



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2009

Mr. Scott A. Kelly
Interim General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2009-06164

Dear Mr. Kelly:

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# 342580.

Texas A&M University (the "university") received two requests for information pertaining to a specified research article, including all e-mails regarding post-publication publicity of the specified article that were sent or received by named university employees. You state the university does not maintain some of the requested information.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.111, 552.117, and 552.137 of the Government Code, and you claim some of the submitted information is protected by copyright law. We have considered your arguments and reviewed the submitted representative samples of information.²

¹The 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).

²We assume that the representative samples of records submitted to this office 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.

Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You argue that Exhibit B-1, which contains a manuscript of the specified research article, is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 51.914(1) of the Education Code. Section 51.914 of the Education Code 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 [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 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). However, this office has determined that section 51.914 does not protect information relating to scientific research that has been published. *See* ORD 497 at 7 (addressing statutory predecessor).

In this instance, you assert Exhibit B-1 is subject to section 51.194. Although you acknowledge that a final version of Exhibit B-1 has been published in a scientific journal, you argue that it is still subject to section 51.914 because its authors have retained patent and trademark rights to processes and procedures described in the article. However, these processes and procedures have also already been published, along with the rest of the submitted article. You do not otherwise explain how the scientific processes or documentation of the university's research efforts within Exhibit B-1 could still be sold, traded, or licensed for a fee. Thus, we find you have failed to demonstrate the applicability of section 51.914 to Exhibit B-1, and it may not be withheld under section 552.101 on that basis. *Id.*

You also assert Exhibit B-1 is subject to section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5.

This office has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document. *See id.* at 2. However, a governmental body may only withhold a draft policymaking document if the final form of this document is intended for public release.

You assert that Exhibit B-1 should be withheld under section 552.111 and the deliberative process privilege. However, we note that Exhibit B-1 consists entirely of a draft research paper about the public's perception of global warming and climate change. You make no representations explaining how this document relates to university policymaking or reflects the policymaking process of the university. Thus, we find that you have failed to

demonstrate the applicability of the deliberative process privilege to this document, and it may not be withheld under section 552.111 on this basis.

You also raise section 552.117(a)(1), which excepts from disclosure the 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. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which these requests for information were made. You inform us that prior to the dates the information requests were received, the university employee at issue elected to keep his personal information confidential. Accordingly, we agree that you must withhold the information you have marked under section 552.117(a)(1).

You assert that some of the remaining information is subject to section 552.137 of the Government Code. Section 552.137 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). The e-mail addresses you have marked are not of a type specifically excluded by section 552.137(c). Further, you represent that the owners of the email addresses at issue have not consented to their release. Therefore, the university must withhold the e-mail addresses you marked under section 552.137 of the Government Code.

You assert that some of the submitted information is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with the copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the university must withhold the information you marked under sections 552.117(a)(1) and 552.137 of the Government Code. The remaining information must be released, but any copyrighted information must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 342580

Enc. Submitted documents

c: Requestor
(w/o enclosures)