



January 28, 2002

Ms. Carol Longoria
Public Information Coordinator
University of Texas System
201 West 7th Street
Austin, Texas 78701-2981

OR2002-0417

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157793.

The University of Texas System (the "system") received a request for copies of documents related to a specified person's experimental research using "alendronate or risendronate in either animals or humans." You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.104, 552.107, and 552.110 of the Government Code and the Family Educational Rights and Privacy Act ("FERPA"). You state, and provide documentation showing, that you notified an interested third party whose proprietary interests may be implicated by the request, Aventis Pharmaceuticals, Inc. ("Aventis"), of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 (the "Act") in certain circumstances). We have considered all claimed exceptions and have reviewed the submitted information, which includes representative sample documents.¹

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). Section 552.022(a) provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege.

Gov't Code § 552.022(a)(1), (3), (16). Two of the documents in Tab 8 and one of the documents in Tab 9, which we have marked, constitute completed reports and evaluations prepared for the system. Several of the documents in Tab 5, which we have marked, constitute information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by the system. Two of the documents in Tab 8, which we have marked, are attorney fee bills. You claim that the completed reports and the attorney fee bills in Tab 8 are excepted from disclosure pursuant to section 552.107 of the Government Code. However, section 552.107 is a discretionary exception under the Act and, as such, does not constitute "other law" that makes information confidential.² *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

privilege, section 552.107(1). Accordingly, we do not address section 552.107 of the Government Code with respect to the completed reports and the attorney fee bills in Tab 8.

We note, however, that the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether the completed reports and the attorney fee bills in Tab 8 are confidential under rule 503. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* Therefore, in order for information to be withheld from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not

fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on our review of your arguments and the completed reports and attorney fee bills in Tab 8, we conclude that you have failed to demonstrate that any portion of the completed reports constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, the system may not withhold any portion of the completed reports in Tab 8 from disclosure pursuant to rule 503 of the Texas Rules of Evidence. However, we conclude that portions of the attorney fee bills in Tab 8, which we have marked, are encompassed by the attorney-client privilege and, therefore, may be withheld from disclosure pursuant to rule 503 of the Texas Rules of Evidence.

You claim that portions of Tab 9, to include the completed evaluation, are excepted from disclosure pursuant to FERPA. We note that section 552.114 of the Government Code exempts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and FERPA. *See Open Records Decision No. 539 (1990)*. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See 20 U.S.C. § 1232g(b)(1)*. "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A).

Information must be withheld from disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See Open Records Decision Nos. 332 (1982), 206 (1978)*. This includes information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. *See Open Records Decision No. 224 (1979)*. Based on our review of your arguments and the information in Tab 9, we conclude that some portions of this information constitute personally identifiable information contained in a student's education records. Accordingly, we conclude that the system must withhold from disclosure all student-identifying information contained within Tab 9 pursuant to section 552.114 of the Government Code and/or FERPA. *See Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978)*.

You also claim that the documents that are subject to section 552.022(a)(3) in Tab 5, along with the remaining information in Tabs 5, 8, and 9 and the information in Tab 3, is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with

section 51.914 of the Education Code.³ Section 51.914 of the Education Code provides in pertinent part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, 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[.]

(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[.]

Educ. Code § 51.914(1), (2). The purpose of section 51.914(1) is to protect the “actual or potential value” of technological and scientific information developed in whole or in part at a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting former Education Code section 51.911). You state that the documents that are subject to section 552.022(a)(3) in Tab 5, along with the remaining information in Tabs 5, 8, and 9, and the information in Tab 3 detail scientific and technical information and have the inherent potential to produce scientific information that has the potential to be sold, traded, or licensed for a fee. Whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See* Open Records Decision No. 651 (1997). Thus, this office has stated that in considering whether requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a university’s assertion that the information has this potential. *See id.* Based on our review of your arguments, the documents that are subject to section 552.022(a)(3) in Tab 5, the remaining information in Tabs 5, 8, and 9, and the information in Tab 3, we conclude that

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

some of this information is confidential under section 51.914 of the Education Code. However, you have not demonstrated that the release of some of this information would reveal information *directly* relating to the substance of various research protocols or experiments which could be appropriated by other interested parties. *See* Open Records Decision Nos. 557 at 2 (1990) (stating that working titles of experiments are not per se protected by section 51.914 because release would not permit person to appropriate research nor does information directly reveal substance of proposed research); 497 (1988) (stating that information related to research is not protected if it does not reveal details about research). Accordingly, the system must withhold from disclosure the information that we have marked in Tabs 5, 8, and 9 pursuant to section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

You also claim that the remaining information in Tab 5 is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. Section 552.104 also protects information from disclosure when the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 592 at 8-9 (1991), 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* Open Records Decision No. 593 at 4 (1991). Based on our review of your arguments and the remaining information in Tab 5, we conclude that the system has failed to demonstrate that the release of this information would cause specific harm to the system's interests in a particular competitive situation. Accordingly, the system may not withhold any portion of the remaining information in Tab 5 from disclosure pursuant to section 552.104 of the Government Code.

Aventis responded to the system's section 552.305 notice by claiming that the requested information is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects two types of information: trade secret information and commercial/financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. We note that all of the submitted information that Aventis claims to be excepted from disclosure under section 552.110 has already been addressed in this ruling. Aventis does not make any specific section 552.110 arguments for any portion of the remaining information in Tab 5. Consequently, the system may not withhold any portion of the remaining information in Tab 5 pursuant to section 552.110 of the Government Code.

We note, however, that portions of the remaining information in Tab 5 contain account numbers that are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides, in pertinent part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, the system must withhold from disclosure the account numbers contained within the remaining information in Tab 5 that we have marked pursuant to section 552.136 of the Government Code.

We also note that the remaining information in Tab 5 contains email addresses that may be subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, unless the members of the public in question have affirmatively consented to their release, the system must withhold from disclosure the email addresses contained within the remaining information in Tab 5, which we have marked, pursuant to section 552.137 of the Government Code.

You also claim that the remaining information in Tab 8 is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) excepts information encompassed by the attorney-client privilege from disclosure. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. *See* Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information

from disclosure, including factual recountings of events, documentation of calls made, meetings attended, or memos sent. *See id.* Based on our review of your arguments and the remaining information in Tab 8, we agree that some of the information constitutes either a client confidence or an attorney's legal advice or opinion. Therefore, we conclude that the system may withhold the marked information in Tab 8 from disclosure pursuant to section 552.107(1) of the Government Code.

We note that portions of the remaining information in Tab 8 may be excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. The remaining information in Tab 8 contains the home addresses and social security numbers of two associate professors employed by the system. Consequently, the system may only withhold these home addresses and social security numbers under section 552.117, if the associate professors made a request for confidentiality under section 552.024 prior to the date on which the request for information was received by the system. The system may not withhold this information under section 552.117 if the associate professors did not make a timely election to keep this information confidential. *See Open Records Decision No. 530 at 5 (1989)* (stating whether particular piece of information is protected by section 552.117 must be determined at time request for it is made).

If the associate professors did not elect to withhold their social security numbers from disclosure as prescribed by section 552.024, their numbers may nevertheless be confidential under federal law. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the system to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I). We caution the system, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers at issue, the system should ensure that the numbers were not obtained or are not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Finally, you request that this office issue a previous determination allowing the system to withhold information pertaining to the Institutional Review Board (the "IRB") from disclosure in response to future requests for information without the necessity of seeking a ruling from this office. We decline to issue such a previous determination at this time.

In summary, the system may withhold from disclosure the portions of the attorney fee bills in Tab 8 that we have marked pursuant to rule 503 of the Texas Rules of Evidence. The system must withhold from disclosure all student-identifying information contained within Tab 9 pursuant to section 552.114 of the Government Code and/or FERPA. The system must withhold from disclosure the information that we have marked in Tabs 5, 8, and 9 pursuant to section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The system must withhold from disclosure the account numbers contained within the remaining information in Tab 5 that we have marked pursuant to section 552.136 of the Government Code. Unless the members of the public in question have affirmatively consented to its release, the system must withhold from disclosure the email addresses contained within the remaining information in Tabs 5 and 8, which we have marked, pursuant to section 552.137 of the Government Code. The system may withhold the marked information in Tab 8 from disclosure pursuant to section 552.107(1) of the Government Code. If the associate professors noted in Tab 8 made a request for confidentiality under section 552.024 prior to the date on which the request for information was received by the system, the system may withhold the home addresses and social security numbers of the professors which are contained in Tab 8 pursuant to section 552.117 of the Government Code. If the associate professors noted in Tab 8 did not elect to withhold their social security numbers from disclosure as prescribed by section 552.024, their numbers may nevertheless be confidential under federal law. The system must release the remaining information in Tabs 3, 5, 8, and 9 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

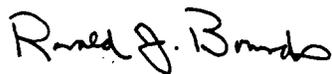
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may 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 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 Texas Building and Procurement 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 157793

Enc. Marked documents

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