ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 9, 2010

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
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College Station, Texas 77845-3424

OR2010-02008

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# 369850 (TAMU ID# 09-578, TALR ID# AR-2009-011, System Offices ID# 09-129).

Texas A&M University, Texas AgriLife Research, and Texas A&M System Offices (collectively, the "university") received a request for all e-mails and other correspondence between several named individuals and entities during specified time periods, as well as specified Material Transfer Agreements ("MTA") in force during a specified time period. You claim portions of the requested e-mails, other correspondence, and MTAs are excepted from disclosure under sections 552.101, 552.107, 552.136, and 552.137 of the Government Code. You also state release of some of the requested information may implicate the proprietary interests of several third parties. Accordingly, you state, and have provided documentation showing, the university notified Agricomseeds; Agromen Sementes Agricolas, Ltda.; ARC-Grain Crops Institute; Botswana College of Agriculture; Ceres, Inc. ("Ceres"); Chevron Technology Ventures; CIRAD; Cornell University; EMBRAPA; EnerGenetics Energies, LLC; John Innes Centre; Kansas State University; Monsanto Company; Rutgers University; Semillas Tuniche Ltda.; University of Florida; University of the Free State; USDA, ARS, Plant Genetic Resources Conservation Unit of the request and of each entity's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental

body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from Ceres.[1] We have considered the submitted arguments and reviewed the submitted information, some of which is a representative sample.[2]

Initially, we note you have marked portions of the submitted e-mails as being non-responsive to the request for information. We have marked additional information that was created after the request was received by the university and is, thus, also not responsive to the present request. Furthermore, the requestor has specifically excluded from his request the social security numbers, home addresses, home telephone numbers, personal cellular telephone numbers, and family information of university employees. Thus, any such information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, Ceres seeks to withhold portions of the MTAs pertaining to it. We note, however, the university has not submitted this information for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the university. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

You acknowledge, and we agree, the university failed to submit a portion of the requested e-mails within the statutory time period prescribed by section 552.301(e) of the Government Code. *See id.* § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information

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[1]Although Ceres raises sections 552.022 and 552.101 of the Government Code, in addition to section 552.110(a) of the Government Code, for its claim regarding trade secrets, we note section 552.110(a) is the proper section for the substance of its arguments. Thus, we will consider Ceres's trade secret arguments under only section 552.110(a) of the Government Code.

[2]We assume 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 those records contain substantially different types of information than that submitted to this office.

confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You state release of the untimely submitted e-mails may implicate third party interests. You also claim section 552.101 of the Government Code for portions of these e-mails. Because third party interests and section 552.101 can provide compelling reasons to withhold information, we will consider whether or not the untimely submitted e-mails are excepted from disclosure under the Act. Furthermore, we will consider the submitted arguments against disclosure for the timely submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You have marked the e-mails and attachments you claim are protected by the attorney-client privilege. You state the marked e-mails and attachments are communications between an

attorney for the university and university officials that were made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the marked e-mails and attachments. Thus, the university may withhold the marked e-mails and attachments under section 552.107 of the Government Code.[3]

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 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 the information has this potential. *See id. But see id.* at 9 (university's determination that

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[3]As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for portions of this information.

information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note, and you acknowledge, 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 portions of the remaining requested information, and Ceres seeks to withhold portions of the requested e-mails pertaining to it, under section 51.914. You contend the representative sample of information you have marked sets forth the details of ongoing research pertaining to plant breeding and disease prevention in sorghum plants. You further contend the information at issue was developed by university researchers and has the potential for being sold, traded, or licensed for a fee. Based on your representations and our review, we conclude the representative sample of information you have marked is confidential under section 51.914. As such, the university must withhold this type of information from all of the requested information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.[4]

You claim the airline advantage number, credit card number, and credit card expiration date you have marked in the remaining information are excepted under section 552.136 of the Government Code. This section provides

> (a) "[A]ccess device" means 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 device may be used to:
>
> > (1) obtain money, goods, services, or another thing of value; or
> >
> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
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> (b) Notwithstanding any other provision of [the Act], 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.

Gov't Code § 552.136(a), (b). We find the marked airline advantage number is an access device number for purposes of section 552.136. Thus, the university must withhold the airline advantage and credit card numbers you have marked, and the additional partial credit card numbers we have marked, under section 552.136 of the Government Code. You have not, however, provided any arguments explaining how the marked credit card expiration

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[4]As our ruling for this information is dispositive, we need not address Ceres's arguments against disclosure for this information.

date, whether used alone or in conjunction with another device, may be used to obtain money, goods, or services, or to initiate a transfer of funds. Consequently, we find you have failed to demonstrate how the marked credit card expiration date constitutes an "access device number" for purposes of section 552.136. Therefore, the university may not withhold the marked credit card expiration date under section 552.136 of the Government Code. As you have raised no other exceptions to disclosure for this information, it must be released.

Section 552.137 of the Government Code 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 id.* § 552.137(a)-(c). Section 552.137(c)(1) states 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" is not excepted from public disclosure. *Id.* § 552.137(c)(1). You claim the e-mail addresses you have marked in the remaining information are excepted under section 552.137. In this instance, however, some of the marked e-mail addresses were provided to the university by people who have a contractual relationship with the university, and are, thus, specifically excluded by section 552.137(c)(1). As such, those e-mail addresses, which we have marked for release, may not be withheld under section 552.137 of the Government Code. The remaining e-mail address you have marked, and the additional e-mail address we have marked, are not specifically excluded by section 552.137(c). You state the owners of the e-mail addresses have not consented to their release. As such, the remaining e-mail address you have marked, and the e-mail address we have marked, must be withheld under section 552.137 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 received comments from only Ceres explaining why its information at issue should not be released. Therefore, we have no basis to conclude any of the remaining notified entities have protected proprietary interests in their information at issue. *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. Accordingly, the university may not withhold these entities' information on the basis of any proprietary interest they may have in it.

We note some of the remaining information appears to be 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

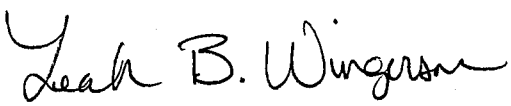
applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the remaining information must be released in accordance with copyright law.

In summary, the university may withhold the marked e-mails and attachments under section 552.107 of the Government Code. The university must withhold the marked research information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code; the marked airline advantage and credit card numbers under section 552.136 of the Government Code; and the e-mail addresses you have marked and we have indicated under section 552.137 of the Government Code.[5] The remaining 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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

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[5]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including credit card numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 369850

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