



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 29, 1994

Ms. Genevieve G. Stubbs  
Associate General Counsel  
The Texas A & M University System  
Office of General Counsel  
State Headquarters Building  
301 Tarrow, 6th Floor  
College Station, Texas 77843-1230

OR94-421

Dear Ms. Stubbs:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act ("the act"), chapter 552 of the Government Code. Your requests were assigned ID# 24880 and ID# 25525.

Texas A & M University ("the university") received two requests for information concerning the Philadelphia Project and Dr. John O'M. Bockris. The first request is for four items of information. You invoke several exceptions in the act to the release of information responsive to the first two items requested.<sup>1</sup> The first two items requested in the first request are as follows:

1. Any and all documents and correspondence between Dr. Robert A. Kennedy, vice president for research and associate provost for graduate studies, and Genevieve Stubbs, associate general counsel, since November 1, 1993 to date.
2. Any and all correspondence and documents between Gaines West, attorney for Dr. John O'M. Bockris, and Stubbs, Kennedy or the committee which conducted an official inquiry into allegations of scientific misconduct against Bockris.

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<sup>1</sup>As you raise no exceptions to the release of the information concerning the third and fourth items, we assume that, if such information exists, you have released it.

The second request is for:

1. A copy of the gift agreement for the Philadelphia Project . . . and any other documents included in the file containing this agreement.<sup>2</sup>
2. All correspondence and memoranda since November 1, 1993 in the files of Dr. Richard Ewing, Mr. David Hicks . . . , Dr. Michael B. Hall, Dr. Michael Kemp, Dr. Elton Lacy, Dr. Robert Kennedy, Dr. William H. Mobley, and/or the Office of General Counsel concerning Dr. John O'M. Bockris and/or the Philadelphia Project.
3. Correspondence sent or received by Dr. Ron Carter, Ms. Genevieve Stubbs, Mr. Bob Wiatt, and/or the Office of Internal Audit concerning improper billings by Mr. Joe Champion to the Philadelphia Project.

You say that the information requested in the second request substantially duplicates the information in the first request. You enclosed two additional items of information, which are responsive only to the second request: a memorandum from an attorney who represented Dr. Bockris before he retained Mr. West as counsel, and a memorandum from you to Dr. Benton Cocanougher, Interim Senior Vice President and Provost at the university. Since the two requests are for substantially the same information and since you urge the same exceptions to the required release of the requested information, we have combined our responses to these two requests into one letter.

You assert that section 552.103 of the Government Code exempts the requested information from required public disclosure. Section 552.103 permits a governmental body to withhold information that relates to pending or reasonably anticipated litigation to which the governmental body is a party. Administrative proceedings subject to the Administrative Procedure Act, Government Code chapter 2001, are considered "litigation" within the meaning of section 552.103. *See* Open Records Decision No. 588 (1991).

You inform us that the requested information pertains to the university's inquiry into allegations of scientific misconduct by a faculty member. You say "[t]he possible outcomes of the inquiry were either closure of the case, or referral to a second body for a formal investigation. . . . [S]uch procedures are the equivalent of administrative proceedings."

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<sup>2</sup>We note that you did not enclose information that is responsive to the first item of the second request. We, therefore, assume that if it exists, you have or will release it.

Section 552.103 requires concrete evidence that a claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). The mere chance of litigation is not sufficient to trigger this exception. *See* Open Records Decision No. 359 (1983).

By telephone on May 25, 1994, you informed us that the inquiry is completed and that the faculty member was exonerated of the allegations against him. You stated that you expect no further proceedings regarding the allegations of scientific misconduct. Furthermore, you have not provided us with information regarding any other anticipated or pending litigation to which the requested information may relate. Thus, as you have provided no concrete evidence that the requested information relates to reasonably anticipated litigation to which the university may be a party, we conclude that the university may not withhold the requested information pursuant to section 552.103 of the Government Code.

You also seek to withhold the requested information based on the attorney-client privilege. Section 552.107(1) of the act protects attorney-client communications.<sup>3</sup> Section 552.107(1) applies to "privileged information" under rule 1.05 of the State Bar Disciplinary Rules of Professional Conduct. *See* Open Records Decision No. 574 (1990). Section 552.107(1) does not apply to "unprivileged information" under rule 1.05.<sup>4</sup> *See id.*

In the context of the Open Records Act, the privilege generally applies to factual information or requests for legal advice communicated by the client to the attorney. *See id.* It also applies to advice or opinion rendered by the attorney to the client or to an associated attorney in furtherance of the rendition of legal services to the client. *See id.* However, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *See id.*

The documents you submit include correspondence from you to Mr. Gaines West, Dr. Bockris's attorney, as well as correspondence from Mr. West to you. Your response to the second request also includes a memorandum from Dr. Bockris's former attorney, Mr. John Hawtrey, to you.

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<sup>3</sup>Although you raise section 552.101 of the act, the privilege is more properly deemed an aspect of section 552.107(1) of the act. *See* Open Records Decision No. 574 (1990). Moreover, discovery privileges are not covered under section 552.101 of the act, since information is "privileged" only to the extent that the court in a particular case deems it to be so. *See* Open Records Decision No. 575 (1990) at 2.

<sup>4</sup>Rule 1.05 defines "privileged information" as information of a client protected by the lawyer-client privilege of rule 503 of the Texas Rules of Civil Evidence or rule 503 of the Texas Rules of Criminal Evidence or rule 501 of the Federal Rules of Evidence. State Bar of Texas, Disciplinary Rules of Professional Conduct 1.05. Rule 1.05 states that "[u]nprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." *Id.* 1.05(a).

You apparently did not represent Dr. Bockris in this matter. The attorney-client privilege does not apply to communications between attorneys who are not representing the same client. *See* Tex. R. Civ. Evid. 503(d)(5). The privilege may apply to communications between attorneys when the communication is from another attorney representing another party in a pending action concerning a common interest therein. *See id.* 503(b)(3). Given that a university committee was investigating Dr. Bockris, the university and the faculty member did not share common interests during the inquiry. Thus, the documents from you to Mr. West, and the documents to you from Mr. West and Mr. Hawtrey are not privileged and are therefore outside the protection of section 552.107(1) of the act.

You also submit documents from you to Dr. Robert A. Kennedy, Vice President for Research and Associate Provost for Graduate Studies. These are "privileged" material under rule 1.05 of the State Bar Disciplinary Rules of Professional Conduct. Thus, you may withhold these documents pursuant to section 552.107(1) of the act. Portions of the memorandum from you to Dr. Cocanougher contain attorney advice or opinion which you may withhold. We have marked the documents accordingly.

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 contact this office.

Yours very truly,



Kay Guajardo  
Assistant Attorney General  
Open Government Section

KHG/rho

Ref.: ID# 24880, ID# 25525

Enclosures: Marked documents

cc: Mr. Rene A. Henry, Jr.  
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