



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 26, 2011

Mr. R. Brooks Moore
Assistant General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845

OR2011-01341

Dear Mr. Moore:

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# 406986 (SO-10-128, AR-2010-039, TAMU-10-579).

Texas A&M University, Texas AgriLife Research, and Texas A&M System Offices (collectively, the "university") received a request for all e-mails, including attachments, sent or received by a named individual during a specified time period and all e-mails, including attachments, sent or received by the same named individual to or from thirteen named individuals during a specified time period. You claim some of the requested information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 other statutes make confidential, such as section 51.914 of the Education Code, which provides in part:

¹We 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.

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 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 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 the information you have marked under section 51.914. You contend the marked information sets forth the details of ongoing research pertaining to certain plant products and cultivars. 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 determine some of the information you have marked sets forth specific details of the research pertaining to the products and must be withheld under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The remaining information at issue, however, consists of information pertaining to marketing and intellectual property protection strategies, product ownership, obligations to third parties, and general research descriptions. You have not explained, nor can we discern, how this remaining information at issue reveals details about the research. *See id.* Accordingly, you may not withhold the remaining information at issue, which we have marked, under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. As you have not claimed any other exceptions to disclosure for the information we have marked, it must be released.

You contend some of the remaining information is protected under section 552.104 of the Government Code, excepts from disclosure "information that, if released, would give

advantage to a competitor or bidder.” Gov’t Code § 552.104. This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You explain the university is a competitor in the marketplace for the commercialization of plant products and cultivars. You also state the university’s commercialization efforts often result in the licensing of such research products. Based on these representations, we find you have established the university has legitimate marketplace interests in the commercialization of plant products and cultivars for purposes of section 552.104. You seek to withhold the commercial terms of the university’s license agreements and contend this information reveals the university’s negotiation strategy for its technology licenses. You assert release of this information would generally give the university’s competitors an unfair advantage over the university and undermine the university’s ability to license and market its inventions and research products. You have not, however, explained, or otherwise demonstrated, how release of the information you seek to withhold would harm the university’s interests in a particular competitive situation. Therefore, we find you have failed to demonstrate release of the information at issue would cause specific harm to the university’s marketplace interests. Consequently, the university may not withhold the information you have marked under section 552.104 of the Government Code. As you have not claimed any other exceptions to disclosure for this information, it must be released.

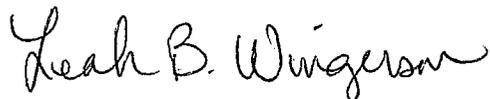
In summary, with the exception of the information we have marked for release, the university may withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The remaining information must be released.

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, 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

Ref: ID# 406986

Enc. Submitted documents

c: Requestor
(w/o enclosures)