in periodicals or scientific journals.

The university contends that the text of grant proposals that describes research to be performed under a grant may be withheld pursuant to section 3(a)(1) of the Open Records Act in conjunction with section 51.911 of the Education Code. We agree with this contention insofar as a particular grant proposal contains technical or scientific information developed in whole or in part at the university that is capable of being sold, traded, or licensed for a fee. Whether particular technical or scientific information meets this test is a matter that in most cases must first be determined by the university. In some cases, however, the answer will be obvious. For example, in Open Records Decision No. 497, it was clear from an awareness of current events and knowledge of information available to the general public that superconductivity research performed at the University of Houston held substantial commercial and proprietary potential. However, where the commercial potential of a grant proposal is not clearly shown on the face of the proposal, the governmental body should demonstrate that the requested information has the potential to be sold, traded, or licensed for a fee.

The university submitted five grant proposals and related documents as representative samples of the kinds of documents subject to this open records request. The samples cover a range of topics, including cancer research, surgical delivery systems, synthetic bone materials, and environmental health studies. Each of the five samples contain information that demonstrates the commercial or proprietary potential of the proposed research projects. We believe the descriptions of the proposed research contained in these grant proposals, and information that would permit a person to appropriate such research, are protected from public disclosure by section 51.911 of the Education Code in conjunction with section 3(a)(1). Information that does not

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directly reveal the substance of the proposed research, however, is not protected by section 51.911, even though it may be contained in grant applications. We have marked the five samples to indicate which material is excepted from disclosure.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-236.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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Prepared by Steve Aragon
Assistant Attorney General

SA/mc

Ref.: ID# 6261

Enclosures: Marked documents

cc: Ms. Laura Barnekow
3303A Clawson
Austin, Texas 78704