



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 29, 2003

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

OR2003-6103

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# 186062.

The University of Texas Medical Branch at Galveston (the "university") received a request for a copy of the university's application for funding as the Region VI Center of Excellence for Bio-defense and Emerging Infectious Disease Research (the "RCE"). You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.137 of the Government Code.<sup>1</sup>

You also assert that release of the requested information would implicate the proprietary interests of twenty-seven third parties. Pursuant to section 552.305 of the Government Code, the university notified the interested third parties of this request for information and of their opportunity to submit comments to this office. *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). An interested third party has ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code*

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<sup>1</sup>Although you assert section 552.137, the submitted records did not contain personal e-mail addresses. Accordingly, we do not address your arguments under this exception.

§ 552.305(d)(2)(B). As of the date of this letter, only one third party, the University of Texas at El Paso (“UTEP”) has provided reasons explaining why those portions of the application revealing research conducted by one of its employees should not be released. Therefore, we have no basis to conclude that release of the other portions of the application would implicate the proprietary interests of the other twenty-six third parties.<sup>2</sup> See Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). UTEP asserts that its research information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. Since UTEP’s arguments mirror those of the university, we will address their assertions together. We have considered all comments submitted to this office and have reviewed the sample records provided by the university.<sup>3</sup> See Gov’t Code § 552.304 (permitting interested party to submit reasons why requested information should or should not be released).

Initially, we address the claim that all of the submitted information is excepted under 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. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. See, e.g., Open Records Decision No. 463 (1987). In those situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the “competitive advantage” aspect of section 552.104 if it meets two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. See Open Records Decision No. 593 at 4 (1991) (stating that governmental body that has been granted specific authority to compete in private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm

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<sup>2</sup>We note that this office received correspondence from the University of New Mexico (“UNM”) indicating that Dr. Frank Gilfeather does not object to the release of those portions of the application that relate to research conducted by UNM.

<sup>3</sup>We assume that these sample records are 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.

the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

You state that the university constantly “competes” with other entities for research dollars. As previously noted, the purpose of this aspect of section 552.104 is to place a public entity on equal footing with a private entity when competing in a private marketplace environment. However, you have not demonstrated that the university has a marketplace interest for purposes of section 552.104. *See* Gov’t Code § 552.301 (providing that it is governmental body’s burden to explain applicability of claimed exceptions to disclosure). Therefore, we conclude that none of the requested information may be withheld under section 552.104. *See generally* Open Records Decision No. 604 (1992) (concluding, among other things, that State Bar could not avail itself of this aspect of Gov’t Code § 552.104 because its “guiding principles” were incompatible with an ethic of marketplace competition).

Next, we address the assertions made under section 552.101. Section 552.101 of the Government Code exempts from disclosure information that is deemed confidential by law, including information made confidential by statute. Initially, you assert that all of the responsive information is protected from disclosure under section 51.914 of the Education Code, which provides in pertinent part as follows:

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). You represent that the information at issue reveals the “details of procedures, data, and other information that relate to products, devices, or processes (or the application of such) developed by [the university] and/or in collaboration with several other researchers and institutions.” You also represent that these research ideas have not yet been published.<sup>4</sup> You further claim that the university “can potentially sell or license this information for a fee to other researchers, or third parties interested in similar studies.” After reviewing your arguments and the submitted information, we agree that portions of the records directly reveal the substance of research or proposed research and are, therefore, within the scope of section 51.914. *See* Open Records Decision No. 497 (1988) (allowing university to withhold all of its superconductivity research, including patent applications, under statutory predecessor to Educ. Code § 51.914).

Other portions of the submitted records, however, including all of the information submitted as Exhibits C, N, O, and P, contain only general background information or other information tangential to the proposed research. You have not explained, nor can we discern, how the release of this information would reveal the details of the research at issue. Open Records Decision Nos. 557 (1990) (stating that working titles of experiments are not per se protected by Educ. Code § 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, we have marked the information that must be withheld under section 552.101 in conjunction with section 51.914 of the Education Code.

You also claim that Exhibit C is protected from disclosure under section 552.101 in conjunction with sections 418.176 and 418.177 of the Government Code. The Seventy-eighth Legislature recently added sections 418.176 through 418.182 to chapter 418 of the Government Code. These newly enacted provisions make certain information related to terrorism confidential. Sections 418.176 and 418.177, which became effective on June 22, 2003, provide in relevant part:

**Sec. 418.176. CONFIDENTIALITY OF CERTAIN INFORMATION  
RELATING TO EMERGENCY RESPONSE PROVIDERS.**

(a). Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

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<sup>4</sup>The requestor contends that UTEP’s information has been released to the public by the United States Patent and Trademark Office (“USPTO”). This office has confirmed with the USPTO that Dr. Luis Martinez’s patent application has not been released to the public.

- (1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

**Sec. 418.177. CONFIDENTIALITY OF CERTAIN INFORMATION RELATING TO RISK OR VULNERABILITY ASSESSMENT.**

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Act of June 2, 2003, 78th Leg., R.S., H.B. 9, § 3 (to be codified at Gov't Code §§ 418.176, .177). Exhibit C is merely general information identifying facilities and scientific support that, if funded, the RCE would make available to emergency responders in the event of a bio-defense emergency. Exhibit C is not a vulnerability assessment. Furthermore, the RCE is not itself an emergency response provider nor do these records reveal any protected information about an actual emergency response provider. Accordingly, the university may not withhold Exhibit C under section 552.101 in conjunction with sections 418.176 and 418.177 of the Government Code.

Finally, we address the university's assertion that it has a section 552.110 interest in the requested records. Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial or 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. Gov't Code § 552.110(a), (b). We note that, by its terms, section 552.110 only protects the interests of the person from whom the information was obtained. The provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. As previously noted, none of the notified third

parties asserted a section 552.110 interest in the requested materials. Therefore, none of the requested information may be withheld under that exception.

In summary, the university must withhold the types of information that we have marked under section 552.101 in conjunction with section 51.914 of the Education Code. The remaining information must be released.

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).

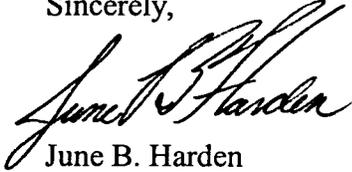
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/lmt

Ref: ID# 186062

Enc: Submitted documents

c: Mr. Edward Hammond  
The Sunshine Project  
101 West 6<sup>th</sup> Street, Suite 607  
Austin, Texas 78701  
(w/o enclosures)

3<sup>rd</sup> parties  
(w/o enclosures)

Dr. Theresa Koehler  
Microbiology & Molecular Genetics  
University of Texas Health Science Center at Houston  
P.O. Box 20708  
Houston, Texas 77225

Dr. Karl Klose  
Department of Microbiology & Immunology  
University of Texas Health Science Center at San Antonio  
7703 Floyd Curl Drive  
San Antonio, Texas 78229-3900

Dr. Shinji Makino  
University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-1019

Dr. Robert Shope  
University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0609

Dr. Scott Weaver  
University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0609

Dr. Peter Mason  
University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0609

Dr. L. Gary Adams  
College of Veterinary Medicine  
Texas A&M University  
Suite 101 - VMA  
College Station, Texas 77843-4461

Dr. James Samuel  
Department of Med Microbiology & Immunology  
Texas A&M University System Health Science Center  
1114 TAMU  
College Station, Texas 77843-1114

Dr. David Walker  
The University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0609

Dr. Frank Gilfeather  
High Performance Computing  
Education & Research Center  
1601 Central Avenue, NE  
Albuquerque, New Mexico 87131

Dr. Kathryn Sykes  
Macrogenics  
2600 North Stemmons Freeway, Suite 210  
Dallas, Texas 75207

Dr. Frank Hamill  
Virology & Immunology  
Southwest Foundation for Biomedical Research  
P.O. Box 760549  
San Antonio, Texas 78245-0549

Dr. Chiaho Shih  
The University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0609

Dr. Donald Bouyer  
The University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0609

Dr. L. E. Martinez  
Department of Chemistry  
University of Texas El Paso  
500 West University Avenue  
El Paso, Texas 79968

Dr. Yan Xiang  
Department of Microbiology & Immunology  
University of Texas Health Science Center at San Antonio  
7703 Floyd Curl Drive  
San Antonio, Texas 78229-3900

Dr. Stanley Watowich  
The University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0609

Dr. Edward Nokonowicz  
Department of Biochem & Cell Biology  
Rice University  
P.O. Box 1892 - MS140  
Houston, Texas 77251-1892

Dr. Suzette Tardif  
Primate Research Center  
Southwest Foundation for Biomedical Research  
P.O. Box 760549  
San Antonio, Texas 78245-0549

Dr. Harold Garner  
University of Texas Southwestern Medical Center  
5323 Harry Hines Boulevard  
Dallas, Texas 75390-8591

Dr. Alexander Kurosky  
The University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0645

Dr. C. Rick Lyons  
University of New Mexico Health Science Center  
Cancer Research Facility 301  
915 Camino De Salud  
Albuquerque, New Mexico 87131

Dr. C. J. Peters  
The University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0609

Dr. Lawrence Stanberry  
Department of Pediatrics  
The University of Texas Medical Branch  
301 University Boulevard  
Galveston, Texas 77555-0351

Dr. Stephen A. Johnston  
University of Texas Southwestern Medical Center  
5323 Harry Hines Boulevard  
Dallas, Texas 75390-8573

Dr. Ellen S Vitetta  
Immunobiology Center  
University of Texas Southwestern Medical Center  
5323 Harry Hines Boulevard  
Dallas, Texas 75390-8576

Dr. George Weinstock  
Human Genome Sequencing Center  
Baylor College of Medicine  
1 Baylor Plaza, MSC 226  
Houston, Texas 77030

Ms. Cynthia Villa  
Vice President for Finance & Administration  
University of Texas El Paso  
500 West University Avenue  
El Paso, Texas 79968-0506

Ms. Pamina M. Deutsch  
University Counsel  
University of New Mexico  
Scholes Hall 152  
Albuquerque, New Mexico 87131-0056

Mr. Scott Henson  
American Civil Liberties Union of Texas  
1210 Rosewood Avenue  
Austin, Texas 78702