



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 23, 2009

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

OR2009-13446

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# 354645 (SO 09-076).

The Texas A&M University System (the "university") received a request for all documents from January 1, 2008 to June 18, 2009 related to the university's hiring of a named employee, and for all e-mail correspondence between the named employee and two other university employees during the same time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.117, 552.136, and 552.137 of the Government Code. You also indicate release of some of the requested information may implicate the proprietary interests of Xoma. Thus, pursuant to section 552.305 of the Government Code, you notified Xoma of the request and of the company's right to submit arguments to this office as to why its information should not be released. Gov't Code § 552.305(d); *see also* 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 under in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

You first assert the strategic plan and briefing documents submitted in Exhibit B-1 are excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental

body's interests in certain competitive situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990).

The information submitted in Exhibit B-1 relates to a proposed biomedical institute, which will be owned by the university partnering with a private pharmaceutical manufacturer that will operate the facility. Although you state that the university is in the process of selecting a Construction Manager at Risk Services ("CMAR"), you do not explain how the process by which a CMAR is chosen is a competitive matter for purposes of section 552.104, nor exactly how release of Exhibit B-1 will harm the university's interest in this process. *See* Gov't Code § 552.104(a); ORD 592. Thus, you have failed to establish how section 552.104 is applicable to the information in Exhibit B-1.

You next assert the strategic plan and briefing documents submitted in Exhibit B-1 are excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts 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, such as section 51.914 of the Education Code. Although you generally assert that subsections 51.914(1), (2), and (3) each apply to the information in Exhibit B-1, you only present arguments for the applicability of subsection (1). Thus, because you have not provided arguments explaining the applicability of subsections (2) or (3) to the information you submitted, we assume the university no longer intends to claim these subsections. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). We will, however, address your arguments under section 51.914(1).

Section 51.914 of the Education Code provides in relevant 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[.]

Educ. Code § 51.914(1). As noted in Open Records Decision No. 651, 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." Open Records Decision No. 651 at 9 (1997). 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. *But see id.* at 9 (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(1) 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).

As noted above, the information submitted in Exhibit B-1 relates to a proposed biomedical institute. Although you explain, and the documents reflect, that biological products will be developed at the proposed facility, the submitted briefing and strategic plan do not reveal the specifics of any actual research. Consequently, we determine that you failed to establish the applicability of section 51.914(1) to the information in Exhibit B-1, and the university may not withhold this information under section 552.101 of the Government Code.

An interested third party is allowed ten 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, we have not received comments from Xoma explaining how its proprietary interests, if any, would be harmed by release of any submitted information. *See id.* § 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). Consequently, the university may not withhold any of the submitted information on the basis of any proprietary interest Xoma may have in the information.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses, 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 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform this office the employee whose personal information is at issue in Exhibit B-2 made a timely election to keep his personal information confidential in accordance with section 552.024. Accordingly, the university must withhold the information you marked pursuant to section 552.117(a)(1) of the Government Code.

You next assert the Universal Identification Number (“UIN”) you marked in Exhibit B-2 must be withheld under section 552.136 of the Government Code. Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(b). You inform this office that the UIN at issue is used to access employee payroll and benefit information. However, you do not explain how a UIN can be used to obtain money, goods, services, or another thing of value, or initiate a transfer of funds. Accordingly, we conclude you failed to establish that the UIN you marked in Exhibit B-2 is excepted under section 552.136, and it may not be withheld.

You finally raise section 552.137 for the e-mail address you marked in Exhibit B-2. 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). Subsection (c)(1) states that subsection (a) does not apply to an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent” and subsection (c)(2) states that subsection (a) does not apply to an e-mail address “provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent[.]” *Id.* § 552.137(c)(1), (2). You inform us that the owners of the e-mail addresses at issue have not consented to their release. Although you also assert that none of the e-mail addresses you marked are a type excluded by section 552.137(c), we note that one of the e-mail addresses pertains to Xoma, a company you indicate is seeking a contractual relationship with the university. Accordingly, the university must release the e-mail address you marked pertaining to a Xoma employee. The remaining e-mail address you marked must be withheld under section 552.137.

In summary, the university must withhold the named employee’s personal information you marked under section 552.117(a)(1) of the Government Code and the e-mail address you marked that does not relate to Xoma under section 552.137. The remaining information must be released.

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](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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

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RSD/cc

Ref: ID# 354645

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)