



June 5, 2001

Mr. Scott A. Kelly  
Deputy General Counsel  
The Texas A&M University System  
John B. Connally Building, 6<sup>th</sup> Floor  
301 Tarrow  
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OR2001-2327

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 147970.

Texas A&M University (the "university") received a request for information relating to an academic dispute involving the requestor and two other current or former faculty members. You inform us that the university is releasing some of the requested information. The university takes no position as to whether the remaining requested information is excepted from public disclosure. You believe, however, that the remaining information may implicate the proprietary interests of one of the faculty members, Dr. Mary Zey. You submitted the information in question to this office. Under section 552.305 of the Government Code, you also notified Dr. Zey of the request for information and of her right to submit arguments to this office as to why the information you submitted should not be released. *See* Gov't Code § 552.305(d); 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 to disclosure under Public Information

Act in certain circumstances). We received written comments from Dr. Zey's attorney, Andrew S. Golub. We have considered his comments and have reviewed the information at issue.<sup>1</sup>

We first note that this office addressed a substantially similar request for information in Open Records Letter No. 2000-4464 (2000). That ruling involves a request by the same requestor, Dr. Prechel, for "all of the materials that [Dr.] Zey submitted to [the university] to support her claims that I misappropriated data and committed plagiarism." The university submitted a "random sample" of the materials that Dr. Zey had designated as being proprietary and invited her to submit comments under section 552.305. Mr. Golub did so on Dr. Zey's behalf. We held some of the responsive information to be excepted from disclosure under section 51.914 of the Education Code in conjunction with section 552.101 of the Government Code. Insofar as Open Records Letter No. 2000-4464 (2000) encompasses any of the materials that the university submitted in requesting our present decision, the prior ruling constitutes a previous determination with respect to such information. All such information must be withheld or released in accordance with Open Records Letter No. 2000-4464 (2000). See Open Records Decision No. 673 at 6-7 (2001) (explaining that attorney general decision constitutes previous determination under Gov't Code § 552.301(a) where (1) precisely the same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D), (2) same governmental body previously requested and received a ruling, (3) prior ruling concluded that same records or information are or are not excepted from disclosure, and (4) law, facts, and circumstances on which prior ruling was based have not changed).

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<sup>1</sup>Mr. Golub also submitted six folders of documents that Dr. Zey deems to be responsive to the request for information. Section 552.301(e)(1)(D) of the Government Code requires, however, that we consider only the documents submitted by the university that Mr. Golub also submitted with his arguments. They are as follows: (1) documents titled "List of Attachments" and "Contents of Attachments for 2000 Investigation Committee"; (2) document titled "A demonstration that the data underlying the articles under investigation are mine and have been misappropriated from my data bases"; (3) memorandum from Dr. Zey to 2001 Investigation Committee members dated February 7, 2001; (4) memorandum from Darrell Fannin, System Analyst, dated January 24, 2001; (5) Attachment I.1 ("Code Sheet for Sublevel"); (6) Attachment I.2 ("Data from Zey's 'Sublevel.xls' file before 1992"); (7) Attachment I.3 (Dr. Prechel's Workstation . . . 7/11/94"); (8) Attachment I.4 ("Zey's 'Sublevel.xls' file [f]ound in Boies\Boies"); (9) Attachment I.5 ("Copy of list of files zipped by Boies April 1995"); (10) Attachment I.6 ("Printout of content of Dr. Boies' zip file labeled 'Sublevel.dbf' 8/2/94"); (11) Attachment II.1 ("Codebook for CEO Background"); (12) Attachment II.2 ("Zey's listing of data in original 'CEOLST.xls'"); (13) Attachment II.3 (Dr. Prechel's workstation . . . 2/22/94"); (14) Attachment II.4 ("CEO Background"); (15) Attachment II.5 ("Listing of Boies\Boies\Boies.zip files"); (16) Attachment II.6 ("Content of 'Ceolst.dbf'"); (17) Attachment III ("Kalaha's files"); (18) Attachment 00 ("numerical and alphabetical list of Zey sample of 1988 Fortune Top 100 and 200 Industrials"); (19) Attachment 2, Parts 1-7 ("Zey's 9/94 data files for each firm, 1981-1993"); (20) Attachment 3.1 ("Command Statements to compute all subsidiaries and divisions"); (21) Attachment 3.2 ("Zey's Command Statements to electronically designate each firm as MDF or MSF provided to Boies 3/2/92"); and (22) Attachment 5, Parts 1 through 5 (documents relating to research in organizational change and development).

Subject to this qualification, we now address Dr. Zey's arguments against disclosure of the information that the university submitted. We begin with her contention that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 51.914 of the Education Code provides in relevant 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; [and]

(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 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[.]

Educ. Code § 51.914(1)-(2). We have reviewed the information that Dr. Zey claims is confidential under section 51.914. We conclude that Dr. Zey has not demonstrated that any of the information in question is confidential under section 51.914. *See also* Open Records Decision Nos. 651 at 9 (1997) (addressing required showing under Educ. Code § 51.914(1) that particular scientific information have "a potential for being sold, traded, or licensed for a fee"), 557 at 3-4 (1990) (concluding that university had not demonstrated that committee minutes or proceedings were confidential under section 51.914), 497 at 6-7 (1988) (concluding that statutory predecessor did not protect general information and published materials relating to superconductivity research).

Dr. Zey also contends that the submitted materials constitute trade secrets that are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from public disclosure two types of information: (1) trade secrets, and (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. *See* Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 a single or ephemeral event 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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If, as is true here, a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to requested information, this office will accept a private person's claim for exception as valid if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> *See* Open Records Decision No. 552 at 5 (1990). In support of her contention that the submitted materials are trade secrets, Dr. Zey asserts only that "[t]hese are confidential, proprietary documents that . . . have commercial value." These contentions do not establish that the contents of the submitted materials qualify as trade secrets under section 757 of the Restatement of Torts. Therefore, the materials are not excepted from disclosure under section 552.110 of the Government Code.

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<sup>2</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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

We note, however, that the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978).

Section 552.114 of the Government Code requires the withholding of "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114 as the equivalent of "education record" information that is subject to FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

The submitted documents contain the names of individuals who are identified as students. Unless the university has authority under FERPA to release information that personally identifies a particular student, the university must withhold such information under the federal law.

Finally, we further note that the submitted materials include copyrighted information. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 147970

Encl. Submitted documents

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