



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 18, 1997

Mr. Max J. Werkenthin  
Office of the General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2981

Open Records Decision No. 651

Re: Whether research data produced by  
university faculty is "public information"  
subject to the Open Records Act, Gov't Code  
ch. 552 (RQ-752)

Dear Mr. Werkenthin:

On behalf of the Board of Regents of The University of Texas System (the "university"), you have requested our opinion regarding the availability of certain information under the Open Records Act, Government Code chapter 552 (the "act"). The university has received two requests for similar types of information. You initially question whether the requested information is "public information" subject to the act. In the event we determine that the requested information is subject to the act, you assert that section 552.101 of the Government Code, in conjunction with section 51.914 of the Education Code, exempts the requested information from required public disclosure. We will begin by describing the requested information.

First, the university received a request for information collected by two employees of the university, Dr. David M. Hillis and Mr. Paul T. Chippindale, in their research of the Barton Springs salamander. Specifically, the requestor seeks the "opportunity to review and copy all field notes, raw data, and other background information" used in compiling three Central Texas salamander studies the Texas Parks and Wildlife Department submitted to the federal Fish and Wildlife Service; the studies were published in 1989, 1990, and 1992.<sup>1</sup>

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<sup>1</sup>You inform us that portions of the requested information already are available to the public. "The raw data in support of the salamander collection localities have been entered into a distributional database at [the Texas Parks and Wildlife Department]. The preserved salamander specimens collected by [Dr. Hillis and Mr. Chippindale] will [be] available in the Texas Memorial Museum." We will not consider the availability of this information here. We assume, however, that the university has informed the requestor of the availability of this information.

You inform us that the studies are based on work Dr. Hillis and Mr. Chippindale performed under a contract between the university and the Texas Parks and Wildlife Department.

The requestor also seeks an opportunity to review and copy all field notes, raw data, and other background information used in compiling an article, which Dr. Hillis and Mr. Chippindale co-wrote with Mr. Andrew H. Price of the Texas Parks and Wildlife Department, concerning a new species of salamander;<sup>2</sup> the article was published in *Herpetologica* in 1993. You aver that the *Herpetologica* article "is an example of a scholarly writing by faculty members that is neither commissioned by [the university] nor a [university] work for hire." Rather, you state that publication of the article in a scholarly journal is "a part of the peer review process" the Texas Parks and Wildlife Department required in its contract with the university for the services of Dr. Hillis and Mr. Chippindale.

Second, the university received a request for information concerning certain research undertaken by Dr. Louis Morejohn, an assistant professor in the Department of Botany. Specifically, the requestor seeks "[a]ll correspondence, contracts, notes, summaries, written opinions, evaluations and other documents relating to the research of Dr. Louis Morejon [*sic*] on Benlac or Benomyl."<sup>3</sup> You explain that Dr. Morejohn (and his assistant) performed the research under a contract between the university and a corporate sponsor, E.I. Du Pont de Nemours and Company. Under the contract, the corporate sponsor will receive a report of the research results.

You refer to the university's contracts with the Texas Parks and Wildlife Department and E.I. Du Pont de Nemours and Company as "sponsored research contracts." Although the university executes a sponsored research contract with the sponsor--such as the Texas Parks and Wildlife Department or E.I. Du Pont de Nemours and Company--you indicate that the university's duties with respect to the contract are limited.

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<sup>2</sup>The requestor also asked for field notes, raw data, and other background information used in compiling two reports by other named researchers concerning the Edwards Aquifer and Barton Springs and a report by other named researchers concerning urbanization and water quality in the Austin area. You state that neither Dr. Hillis, Mr. Chippindale, nor the university has, or has any connection with, the requested information regarding these reports. Generally, a governmental body need not obtain, in response to an open records request, information it does not possess. *See* Open Records Decision No. 558 (1990) at 2.

<sup>3</sup>You indicate that a portion of the requested information is public information. Accordingly, you state that the university will release to the requestor the information it considers to be public: correspondence and other contractual documents concerning the subject research that is in the university's custody.

The reason that [The University of Texas at Austin (“UT”)] is the contracting party in most sponsored research projects undertaken by faculty researchers is the prohibition in the Texas Constitution against use of state resources except for public purposes and in return for proper compensation. The Board’s Rules, Part One, Chap. III, Section 31, require that no UT resources may be used in performance of a contract or grant unless it is administered and controlled by the UT institution. Further, no UT employee can enter into any outside employment unless the nature of the work is approved by UT administration. Board of Regent’s Rules, Part One, Chap. III, Section 13.7. Because most sponsored research projects undertaken by UT faculty members will require use of UT resources, these contracts are entered into in the name of the UT institution, rather than in the name of the individual faculty investigator.

For the reason explained above, it is typical in sponsored research contracts or grants for the UT institution to be named as the performing party, even though the only duties actually performed by the UT institution are to see that the work is performed and to act as fiscal agent to handle the funding of the work. UT institutional procedures require the individual faculty research[er] to be responsible for the actual performance of the contracted research and the final product. The Handbook of Operating Procedures of the University of Texas at Austin, at Section 5.08.2, specifies that faculty members are responsible for making the original proposals to perform sponsored research and also for the management of the project. The UT Procedures further state that all such proposals must be approved by UT administration and that UT will be responsible for performance of the work and fiscal management of funds. However, Section 5.10 of the UT Procedures states that it is the responsibility of each research investigator to maintain the integrity of projects by keeping accurate records of all experimental protocols, data, and findings.<sup>4</sup>

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<sup>4</sup>Until World War II, most scientific research conducted at a university was essentially subsidized by the university itself. Leonard G. Boonin, *The University, Scientific Research, and the Ownership of Knowledge*, in *OWNING SCIENTIFIC AND TECHNICAL INFORMATION: VALUE AND ETHICAL ISSUES* 253, 260 (Vivian Weil and John W. Snapper eds., 1989). For many years following World War II, the United States government was a major source of funds for such research. *Id.* “The Reagan administration,” however, “as part of a general policy of cutting back on government programs, sought to reduce” the government’s support. *Id.* Universities found an alternative source of support in venture capitalists. *Id.*

Many “partnerships” have evolved between universities and commercial corporations, e.g., Harvard and Washington University of St. Louis with Monsanto, Massachusetts General Hospital with Hoechst, and MIT with an institute established by industrialist Edwin Whitehead. *Id.* at 261. “In exchange for providing

Letter from Max J. Werkenthin, Office of General Counsel, The University of Texas System, to The Honorable Dan Morales, Attorney General, State of Texas (June 27, 1994) at 4-5 (footnote added); *cf.* Letter from Max J. Werkenthin, Office of General Counsel, The University of Texas System, to The Honorable Dan Morales, Attorney General, State of Texas (June 13, 1994) at 4.

All of the university employees whose research data has been requested voluntarily have provided the university with the requested information or representative samples of the requested information for the limited purpose of preparing your request for an open records decision from this office. You have included copies of the information with your requests. *See* Gov't Code § 552.301(b)(3) (requiring governmental body that requests attorney general decision on open records request to supply to attorney general specific information requested).

As a threshold matter, you claim that the requested information is not public information subject to the act. Consequently, you believe that the university need not release the requested information to the requestor. You premise your argument that the requested information is not public information subject to the act on your assertion that the information is not intellectual property in which, pursuant to the university's intellectual property policy, the university may assert an interest.

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substantial financial support, the companies receive a variety of things, ranging from patent rights or exclusive licenses to (in the case of the Whitehead Institute) participation in faculty appointments and control of research areas. In addition, they may exercise varying degrees of control over publication of results." *Id.*

Thus, scientists on university faculties today rely predominantly on sponsors outside the university--either governmental or corporate--to fund the scientists' research. *See* Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1363 (1988). Often, "faculty members themselves submit grant proposals and establish relationships with both private and government research sponsors. Indeed, in the initial stages of applying for project grants, faculty members often interact directly with potential sponsors with minimal university involvement, although the university ultimately enters the negotiations and becomes a party to any grant or contract for the performance of sponsored research on campus." *Id.* at 1372.

The university's participation in the grant or contract is, practically speaking, imperative:

The scale of modern scientific research requires significant commitments of university facilities and personnel for academic research projects. Universities obviously need to decide how to allocate these resources at the institutional level. . . . When sponsored research takes place on campus using university facilities and personnel, the university must enter into an agreement with the sponsor to protect its own interests as well as the interests of the faculty members doing the research.

*Id.*

In 1985 the legislature adopted Senate Concurrent Resolution 92, directing “the governing board of each state institution of higher education, . . . , to adopt a written intellectual property policy regarding the ownership, patenting, copyrighting, control, licensing, and other use of inventions of employees of the institution . . . .”<sup>5</sup> Tex. S. Con. Res. 92, 69th Leg., R.S., 1985 Tex. Gen. Laws 3420, 3420. The resolution defines “intellectual property policy” as “a policy regarding the ownership, patenting, copyrighting, control, licensing, and use of an invention, and ‘invention’ includes a discovery, innovation, improvement or research finding.” *Id.*

With certain exceptions, the university’s intellectual property policy applies to all university employees, among others. THE UNIVERSITY OF TEXAS SYSTEM BOARD OF REGENTS, INTELLECTUAL PROPERTY POLICY & GUIDELINES § 2.1, at 5 (1993). The policy permits the university’s board of regents to assert ownership in “intellectual property of all types (including, but not limited to, any invention, discovery, trade secret, technology, scientific or technological development, and computer software) regardless of whether subject to protection under patent, trademark, copyright, or other laws.” *Id.* § 2.2, at 5. Section 2.3 excepts “scholarly writing” from the category of intellectual property in which the board of regents may assert an interest unless The University of Texas System or a component institution has commissioned the work or unless the work is a work for hire for The University of Texas System or a component institution. *Id.* § 2.3, at 6; *see also id.* § 2.4, at 6.

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<sup>5</sup>Senate Concurrent Resolution 92 of the 69th Legislature further requires the governing board of each institution of higher education, by January 1, 1986, to file its intellectual property policy with the Coordinating Board, Texas College and University System. Tex. S. Con. Res. 92, 69th Leg., R.S., 1985 Tex. Gen. Laws 3420, 3421. Two years after adopting Senate Concurrent Resolution 92, in 1987, the legislature enacted section 51.680 of the Education Code, relating to intellectual property policies of institutions of higher education. *See* Act of May 23, 1987, 70th Leg., R.S., ch. 772, § 1, 1987 Tex. Gen. Laws 2747, 2747-48. Section 51.680(a) requires the commissioner of higher education to review the intellectual property policies filed with the Coordinating Board, Texas College and University System, pursuant to Senate Concurrent Resolution 92 of the 69th Legislature.

The enactment of Education Code section 51.680 is one of several measures the 70th Legislature adopted to encourage the development, at institutions of higher education, of technologies that may be commercialized. TEXAS HIGHER EDUCATION COORDINATING BOARD DIVISION OF RESEARCH PROGRAMS, INTELLECTUAL PROPERTY POLICIES IN TEXAS INSTITUTIONS OF HIGHER EDUCATION 1 (1989). The actions of the 70th Legislature were motivated by a report of a select committee of the legislature on higher education, which established as a priority for the state to “firmly establish the critical role of higher education as a powerful instrument for economic development and an indispensable factor in producing a brighter economic future.” *Id.* (quoting 1987 report of select committee on higher education).

You indicate that the research Dr. Hillis and Mr. Chippindale conducted for the Texas Parks and Wildlife Department is an example of sponsored research. Similarly, the research Dr. Morejohn conducted on Benlac or Benomyl for E.I Du Pont Du Nemours and Company is, you claim, an example of sponsored research. The information in both of these situations was compiled pursuant to a contract between the university and a separate entity; in the case of Dr. Hillis and Mr. Chippindale, the university contracted with the Texas Parks and Wildlife Department, while in the case of Dr. Morejohn, the university contracted with E.I. Du Pont de Nemours and Company. Because sponsored research is not commissioned by the university, you continue, section 2.3 of the university's intellectual policy does not authorize the board of regents to claim an intellectual property interest in the requested data.

You additionally indicate that the requested field notes and raw data Dr. Hillis and Mr. Chippindale used in writing the article published in *Herpetologica* were used in the preparation of a scholarly writing that was neither commissioned by the university nor a work for hire for the university. Consequently, you contend that section 2.3 of the university's intellectual property policy does not authorize the board of regents to assert an intellectual property interest in the information. For purposes of this decision, we will assume that your interpretation and application of the university's intellectual property policy is correct. Accordingly, we assume that section 2.3 of the policy excepts all of the requested information from the board of regent's general right to assert an intellectual property interest in intellectual property created by university employees.

We do not believe, however, that the status of the requested information for purposes of the university's intellectual property policy is relevant to a consideration of whether the information is public and subject to the act. This office has stated on numerous occasions that a governmental body may not promulgate a rule designating information as confidential to except the information from required public disclosure under section 552.101 of the Government Code. *See, e.g.,* Open Records Decision Nos. 594 (1991) at 3, 484 (1987) at 2, 392 (1983) at 2. Similarly, we do not believe a governmental body may promulgate rules or a policy exempting certain information from the reach of the act unless the governmental body is explicitly, statutorily authorized to do so. We do not believe the legislative directive to institutions of higher education to formulate an intellectual property policy authorizes the institutions to exempt information from the scope of the act.<sup>6</sup>

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<sup>6</sup>We do not suggest that the university's intellectual property policy assumes to exempt information from the act.

At the time the university received these requests, section 552.021(a) of the Government Code defined information as “public information” if

under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.<sup>7</sup> [Footnote added.]

Thus, to determine whether information is public under the act we apply a two-part inquiry. Initially, we must consider whether a governmental body collected, assembled, or maintains the information in connection with the transaction of official business. If we find that particular information is not public and subject to the act under the first inquiry, we must consider whether the information was collected or assembled or is maintained in connection with the transaction of official business for the governmental body, and the governmental body either owns the information or is entitled to access it.

Information related to the transaction of official business is subject to the act whether the information is maintained by an individual member of the governmental body or in the governmental body’s administrative offices. *See* Open Records Decision No. 425 (1985) at 2. In our opinion, the requested information relates to the transaction of official business. We understand, as you point out, that the university may not assert an intellectual property interest in the requested information. We further understand, as you state, that in the event a university faculty member leaves the university, the university generally forwards to the researcher’s new institution any unexpended sponsored research funds attributable to that faculty member’s research in progress.

Nevertheless, as you also suggest, a sponsored research project involves the use of state resources, *e.g.*, university laboratory equipment, university computer equipment, and the time of university personnel. The university, as a signatory to a sponsored research

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<sup>7</sup>The 74th Legislature amended several sections of the act. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127. Among other things, the legislature apparently moved the substance of section 552.021(a) to section 552.002(a). *See id.* § 2, 1995 Tex. Sess. Law Serv. at 5127. Although the amendments to sections 552.002 and 552.021 took effect September 1, 1995, *see id.* § 29, 1995 Tex. Sess. Law Serv. at 5142, they do not apply to a request for information received prior to the effective date. *See id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142. Because the changes to the definition of “public information,” with respect to the issue before us here, were nonsubstantive, we believe our conclusion applies to similar requests for information received after September 1, 1995.

contract, is, you state, “responsible for performance of the work and fiscal management of the funds.” We consequently conclude that research data produced by university faculty pursuant to a contract between the university and a third party is information that is collected, assembled, or maintained by a governmental body and that is connected to the transaction of official business. Thus, the information requested here is public information subject to the act.<sup>8</sup> We proceed, therefore, to consider whether the information is specifically excepted from required public disclosure.

You believe the requested information is excepted from required public disclosure under section 552.101 of the Government Code. Section 552.101 excepts information that is “confidential by law, either constitutional, statutory, or by judicial decision.” You aver that Education Code section 51.914 is a statutory source of confidentiality for the requested information.

Section 51.914 of the Education Code provides:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, 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;*

(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

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<sup>8</sup> *Cf. Progressive Animal Welfare Soc’y v. University of Wash.*, 884 P.2d 592, 598-99 (Wash. 1994) (assuming, in general, that information in university researcher’s unfunded grant proposal to National Institutes of Health is public); Op. La. Att’y Gen. No. 92-94, 1992 WL 610895 (1992) (assuming data compiled by research unit of Southeastern Louisiana University, funded by private and commercial companies, is public and subject to Louisiana Public Records Law); Op. Ore. Att’y Gen. No. OP-6217, 1988 WL 416244 (1988) (concluding that data generated by researchers at Oregon State University in project funded in part by private companies “plainly constitutes a public ‘public record’” subject to state’s public records law).

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; or

(3) the plans, specifications, blueprints, and designs, including related proprietary information, of a scientific research and development facility that is jointly financed by the federal governmental and a local governmental or state agency, including an institution of higher education, if the facility is designed and built for the purposes of promoting scientific research and development and increasing the economic development and diversification of this state. [Emphasis added.]

Clearly, all of the requested information is “scientific information . . . developed in whole or in part at a state institution of higher education.” *See* Educ. Code § 51.914(1). We must consider, however, whether the requested information has “a potential for being sold, traded, or licensed for a fee.” *See id.*

You state that the requested data related to Dr. Hillis’ and Mr. Chippindale’s research that identifies the DNA sequences of a new species of salamander has the potential for being sold, traded, or licensed for a fee. Likewise, you assert that the requested data related to Dr. Morejohn’s research has the potential for being sold, traded, or licensed for a fee, although you do not explain why you believe Dr. Morejohn’s data has such potential. Additionally, we note that Dr. Morejohn stated in a letter that he expected no inventions to arise from his research.

The legislature added the substance of section 51.914 to the Education Code in 1985.<sup>9</sup> *See* Act of May 27, 1985, 69th Leg., R.S., ch. 818, § 2, 1985 Tex. Gen. Laws 2874, 2875. The bill that proposed the confidentiality provision, now section 51.914, also proposed to add a section to the Education Code authorizing the board of regents of the university to establish a Center for Technology Development and Transfer. *See id.* § 1. The purpose of the Center for Technology Development and Transfer is to promote high technology industry. *See* Educ. Code § 65.45; Senate Comm. on Education, Bill Analysis, C.S.S.B. 840, 69th Leg. (1985). The confidentiality granted in Education Code section 51.914 is not, however, limited to information of the Center for Technology Development and Transfer.

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<sup>9</sup>As originally enacted, the substance of section 51.914 of the Education Code was codified as section 51.911 of the Education Code. *See* Act of May 27, 1985, 69th Leg., R.S., ch. 818, § 2, 1985 Tex. Gen. Laws 2874, 2875. The legislature renumbered the section in 1989. *See* Act of Feb. 22, 1989, 71st Leg., R.S., ch. 2, § 16.01(13), 1989 Tex. Gen. Laws 123, 198.

We found nothing indicating how the legislature intended a court or this office to determine whether particular scientific information has “a potential for being sold, traded, or licensed for a fee.” Whether particular scientific information has such a potential is, of course, a question of fact that is not appropriate to the opinion process. *E.g.*, Attorney General Opinions DM-98 (1992) at 3, H-56 (1973) at 3, M-187 (1968) at 3, O-2911 (1940) at 2. Instead, we believe the university must make that determination, and the university’s determination is subject to review by a court.

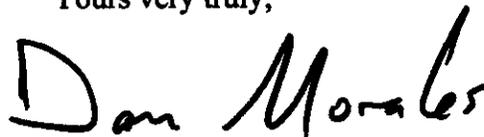
We must, therefore, assume the correctness of the university’s determination that the requested information has the potential for being sold, traded, or licensed for a fee. *Cf.* Open Records Decision Nos. 592 (1991) at 2-3, 552 (1990) at 5, 435 (1986) at 3-4. With respect to the requested information related to Dr. Hillis’ and Mr. Chippendale’s research, however, the university does not appear to have determined that section 51.914 of the Education Code deems confidential information that does not identify DNA sequences. Furthermore, you have not raised any other exceptions to disclosure that may apply. Accordingly, the university must release to the requestor information from Dr. Hillis’ and Mr. Chippendale’s research that does not identify DNA sequences. We further conclude, relying on the university’s determinations, that the information related to Dr. Hillis’ and Mr. Chippendale’s research identifying DNA sequences and the requested information relating to Dr. Morejohn’s research is confidential under section 51.914 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the university must withhold the requested information related to Dr. Hillis’ and Mr. Chippendale’s research that identifies DNA sequences and the requested information pertaining to Dr. Morejohn’s research.

**S U M M A R Y**

Research data produced by university faculty pursuant to a contract between the university and a third party is information that is collected, assembled, or maintained by a governmental body and that is connected to the transaction of official business. Consequently, the data is public information subject to the Open Records Act, Government Code chapter 552.

Section 51.914(1) of the Education Code deems confidential "scientific information . . . developed in whole or in part at a state institution of higher education" if the information has "a potential for being sold, traded, or licensed for a fee." Whether particular scientific information has a potential for being sold, traded, or licensed for a fee is a question requiring the resolution of fact issues. This office will therefore rely on the university's assertion that some of the requested information has this potential. Accordingly, the university must withhold certain of the requested information under section 51.914(1) of the Education Code as applied through section 552.101 of the Government Code.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

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