



May 22, 2001

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
John B. Connally Building, 6th Floor
301 Tarrow
College Station, Texas 77840-7896

OR2001-2107

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# 147548.

Texas A&M University (the “university”) received a request for “all information and evidence which Harland Prechel and John Boies submitted to the inquiry and investigation committee after the procedure started and during the investigation hearing.” The requestor also asks for depositions of Boies and Prechel. You state that you have no knowledge of any depositions but that the requestor has copies of transcripts of the committee interviews of Boies and Prechel. You claim that a portion of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 51.914 of the Education Code. You also explain that Dr. Prechel has identified the submitted information as proprietary and excepted under section 552.110 of the Government Code. You have submitted a copy of a letter notifying Dr. Prechel through his attorney about the request as required by section 552.305(d).¹ We have considered the exceptions you claim and reviewed the submitted information.

¹See 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).

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.²

In Open Records Letter No. 2001-1554 (2001), we ruled on the submitted corporation report and editorial comments received by a scholarly journal. We have marked the information that we have already addressed in our previous ruling. Therefore, you must release the corporation report but withhold the underlining and comments in the report as well as the editorial comments in accordance with Open Records Letter No. 2001-1554 (2001). See Gov't Code Gov't Code § 552.301(f) (providing that a governmental body must release information and is prohibited from asking for a decision from the attorney general if the governmental body has previously requested and received a determination from the attorney general concerning the precise information and the attorney general determined that the information is not excepted from disclosure); Open Records Decision No. 673 (2001).

In a letter dated March 28, 2001, Dr. Prechel submitted comments and sample documents to this office with regard to the request for information. Dr. Prechel argues that the information is proprietary, but does not argue or demonstrate that the information is excepted under section 552.110. Accordingly, we have no basis to find that the information is excepted 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 asserts that the research papers marked as Exhibit C-1 are excepted under section 51.914(1) of the Education Code. Dr. Prechel also argues that his research materials are excepted under section 51.914(1) of the Education Code. 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:

²The 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).

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[.]*

Educ. Code § 51.914(1) (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 the documents marked as Exhibit C-1 are confidential under section 51.914 of the Education Code. Although you do not argue that the remainder of the submitted information is excepted under section 51.914, Dr. Prechel claims that all of his research materials are excepted under section 51.914 of the Education Code. Most of the remaining submitted information contains editorial comments regarding the research papers and the author’s responses which are similar in nature to a portion of the information found to be confidential under section 51.914 of the Education Code in Open Records Letter No. 2001-1554 (2001). Therefore, we conclude that the university must withhold the editorial comments and responses under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. However, we do not believe that some of the cover letters are excepted under section 51.914 of the Education Code. We have marked the information that may not be withheld under section 51.914 and must be released. You must withhold the remaining submitted 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
Open Records Division

JHB/sdk

Ref: ID# 147548

Encl: Submitted documents

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