



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 10, 2013

Ms. Zeena Angadicheril  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701

OR2013-10958A

Dear Ms. Angadicheril:

This office issued Open Records Letter No. 2013-10958 (2013) on June 27, 2013. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on June 27, 2012. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 498143 (OGC # 149500).

The University of Texas at Austin (the "university") received a request for copies of all release agreements of intellectual property to the inventors by the university's Office of Technology Commercialization for a specified period of time. You state the university has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim a portion of the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code.<sup>2</sup> Additionally, you state release of the submitted information may

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>Although you do not raise section 552.137 of the Government Code in your brief, we understand you to raise this exception based on your markings in the submitted documents.

implicate the proprietary interests of third parties.<sup>3</sup> Pursuant to section 552.305 of the Government Code, you state you notified the third parties of the request and of their opportunity to submit comments to this office explaining why the requested information should be withheld from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 applicability of exception in certain circumstances). We have received comments from Dr. Georgiou and Dr. Liapi. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>4</sup>

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 section encompasses information protected by other statutes, such as section 51.914 of the Education Code, which provides, in pertinent part:

(a) In order to protect the actual or potential value, the following information is confidential and is not 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]

Educ. Code § 51.914(a)(1). 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." ORD 651

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<sup>3</sup>The third parties are Doctor Eric V. Anslyn ("Dr. Anslyn"), Mr. Jason L. Avent ("Mr. Avent"), Doctor Aaron B. Baker ("Dr. Baker"), Mr. Cameron D. Beasley ("Mr. Beasley"), Doctor Christopher W. Bielawski ("Dr. Bielawski"), Doctor Kenneth R. Diller ("Dr. Diller"), Doctor Andrew Ellington ("Dr. Ellington"), Doctor Wilson S. Geisler ("Dr. Geisler"), Doctor George Georgiou ("Dr. Georgiou"), Doctor Ranjit Gharpurey ("Dr. Gharpurey"), Doctor Sharon D. Horner ("Dr. Horner"), Doctor Lizy K. John ("Dr. John"), Doctor Brian A. Korgel ("Dr. Korgel"), Doctor Scott Levinson ("Dr. Levinson"), Doctor Katherine A. Liapi ("Dr. Liapi"), Doctor Glenn Lightsey ("Dr. Lightsey"), Doctor Daniel P. Miranker ("Dr. Miranker"), Doctor Lili Qui ("Dr. Qui"), Mr. Eric Quinnell ("Dr. Quinnell"), Doctor Gennady Shvets ("Dr. Shvets"), Doctor Paul L. Stoffa ("Dr. Stoffa"), Doctor Earl E. Swartzlander ("Dr. Swartzlander"), Doctor Brent R. Waters ("Dr. Waters"), and Doctor David Zuckerman ("Dr. Zuckerman").

<sup>4</sup>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.

at 9. 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 governmental body’s assertion that the information has this potential. *See id.* *But see id.* at 10 (stating that 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 the information you have marked under section 51.914 of the Education Code. You state the university is an institution of higher education for purposes of section 61.003(5) and (8) of the Education Code. *See Educ. Code § 61.003(5), (8).* You state the information at issue contains the details of research conducted by university employees, including information regarding the findings of various research projects and research protocols. You assert this information contains scientific information as well as procedures and other information that relate to a product, device, or process developed by university employees. You further state the marked information describes experimentation and research that has the potential for being further sold, traded, or licensed for a fee and is therefore confidential pursuant to section 51.914(a). Based on your representations and our review, we find you have demonstrated the applicability of section 51.914 of the Education Code to a portion of the information at issue, which we have marked. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.<sup>5</sup> However, we find you have not demonstrated how the remaining information is subject to section 51.914. Accordingly, the university may not withhold the remaining information you marked under section 552.101 in conjunction with section 51.914 of the Education Code.

We note 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 Dr. Anslyn, Mr. Avent, Dr. Baker, Mr. Beasley, Dr. Bielawski, Dr. Diller, Dr. Ellington, Dr. Geisler, Dr. Gharpurey, Dr. Horner, Dr. John, Dr. Korgel, Dr. Levinson, Dr. Lightsey, Dr. Miranker, Dr. Qui, Dr. Quinnell, Dr. Shvets, Dr. Stoffa, Dr. Swartzlander, Dr. Waters, or Dr. Zuckerman explaining why their information should not be released. Therefore, we have no basis to conclude Dr. Anslyn, Mr. Avent, Dr. Baker, Mr. Beasley, Dr. Bielawski, Dr. Diller, Dr. Ellington, Dr. Geisler, Dr. Gharpurey, Dr. Horner, Dr. John, Dr. Korgel, Dr. Levinson, Dr. Lightsey, Dr. Miranker, Dr. Qui, Dr. Quinnell, Dr. Shvets, Dr. Stoffa, Dr. Swartzlander, Dr. Waters, or Dr. Zuckerman have protected proprietary interests in the submitted information. *See id.* § 552.110; *Open Records Decision Nos. 661 at 5-6 (1999)*

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<sup>5</sup>As our ruling is dispositive, we do not address the remaining argument against disclosure of this information.

(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 any of the information at issue on the basis of any proprietary interests Dr. Anslyn, Mr. Avent, Dr. Baker, Mr. Beasley, Dr. Bielawski, Dr. Diller, Dr. Ellington, Dr. Geisler, Dr. Gharpurey, Dr. Horner, Dr. John, Dr. Korgel, Dr. Levinson, Dr. Lightsey, Dr. Miranker, Dr. Qui, Dr. Quinnell, Dr. Shvets, Dr. Stoffa, Dr. Swartzlander, Dr. Waters, or Dr. Zuckerman may have in it.

Dr. Georgiou asserts a portion of the remaining information is protected by a confidentiality agreement. We note information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Dr. Georgiou also raises section 552.101 of the Government Code for portions of the remaining information. However, Dr. Georgiou has not pointed to any confidentiality provision, nor are we aware of any, that would make any of the remaining information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the university may not withhold any of the remaining information under section 552.101 of the Government Code.

Next, Dr. Georgiou argues portions of the remaining information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a)-(b). We note section 552.110 protects the interests of private parties that provide information to governmental bodies, not the interests of governmental bodies themselves. *See generally* Open Records Decision No. 592 (1991). Accordingly, we do not consider the corporation’s arguments under section 552.110. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>6</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial

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<sup>6</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5 (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).

Dr. Georgiou asserts portions of his information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Dr. Georgiou has failed to establish a *prima facie* case that any portion of the information at issue meets the definition of a trade secret, nor has Dr. Georgiou demonstrated the necessary factors to establish a trade secret claim for this information. *See* RESTATEMENT OF TORTS § 757 cmt. b, ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Therefore, none of Dr. Georgiou’s information may be withheld under section 552.110(a).

Dr. Georgiou further argues portions of his information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Dr. Georgiou has made only conclusory allegations that the release of any of the remaining information would result in substantial harm to its competitive position. *See* ORDs 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of Dr. Georgiou’s information may be withheld under section 552.110(b).

Dr. Georgiou also raises section 552.131 of the Government Code. Section 552.131 of the Government Code relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Gov't Code § 552.131(a). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a). Because we have already disposed of Dr. Georgiou's claims under section 552.110, the university may not withhold any of Dr. Georgiou's information under section 552.131(a) of the Government Code.

We note some of the remaining information is subject to section 552.117 of the Government Code.<sup>7</sup> Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by 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). Therefore, the information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, to the extent the individual at issue timely requested confidentiality under section 552.024, the university must withhold the information we have marked in the remaining information under section 552.117(a)(1) of the Government Code, including the cellular telephone number if the cellular telephone service is not paid for by a governmental body.

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 552.137(c)(1) provides subsection 552.137(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[.]" *Id.* § 552.137(c)(1). Upon review, we find the e-mail address you have marked falls within the scope of subsection 552.137(c). Therefore, the university may not withhold the e-mail address you have marked under section 552.137 of the Government Code.

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<sup>7</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The university must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including the cellular telephone number if the cellular telephone service is not paid for by a governmental body. 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey W. Giles". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jeffrey W. Giles  
Assistant Attorney General  
Open Records Division

JWG/dls

Ref: ID# 498143

c: Requestor

24 Third Parties