



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 5, 2004

Ms. Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
P.O. Box 12788
Austin, Texas 78711

OR2004-2715

Dear Ms. Greenberg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198684.

The Texas Higher Education Coordinating Board (the "board") received a request for "[a]ll proposals, progress reports, and final reports" submitted during a specified period by five named individuals at Texas Technological University ("Texas Tech") and the University of Texas Southwestern Medical Center ("UT Southwestern"). You inform us that you "have provided . . . the overall statement of work for each of the funded proposals to the requestor." You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. In addition, you have notified the five named third parties of the request 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In correspondence with this office, UT Southwestern asserts that portions of the records pertaining to its faculty members are excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered all claimed exceptions and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. You inform us that the

submitted information pertains “to two complementary, statewide research programs, the Advanced Research Program and the Advanced Technology Program,” which are governed by chapters 142 and 143 of the Education Code. *See* Educ. Code §§ 142.001-.007 (advanced research program), 143.001-.008 (advanced technology program).

Section 142.007 of the Education Code provides:

Information submitted as part of a pre-proposal or proposal or related to the evaluation and selection of research projects to be funded by the program is confidential unless made public by coordinating board rule.

Educ. Code § 142.007.

Section 143.008 of the Education Code provides:

Information submitted as part of a pre-proposal or proposal or related to the evaluation and selection of research projects to be funded by the technology program is confidential unless made public by coordinating board rule.

Educ. Code § 143.008. Both sections 142.007 and 143.008 make confidential information that is submitted for use in the process of evaluating and selecting research projects, and both provide that such information may only be made public in accordance with the board’s rules.

You inform us that, in order to implement these provisions, the board adopted the rules found at section 14.74 of title 19 of the Texas Administrative Code. This section provides:

(a) Any information either submitted by investigators or their institutions to the Coordinating Board or kept by the Coordinating Board related to the evaluation and selection of research projects to be funded by any of the research funding programs under this chapter shall be confidential unless released by the Coordinating Board pursuant to the following subsections of this section.

(b) The contents of pre-proposals and proposals submitted under the research funding programs shall be confidential. Reviewers shall be required to sign a confidentiality agreement prior to reviewing pre-proposals and proposals. No information shall be released to the general public on the content of unfunded proposals. Information released on funded proposals shall be limited to an overall statement of work approved by the affected institutions.

(c) Pre-proposals and proposals submitted by investigators or their institutions shall not be available to persons or entities other than the submitting investigators or their institutions at any time, except that the

copies of the project summaries of awarded research project may be made available in a manner specified by the Coordinating Board.

(d) Reviews shall not be disclosed to persons or entities outside the Coordinating Board at any time, except that each individual investigator shall receive a copy of the reviews of his or her proposal with the names, affiliations, and any other identifying characteristics of the reviewers redacted.

(e) Only after the grant awards are complete, the names and affiliations of reviewers shall be released as a group without an identifying link to any grant application.

19 T.A.C. § 14.74.

In this instance you have submitted proposals, progress reports, and final reports pertaining to the named individuals' research projects. We find that the submitted proposals constitute "[i]nformation submitted as part of a pre-proposal or proposal or related to the evaluation and selection of research projects" and are thus made confidential by sections 142.007 and 143.008. You do not inform us, nor does it otherwise appear, that section 14.74 allows for release of these proposals. Therefore, the submitted proposals must be withheld in their entirety pursuant to section 552.101 of the Government Code as information made confidential by law.¹ We find, however, that the submitted progress reports and final reports pertain to projects that have already been selected and funded. Because these reports do not pertain to the evaluation and selection of research projects, they are not made confidential under section 142.007 or 143.008 and may not be withheld under section 552.101 on these bases. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

We next address UT Southwestern's arguments regarding the research projects of its faculty members. UT Southwestern argues that some information in the final reports concerning these projects 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 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:

¹Because of our ruling on this issue, we need not address UT Southwestern's arguments regarding the proposals.

(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[.]

Educ. Code § 51.914(1). As noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular scientific information has “a potential for being sold, traded, or licensed for a fee.” Furthermore, 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 id.* 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.*; *but see* ORD 651 at 10 (stating that university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review).

UT Southwestern contends “that the ‘technical description’ sections of all requested, final ARP/ATP reports” are protected by section 51.914 of the Education Code. UT Southwestern informs us that this information “relates to research experiments and results on the use of immunotoxins in potentially treating cancer, HIV-related illnesses in humans, and other possible medical conditions in humans.” UT Southwestern represents that it “believes this immunotoxin information has the potential for being sold, traded, or license for a fee.” After considering UT Southwestern’s arguments and reviewing the submitted information, we find that the technical descriptions of the projects and their results contained in the submitted final reports are within the scope of section 51.914. We have marked this information, which the board must withhold pursuant to section 552.101 in conjunction with section 51.914. Because of our ruling on this issue, we need not consider UT Southwestern’s other arguments regarding this information.

Finally, we note that an interested third party is allowed 10 business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, none of the individuals affiliated with Texas Tech has submitted to this office any reasons explaining why their information should not be released. We thus have no basis for concluding that any portion of the submitted information pertaining to these individuals constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g.*, Gov’t Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party

substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990).

In summary, the board must withhold the submitted proposals pursuant to section 552.101 of the Government Code in conjunction with sections 142.007 and 143.008 of the Education Code. We have marked information in the final reports of UT Southwestern's faculty members that must be withheld under section 552.101 in conjunction with section 51.914 of the Education Code. The remaining submitted 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).

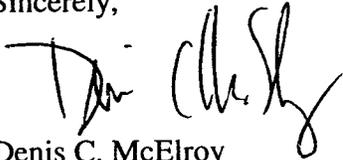
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 198684

Enc. Submitted documents

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