



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 7, 2007

Ms. Carol Longoria  
The University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2981

OR2007-16160

Dear Ms. Longoria:

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# 296682.

The University of Texas at Austin (the "university") received a request for several categories of information regarding research conducted by the university. You state that you have no responsive information regarding a portion of the request.<sup>1</sup> You state you will release some information to the requestor. You also state that you have previously released some information responsive to this request in response to a prior request for information from this requestor. Gov't Code § 552.232 (prescribing procedures for response to repetitious or redundant request for information). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.1235, 552.136, and 552.137 of the Government Code. You also believe that some of the submitted information implicates the interests of third parties. You state, and provide documentation showing, that you notified all interested third parties of the university's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

to the requestor.<sup>2</sup> *See id.* 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). Battelle, FFR, and SFBR responded to this notice. We have considered the submitted arguments and reviewed the submitted information,<sup>3</sup> portions of which consist of a representative sample.<sup>4</sup> We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from BioElectroSpec; Echo Technical; ITT Industries; Nanosphere, Inc.; Real-Time Analyzers, Inc.; TIRF Technologies, Inc.; or UES, Inc. Thus, none of those parties has demonstrated that any of the submitted information is confidential or proprietary for the purposes of the Act, and the university may not withhold any of the information at issue on the basis of any interest that any of those parties may claim in the information. *See id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, you inform us that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2006-14063 (2006). Based on your representation, we conclude that, to the extent that information responsive to the current request is identical to the information previously requested and ruled upon by this office, and the law, facts, and circumstances on which the prior ruling was based have not changed, the university may continue to rely on that ruling as a previous determination and withhold or release any such information in accordance with Open Records Letter No. 2006-14063. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental

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<sup>2</sup>The university notified the following companies pursuant to section 552.305: Battelle Memorial Institute ("Battelle"); BioElectroSpec; Echo Technical; Foundation for Research ("FFR"); ITT Industries; Nanosphere, Inc.; Real-Time Analyzers, Inc.; Southwest Foundation for Biomedical Research ("SFBR"); TIRF Technologies, Inc., UES, Inc.

<sup>3</sup>We understand that the information submitted at Tab 11 is submitted for informational purposes only.

<sup>4</sup>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.

body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not identical, we will consider your arguments.

Next, we address your assertion that some of the requested information is excepted from disclosure under the Defense Federal Acquisition Regulations Supplement (“DFARS”), which governs the disclosure of information by contractors with the federal government. See 48 C.F.R. § 252.204 - 7000. You assert that a portion of the requested information includes grants and contracts awarded by the Department of Defense (the “DoD”) to the university, and that the university may only release this information in accordance with DFARS. DFARS provides in part:

The Contractor shall not release to anyone outside the Contractor’s organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless—

- (1) The Contracting Officer has given prior written approval; or
- (2) The information is otherwise in the public domain before the date of release.

*See id.* § 252.204(a). You state that portions of the requested information, the statements of work that are in public domain through publication, will be provided to the requestor. You state that the university, as the contractor, will submit a request for release for those grants that are not in public domain to the contracting officer at the DoD in accordance with DFARS. You assert that DFARS also prohibits this office from reviewing this information without the written approval of the contracting officer at the DoD. However, because you have not provided this office the documents at issue for review, we are unable to make any determination regarding such documents.

Next, we address your assertion that the submitted internet protocol addresses do not constitute public information for purposes of the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in that decision and our review of the information at issue, we agree that the submitted internet protocol addresses do not constitute public information under section 552.002 of the Government Code. Accordingly, this information is not subject to the Act and need not be released.

You inform us that student information has been redacted from the submitted documents. The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act (“FERPA”), section 1232g

of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>5</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted redacted education records for our review. Because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>6</sup>

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. Section 51.914 of the Education Code provides in part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], 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; [or]

(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

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<sup>5</sup>A copy of this letter may be found on the Office of the Attorney General’s website: [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

<sup>6</sup>In the future, if the university does obtain consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1)-(2). 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 id.* at 10 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.914 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988). Moreover, section 51.914 is applicable only to information “developed in whole or in part at a state institution of higher education.” Educ. Code § 51.914(1).

The university seeks to withhold the information submitted at Tabs 6, 7, and 8, as well as the information you have marked at Tabs 9 and 10 under section 51.914. You state that this information relates to a product, device, or process developed by university researchers that has the potential for being sold, traded, or licensed for a fee. You assert that the information at issue reveals the substance of the research. Based on your representations and our review of the information at issue, we conclude that the university must withhold that information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.<sup>7</sup>

Next, we address your claim under section 552.1235 of the Government Code for the information you have marked. Section 552.1235 excepts from disclosure “the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” Gov’t Code § 552.1235(a). We note that this section does not except from disclosure the amount or value of an individual gift, grant, or donation. *See id.* § 552.1235(b). “Institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an “institution of higher education” as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section. *See* Educ. Code § 61.003. Because section 552.1235 does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See* Gov’t Code § 311.005. “Person” includes a corporation, organization, government

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<sup>7</sup>As our ruling is dispositive, we do not address the remaining arguments against disclosure for this information.

or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2).

You have marked information that the university seeks to withhold under section 552.1235. We understand you to contend that the marked information either identifies or tends to identify donors of the university. You state that these donors have not granted the university permission to reveal their identities. Based on your representations and our review of the information at issue, we conclude that the university must withhold the information that you have marked under section 552.1235.

In summary, the university must withhold the information that you have marked under section 552.101 in conjunction with section 51.914 of the Education Code and section 552.1235 of the Government Code. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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); *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 Office of the Attorney General 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,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/mcf

Ref: ID# 296682

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