



April 18, 2001

Mr. Scott A. Kelly
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OR2001-1554

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145638.

Texas A&M University (the “university”) received three requests for information from the same requestor regarding information related to an investigation of three specified professors. You state that you have released 1200 pages of responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state that you received the first request on January 2, 2001, in which the requestor asks for the transcription of testimony given before an investigation committee as well as a copy of all documents that have been supplied to the investigation committee. Further, the requestor asks in item three for “all documents, e-mail, or other documents on the following parties related in any way to the Prechel/Boies/Zey matter.” The requestor then listed 15 parties. On January 5, 2001, the university sent a letter to the requestor asking for clarification of item number 3. *See* Gov’t Code § 552.122(b) (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). Specifically, the university asked the requestor whether she was referring to information in the possession of the named parties, information about the parties, or something else. The university also asked the requestor to help identify three of the parties and asked what issues and events are encompassed by the term “Prechel/Boies/Zey matter.” The university also informed the requestor that at the time of the request no

responsive information existed for her request for a transcription of testimony or documents supplied to the investigation committee.¹ You state that you will provide the requestor with a transcript of testimony from a meeting held on January 27, 2001.

In a letter dated January 12, 2001 and received by the university on January 16, the requestor responded to the university's clarification letter of January 5, 2001. In this letter, the requestor asks for communications made between three professors or any member of the investigation committee examining potential misconduct related to Prechel, Boies, and Zey resulting from any committee meeting. We agree that this constitutes a new request. With regard to the request for clarification of item three of the first request, the requestor provides the following: "all written, e-mail, recorded notes, records of telephone conversations or any other letters, memorandums or records of other communications of any kind between any of the persons noted below; or between the persons noted below and any other administrator, faculty or staff member in Texas A&M University or the Texas A&M University System; or between any of the persons noted below and any person outside the Texas A&M University System in which the name of Dr. Mary Zey, or Dr. John Boies, or Dr. Harland Prechel has been noted from September 1, 1999 to the present." The requestor then lists eleven persons. The requestor also notes that the individuals that the university could not identify are professors at other universities.

You contend that the requestor has changed her original request rather than clarifying request item three. Thus, you consider the January 12 correspondence to be a new request for a decision. We do not agree. We believe that the requestor has clarified her first request by stating that she wants correspondence between the listed persons and other individuals that reference Zey, Boies, or Prechel for a certain time period. Further, the requestor has provided some information regarding the persons the university was unable to identify. Therefore, we find that the requestor has clarified the first request as requested by the university and the January 12 correspondence is not a new request. However, we agree that the request for information pertaining to the three persons added in the January 12 correspondence that were not listed in the first request should be considered a new request.

The university received a third request on January 30, 2001 for correspondence among administrators, attorneys, Boies, and Prechel about misconduct complaints Zey made against Boies and Prechel, and misconduct complaints Giardino made against Zey. The requestor also asks for the transcription of testimony of all persons who testified before the inquiry committee as well as documents submitted with the testimony. Further, the requestor wants all notes taken by three specified persons during the testimony. We agree that this third request is a new request.

¹The Public Information Act (the "Act") only applies to information in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to open records requests. Open Records Decisions Nos. 452 (1986), 342 (1982). Furthermore, the Act does not ordinarily require a governmental body to obtain new information to comply with a request. Open Records Decision No. 561 (1990).

Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for an attorney general's decision and state the exceptions that apply no later than the tenth business day after the date of receiving the written request. In this instance, you received the first request on January 2, 2000, and sought clarification of the first request on January 5, 2001. Thus, the ten day time period to request a decision began on January 3, 2001 and continued through January 4, 2001 which consisted of two business days. On January 5, 2001, the date you requested clarification, the time period was tolled until January 16, 2001, when you received the correspondence clarifying the first request. *See* Open Records Decision No. 663 at 5 (1999) (providing that ten day period is tolled during the clarification process). In order to meet the ten day deadline under section 552.301(b), you had until January 26, 2001 to request a decision. Because your request for a decision was faxed on January 30, 2001, you failed to request a decision for the information that was requested in the first request and subsequently clarified in the January 12 correspondence within the ten business day period under section 552.301(b). As discussed, we have determined that item three of the first request was clarified on January 16. Information pertaining to the new persons identified in the January 16 correspondence, as well as the first paragraph and the request received January 30 are new requests and the ten day deadline has been met for these requests.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that the information responsive to request item three is excepted under sections 552.103 and 552.107 of the Government Code. Sections 552.103 and 552.107 are discretionary exceptions and, therefore, do not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Act can be waived). Therefore, we will not address the applicability of sections 552.103 and 552.107 to the portions of request item three that were clarified in the January 12 correspondence. However, we will apply these exceptions to correspondence that involves only the new persons listed in the January 12, correspondence. Further, we will address the information submitted in response to the third request.

You assert that portions of the submitted information in Attachment B are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c). After reviewing the submitted arguments and information, we conclude that you have demonstrated that litigation is reasonably anticipated and that the submitted information relates to the anticipated litigation. We have marked the information that you may withhold under section 552.103 of the Government Code.²

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

You also claim that the highlighted portions of the submitted information are excepted under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). A "confidential communication" is a communication "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." Tex. R. Evid. 503(a)(5). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, purely

²Having found the marked information excepted under section 552.103, we need not address section 552.107 for this portion of the submitted information.

factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* After reviewing the submitted information, we conclude that a portion of the information reveals the client's confidential communications or the attorney's legal opinion or advice. We have marked the information which you may withhold under section 552.107(1).

With regard to the third request received on January 30, you contend that documents submitted by Dr. Prechel to the investigation committee are proprietary and excepted under section 552.101 in conjunction with section 51.914 of the Education Code.³ You explain that a number of the records that Dr. Prechel submitted to the committee have been determined in Open Records Letter No. 2000-3447 (2000) and Open Records Letter No. 97-1548 (1997) to be excepted from disclosure under section 552.101 in conjunction with section 51.914 of the Education Code. Assuming that the four criteria for a "previous determination" by this office established in Open Records Decision No. 673 (2001) have been met, you must withhold this information in accordance with the previous rulings.⁴ You also state that you have released documents which are clearly public.

You have submitted a copy of a letter notifying Dr. Prechel through his attorney about the request as required by section 552.305(d). *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). In a letter dated March 28, 2001, Dr. Prechel submitted comments to this office with regard to a subsequent request for documents submitted to the committee by the same requestor. Because the subsequent request encompasses the same information at issue here, we will consider Dr. Prechel's arguments for this request as well.

We note that Dr. Prechel claims that permission to conduct research regarding a corporation was given with the understanding that the name of the corporation and its employees would remain confidential. However, information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540

³We assume that you have released any other information that is responsive to the third request. If you have not done so, you must release this information at this time. *See* Gov't Code §§ 552.301, .302.

⁴The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987, 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld from disclosure.

Dr. Prechel argues that the information is proprietary, but does not argue or demonstrate that the information is excepted under section 552.110. Further, we have not received any comments from the corporation whose information is at issue. Accordingly, we have no basis to withhold the information from disclosure under section 552.110 of the Government Code. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

The university and Dr. Prechel assert that the submitted information is excepted under section 51.914(1) of the Education Code. Dr. Prechel also argues that section 51.914(3) excepts the submitted information. Section 552.101 of the Government Code excepts from disclosure information that is made confidential by law, including information made confidential by statute. Section 51.914 provides in pertinent part:

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;*

. . .

(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 government and a local government 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.

Educ. Code § 51.914(1), (3) (emphasis added). The purpose of section 51.914(1) is to protect the “actual or potential value” of technological and scientific information developed in whole or in part at a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting former Education Code section 51.911). You state that the information was developed in whole or in part at an institution of higher education and relates to a scientific process that has the potential for being sold, traded, or licensed for a fee. 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* Open Records Decision No. 651 (1997). 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.* Based on your representations to this office, we conclude that you have demonstrated that pages numbered ZPB 003736 through 003741 and ZPB 0004013 through 004021 are confidential under section 51.914 of the Education Code. Accordingly, the university must withhold this information pursuant to section 552.101 of the Government Code.

With regard to the pages numbered ZPB 003727 through 003733, we conclude that you must withhold Dr. Prechel’s underlining and comments under section 51.914(1) of the Education Code. However, you have not explained, nor can we determine how release of the report itself would reveal the details of the proposed research. *See* Open Records Decision Nos. 557 (1990) (stating that working titles of experiments are not per se protected by section 51.914 because release would not permit person to appropriate research nor does information directly reveal substance of proposed research); 497 (1988) (stating that information related to research is not protected if it does not reveal details about research). Further, Dr. Prechel has not demonstrated that the submitted information constitutes plans, specifications, blueprints, or designs of a scientific research and development facility under section 51.914(3). Therefore, the pages numbered ZPB 003727 through 003733, except for Dr. Prechel’s underlines and comments, are not confidential under section 51.914 of the Education Code and must be released

In conclusion, you may withhold the marked information under sections 552.103 and 552.107. You must withhold pages ZPB 003736 through 003741 and ZPB 004013 through 004021 of Dr. Prechel’s information, as well as the underlines and comments in pages ZPB 003727 through 003733, under section 552.101 in conjunction with section 51.914 of the Education Code. You must release the remaining information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

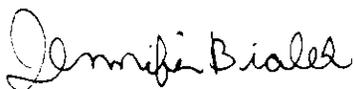
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek
Assistant Attorney General
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JHB/tr

Ref: ID# 145638

Encl: Submitted documents

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