



January 11, 2001

Mr. Scott A. Kelly  
Deputy General Counsel  
The Texas A&M University System  
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OR2001-0126

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#143178.

Texas A&M University (the "university") received a request for information relating to technologies or intellectual properties that the university has licensed to private entities since fiscal year 1996, including but not limited to the following:

1. A name and description of each licensed technology.
2. The academic field most closely associated with each licensed technology.
3. The lead researcher(s) who developed each licensed technology.
4. The date when the technology was licensed.
5. Information about whether or not each license was exclusive.
6. The name of the entity or entities that licensed each technology from the university.
7. Any information relating to any actual or potential benefits that the university received or could receive from each licensing.

You assert no exception to the release of the requested information, nor do you submit any arguments against its disclosure. However, you notified 186 Texas A&M System Technology licensees of the request, pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542

(1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). This office received responses from the following licensees: Invitrogen Living Science ("Invitrogen"); Gentest Corporation ("Gentest"); SYN Fuels International, Inc. ("Synfuels"); Conquest Resources Corp. ("Conquest"); the University of South Carolina ("USC"); Seminis Vegetable Seeds, Inc. ("Seminis"); Lynntech, Inc. and Lynntech International, Ltd. ("Lyntech"); GenomicFX, L.P. ("GenomicFX"); Conexant Systems, Inc. ("Conexant"); Golden Peanut Company ("Golden Peanut"); Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer Ingelheim"); and IDEXX Laboratories, Inc. ("IDEXX"). In addition, this office is considering the correspondence sent to the university and forwarded to this office relating to Trinity Industries ("Trinity"). These companies variously claimed that the requested information is excepted from public disclosure under sections 552.101 and 552.110 of the Government Code.

Section 552.301(b) of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. The university received the written request for information on October 6, 2000. You did not request a decision from this office until November 2, 2000, more than ten days after the requestor's written request. Therefore, we conclude that the department failed to meet its ten-day deadline for requesting an opinion from this office.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex.App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex.App.--Houston[1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982); Gov't Code § 552.302. The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. Consequently, as this request implicates the interests of third parties, we will consider the arguments submitted by those parties.

Initially, we note that counsel for Trinity raised sections 552.103 and 552.104 of the Government Code, in addition to section 552.101 and 552.110, in his letter to the university. As these exceptions protect the interests of governmental bodies, and not third parties, we decline to consider the application of these exceptions to the submitted information. *See* Open Records Decision Nos. 592 (1991), (predecessor to section 552.104 designed to protect the interests of governmental bodies and not interests of private parties submitting information to government), 542 (1990) (litigation exception not one which implicates rights of third party).

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. USC argues that under federal law, information contained in patent applications is confidential pursuant to 35 U.S.C § 122. That section provides:

(a) Confidentiality.--Except as provided in subsection (b), applications for patents shall be kept in confidence by the Patent and Trademark Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of an Act of Congress or in such special circumstances as may be determined by the Director.

As we have no patent applications at issue in this case, and as 35 U.S.C § 122 applies by its terms to the Patent and Trademark Office, we find that this federal statute is inapplicable to the submitted information. Therefore, the submitted information may not be withheld from disclosure based on 35 U.S.C § 122 in conjunction with section 552.101 of the Government Code.

We next address whether the submitted information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. A trade secret is a process or device for continuous use in the operation of the business. [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

You have submitted to this office as responsive to the request a 33-page printout from the Texas A&M University System Technology Licensing office containing the following information pertaining to licensed technologies with signed dates between September 1, 1995 and December 31, 2000: agreement type and agreement ID; licensee; signed date; tech ID; tech title; and inventor(s). You also submitted printouts containing license revenue for fiscal years 1999 and 2000 by license number for license agreements issued from fiscal year 1996 to date. After reviewing the information at issue and the arguments set forth by the licensees under section 552.110 for trade secret protection, we conclude that none of the submitted information constitutes a trade secret for purposes of receiving protection under section 552.110 of the Government Code. Therefore, the submitted information may not be withheld under section 552.110(a).

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999). After reviewing the information at issue and the arguments set forth by the licensees, we conclude that none of the licensees have demonstrated that substantial competitive injury would result from disclosure of the submitted information, and thus this information may not be withheld from the requestor

under section 552.110(b) as commercial or financial information.<sup>2</sup> Therefore, the submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

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<sup>2</sup>We note that Synfuels/Conquest, Lynntech, IDEXX, GenomicFX, Seminis, Gentest, Golden Peanut and Boehringer Ingelheim all made arguments for the protection of information such as certain contract provisions or specific royalty amounts which was not submitted to this office by the university as responsive to the request. Therefore, as these arguments were inapplicable to the information before this office, such arguments could not justify withholding of the submitted information.

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512-475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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MAP/seg

Ref: ID# 143178

Encl. Submitted documents

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