



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Mr. Ronnie H. Wall  
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OR2005-03703

Dear Mr. Wall:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 223032.

Texas Tech University (the "university") received a request for 1) all correspondence with community and government leaders concerning the establishment of a TIEHH Advanced Research Center and/or a High-Containment Advanced Research Center and 2) all correspondence with the US Army concerning inspection and/or certification of university facilities handling chemical and/or biological agents. You state that the university has released all information responsive to item one of the request, but claim that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.117, and 552.125 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the Department of the Army's Research, Development and Engineering Command (the "RDECOM"). See § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you indicate that the submitted information is subject to a confidentiality agreement between the university and RDECOM. We note that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. See Attorney General Opinion JM-672 (1987); see also Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be

compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, the requested information must fall within an exception to disclosure in order to be withheld.

You contend that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The university and RDECOM raises several provisions of the federal Freedom of Information Act (“FOIA”). In Open Records Decision No. 561 (1990) we noted the general rule that FOIA applies only to federal agencies and does not apply to records held by state agencies. *See* Open Records Decision No. 561 at 6 (1990); *see also* Attorney General Opinion MW-95 (1979) (concluding that neither FOIA nor the federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (concluding fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas governmental body). Accordingly, we conclude that FOIA does not apply to the requested information.

In addition to FOIA, you claim that the submitted information is excepted from disclosure pursuant to the Arms Export Control Act, 22 U.S.C § 2778. The Arms Export Control Act authorizes the President of the United States “to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.” *See* 22 U.S.C § 2778(a)(1). After reviewing the statutory language, we conclude that this provision relates to general information regarding the control of arms exports and imports, and does not make information expressly confidential. *See* Open Records Decision Nos. 478 at 2 (1987) (stating that as a general rule, statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public), 658 at 4 (1998) (stating that statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from the statutory structure). Consequently, the university may not withhold the requested information pursuant to section 552.101 in conjunction with section 2778 of title 22 of the United States Code.

You also claim that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with 10 U.S.C. § 130. Section 130 of title 10 of the United States Code provides in part:

a) Notwithstanding any other provision of law, the Secretary of Defense may withhold from public disclosure any technical data with military or space application in the possession of, or under the control of, the Department of Defense, if such data may not be exported lawfully outside the United States without an approval, authorization, or license under the Export Administration Act of 1979 . . . or the Arms Export Control Act[.]

...

c) In this section, the term 'technical data with military or space application means any blueprints, drawings, plans, instructions, computer software and documentation, or other technical information that can be used, or be adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment.

10 U.S.C. § 130. In this instance, you do not demonstrate, and the documents do not reflect, that this information consists of any technical data with military or space application. Thus, you have not demonstrated the applicability of section 130 of title 10 of the United States Code, and the submitted information may not be withheld pursuant to this federal provision.

You also contend that the submitted information is confidential pursuant to section 51.914 of the Education Code, which 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 section 51.914). 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 governmental body’s representation that the information has this potential. *See id.*

In this case, you indicate that the submitted information relates to biological research conducted at the university that can later be sold, marketed, or licensed for a fee. We note, however, that the submitted information contains only general background material, correspondence, and other information tangential to the research. You have not explained, nor can we discern, how the release of this information would reveal the details of the research at issue. *See* Open Records Decision Nos. 557(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 university may not withhold any portion of the submitted information under section 552.101 in conjunction with section 51.914 of the Education Code.

You claim that a portion of the highlighted information is confidential under section 418.178 of the Government Code. As part of the Texas Homeland Security Act, section 418.178 was added to chapter 418 of the Government Code. Section 418.178 provides:

(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.

Gov’t Code § 418.178. The fact that information may relate to biological toxins or a governmental body’s security measures does not make the information per se confidential under this section. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed

provision. As with any confidentiality statute, a governmental body asserting section 418.178 must adequately explain how the responsive records fall within the scope of that provision. *See generally* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

In this instance, you claim that the submitted information “indicates the specific location of chemical, biological or radioactive material since it indicates the location of the lab where this research is taking place.” Upon review, however, we find that you have not demonstrated that the requested information indicates the location of any material that could be used to build or assemble an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction of any kind. *See id.* § 418.178(b)(2)(A). Likewise, you have not shown that the requested information relates to the whereabouts of any information relating to a potential vaccine or to a device that detects biological agents or toxins. *See id.* § 418.178(b)(2)(B). Consequently, you have failed to demonstrate how the highlighted information is protected under section 418.178(b).

Section 552.117(a)(1) excepts from public disclosure the present and former 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the university must withhold the information you have highlighted in blue if the employee elected under section 552.024, prior to the university's receipt of this request, to keep that information confidential. The university may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election.

Section 552.125 excepts from disclosure “[a]ny documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act” (the “EHSAP”). Gov't Code § 552.125. We note that the stated purpose of the EHSAP “is to encourage voluntary compliance with environmental and occupational health and safety laws.” V.T.C.S. art. 4447cc, § 2. In furtherance of its stated purpose, the EHSAP provides for the confidentiality of environmental or health and safety audits voluntarily performed by or for the owner or operator of a facility that is regulated under an environmental or health and safety law. *See id.* §§ 3, 5, 6.

Section 3 of the EHSAP defines “environmental or health and safety audit” as follows:

(3) “Environmental or health and safety audit” means a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of:

(A) a regulated facility or operation; or

(B) an activity at a regulated facility or operation.

*Id.* § 3. Section 5 of the ESHAP provides in part:

(a) An audit report is privileged as provided in this section.

(b) Except as provided in Sections 6, 7, and 8 of this Act, any part of an audit report is privileged and is not admissible as evidence or subject to disclosure[.]

*Id.* § 5. Section 4 of the ESHAP provides in part:

(a) An audit report is a report that includes each document and communication, other than those set forth in Section 8 of this Act, produced from an environmental or health and safety audit.

(b) General components that may be contained in a completed audit report include:

(1) a report prepared by an auditor, monitor, or similar person, which may include:

(A) a description of the scope of the audit;

(B) the information gained in the audit and findings, conclusions, and recommendations; and

(C) exhibits and appendices;

(2) memoranda and documents analyzing all or a portion of the materials described by Subdivision (1) of this subsection or discussing implementation issues; and

(3) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance.

*Id.* § 4. You claim that a portion of the submitted information is related to an audit of the university lab by RDECOM. Upon review, we find that you have not adequately demonstrated that any portion of this information constitutes an “audit report” or a component from an “audit report” that was conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of a regulated facility for the purposes of section 552.125. Accordingly, we conclude that the university may not withhold any portion of the submitted information at issue under section 552.125 of the Government Code.

Finally, you claim that a portion of the submitted information is subject to section 552.137 of the Government Code. This provision excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). We note, however, that section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail address you have marked consists of the work e-mail address of a government employee. Thus, you may not withhold this information under section 552.137 of the Government Code.

In summary, pursuant to section 552.117(a)(1) of the Government Code, the university must withhold the information it has highlighted in blue if the employee timely elected under section 552.024 to keep that information confidential. The remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



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Open Records Division

DKL/krl

Ref: ID# 223032

Enc. Submitted documents

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