



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2003

Mr. Ronny H. Wall
Associate General Counsel
Texas Tech University System
P.O. Box 42021
Lubbock, Texas 79409-2021

OR2003-9224

Dear Mr. Wall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193109.

Texas Tech University (the "university") received a request for the following information in part: (1) the grant applications, approvals and final reports, in their entirety, of all projects begun since 1990 that have involved plant breeding or use of biotechnology techniques to increase the ricin content of any variety of the castorbean plant; (2) all records related to crosses between the castorbean variety Hale and USDA accessions PI 257654 or PI 258368, and progeny of such crosses; and (3) records that describe the ricin extraction unit built under the supervision of Dr. Harry W. Parker of the Department of Chemical Engineering, and its construction, characteristics, and operations. We note that in the requestor's October 21, 2003 letter to this office, the requestor withdrew item number three of his request which related to the records that describe the ricin extraction unit built under the supervision of Dr. Harry W. Parker of the Department of Chemical Engineering. Thus, we do not address Exhibit E, which is responsive to request item number three. You initially stated that the university does not have documents responsive to item one of the request.¹ In your letter dated November 21, 2003, you clarify that a 1995 proposal that is responsive to item number one is also responsive to item number two of the request. Thus, this ruling only addresses Exhibit D, those records that are responsive to item number two of the request. You claim

¹ We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have reviewed the representative sample of information you submitted and considered the exception you claim.² We have also received and considered the requestor's comments. *See* Gov't Code § 552.304.

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You argue that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. 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 statutory predecessor to Educ. Code § 51.914). Whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in

² We assume 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 those records contain substantially different types of information than that submitted to this office.

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.*

You represent that all of the documents in Exhibit D “pertain to a crossbreeding program that could result in low Ricin castor beans that are suitable for commercial purposes[.]” You represent that the documents related to the crossbreeding program could “result in a process or product which has significant potential for being sold, traded, or licensed for a fee.” You also state in your November 21, 2003 letter to this office that the university is “currently exploring commercial opportunities for the latest castor seed lines developed from this project.”

After reviewing your arguments and the submitted information, we agree that portions of the documents directly reveal the substance of research or proposed research of scientific and technological information that has the potential for being sold, traded, or licensed for a fee under section 51.914. Other portions of the submitted information, however, 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.

We now examine your section 418.178 argument to the remaining information in Exhibit D (pertaining to a crossbreeding program) that is not protected under section 51.914, including general background information and budgetary documents to this proposed research. You claim that this information is confidential under section 418.178 of the Government Code. We note that 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. Section 418.178 provides:

**Sec. 418.178. CONFIDENTIALITY OF CERTAIN INFORMATION
RELATING TO CONSTRUCTION OR ASSEMBLY OF WEAPONS.**

- (a) In this section, “explosive weapon” has the meaning assigned by Section 46.01, Penal Code.
- (b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Sess. Law Serv. 4814 (Vernon) (to be codified at Gov't Code § 418.178). Upon review, we conclude that you have not adequately demonstrated how the remaining general background information and budgetary information meets any of the requirements set out in section 418.178(b) that would necessitate exception from disclosure. Therefore, the remaining information in Exhibit D may not be withheld pursuant to section 418.178 of the Government Code.

In summary, the university must withhold the information we have marked under section 51.914 of the Government Code. The remaining 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

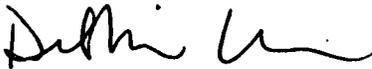
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these 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 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/sdk

Ref: ID# 193109

Enc. Submitted documents

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