



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2004

Mr. Ronny Wall
Associate General Counsel
Texas Tech University System
P.O. Box 42021
Lubbock, Texas 79409-2021

OR2004-0777

Dear Mr. Wall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195581.

Texas Tech University (the "university") received a request for the following information:

1. The IBC Registration Document (found in [university] policies OP 74.05, Vol. 3, 6/26/00) for the project "Bacillus anthracis quorum sensing target for vaccine" (IBC proposal #02-19) of Dr. Michael San Francisco and approved on 3 April 2002.
2. The complete minutes of each Institutional Biosafety Committee meeting at which this project has been discussed.
3. All additional information, including research protocols, concerning this project that has been submitted to the [university] Institutional Biosafety Committee, in their entirety.

You explain that the university does not have any documents responsive to item two of the request. You claim that information responsive to items one and three of the request is excepted from disclosure under section 552.101 of the Government Code. We have considered your claimed exception and have reviewed the submitted information. We have also considered the comments submitted by the requestor. *See Gov't Code § 552.304*

(providing that interested party may submit comments explaining why requested information should or should not be released).

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You argue that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 51.914(1) of the Education Code. Section 51.914 of the Education Code provides in pertinent part as follows:

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). 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." 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 university'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).

You state that the all of the information submitted as Exhibit C pertains to a project to develop an anthrax vaccine suitable for the general population. You also state that if the project "proves successful, it would almost certainly result in significant revenues from licensing and sales since it has the potential to cure or prevent many dangerous diseases." After reviewing your arguments and the submitted information, we find that only the highlighted portions of the records directly reveal the substance of research or proposed research and are, therefore, within the scope of section 51.914.

The remaining portions of Exhibit C, however, contain only general background material, budgetary documents, and other information tangential to the proposed research. You have not explained, nor can we discern, how the release of this information would reveal the

details of the research at issue. *See generally* Open Records Decision Nos. 557 (1990) (stating that working titles of experiments are not *per se* protected by Educ. Code § 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). Accordingly, the university may only withhold the highlighted information under section 552.101 in conjunction with section 51.914 of the Education Code.

You also assert that Exhibit C is confidential under section 418.178 of the Government Code. As part of the Texas Homeland Security Act, section 418.178 was added to chapter 418 of the Government Code. Section 418.178 provides:

**Sec. 418.178. CONFIDENTIALITY OF CERTAIN INFORMATION
RELATING TO CONSTRUCTION OR ASSEMBLY OF WEAPONS.**

(a) In this section, “explosive weapon” has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Sess. Law Serv. 4814 (Vernon) (to be codified at Gov’t Code § 418.178). The fact that information may relate to biological toxins does not make the information *per se* confidential under section 418.178. *See generally* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting section 418.178 must adequately explain how the responsive records fall within the scope of that provision. *See generally* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). After reviewing your arguments,

we conclude that the university has failed to demonstrate how the remaining information, which consists of general background material, budgetary documents, and other information tangential to the proposed research, is protected under section 418.178(b). Therefore, the university must release the non-highlighted portions of Exhibit C.

In summary, the university must withhold the highlighted information under section 51.914 of the Education Code. The remaining information must be released to the requestor.

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).

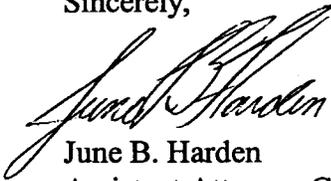
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 195581

Enc: Submitted documents

c: Mr. Edward Hammond
The Sunshine Project
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(w/o enclosures)