



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2009

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

OR2009-15986

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# 361068.

Texas A&M University (the "university") received a request for four categories of information pertaining to specified research. You state the university does not maintain information responsive to two categories of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have informed us, and provided documentation showing, that the requestor has narrowed his request to no longer include drafts or prepublication copies of articles that have been published. Thus, these items in Exhibits B-2 and B-3, which we have marked, are no longer responsive to the instant request for information. This ruling does not

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), 452 at 3 (1986), 362 at 2 (1983).

address the public availability of any information that is not responsive to the request, and the university need not release that information in response to this request.

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, which 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 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, 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. *See id.*; *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 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).

You seek to withhold information you have marked under section 51.914. You state that the information you have marked pertains to research on a sorghum aluminum tolerance gene. You assert that this information relates to and sets forth the details of ongoing research being developed at an institution of higher education that has a potential for being sold, licensed, or traded for a fee. You state this information includes raw data that has not yet been published. Based on your representations and our review, we conclude that the information you have marked is confidential under section 51.914. As such, the university must withhold most of the information you have marked, in addition to the information we have marked, under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.² See Open Records Decision No. 497 (1988)(allowing university to withhold all of its superconductivity research, including patent applications, under statutory predecessor to Educ. Code § 51.914). However, a portion of the information you have marked contains background and administrative material and other information tangential to the substance of the proposed research. We find that this information does not reveal the substance of the research at issue and is not confidential under section 51.914. See *id.* (stating that information related to research is not protected if it does not reveal details about research). Accordingly, the information we have marked for release may not be withheld under section 552.101 on that basis.

The university asserts that some of the remaining information is excepted under 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). 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 addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You inform us that no member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the university must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code.

Finally, you state that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, with the exception of the information we have marked for release, the university must withhold the information you have marked, in addition to the information we have marked, under section 552.101 in conjunction with section 51.914 of the Education Code. The university must withhold the e-mail addresses you have marked, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code. The remaining information must be released, but any copyrighted information may only 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, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 361068

Enc. Submitted documents

cc: Requestor
(w/o enclosures)