



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 21, 2004

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

OR2004-3235

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# 199873.

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

1. All records, from 1 January 1994 through the present date, of correspondence between Dr. Dick Auld (TTU) and Victor Ghetie of UT Southwestern.
2. All records, from 1 January 1994 through the present date, of correspondence between Dr. Dick Auld (TTU) and Paul Jackson of Los Alamos National Laboratory.
3. All records, from 1 January 1994 through the present date, of correspondence between Dr. Harry Parker (TTU) and Victor Ghetie of UT Southwestern.
4. All records, from 1 January 1994 through the present date, of correspondence between Dr. Harry Parker (TTU) and Paul Jackson of Los Alamos National Laboratory.

5. All records, from 1 January 1994 through the present date, of correspondence between Dr. Rial Rolfe (TTU) and Victor Ghetie of UT Southwestern.

6. All records, from 1 January 1994 through the present date, of correspondence between Dr. Rial Rolfe (TTU) and Paul Jackson of Los Alamos National Laboratory.

You explain that the university has released most of the responsive information. You claim, however, that the submitted records are excepted from disclosure under section 552.101 of the Government Code. You also assert that the release of the submitted information may implicate the proprietary interests of a third party. Accordingly, you notified Dr. Victor Ghetie of The University of Texas Southwestern Medical Center at Dallas ("UT Southwestern") of the request and of his right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d) (permitting third party with proprietary interest to submit to attorney general reasons why requested information should not be released); *see also* 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). On behalf of Dr. Victor Ghetie, UT Southwestern asserts that the submitted information is protected from disclosure under section 552.101 of the Government Code. Since UT Southwestern's arguments mirror those of the university, we will address the assertions together. We have considered all of the submitted comments and have reviewed the information at issue.

Initially, we note that the university has not fully complied with the requirements of section 552.301 of the Government Code in seeking this open records decision. Section 552.301 prescribes the procedures that a governmental body must follow when seeking to withhold responsive information from public disclosure. Specifically, the governmental body must seek a ruling from this office and state its claimed exceptions to disclosure within ten business days of receiving the written request. *See* Gov't Code § 552.301(a), (b). You acknowledge that the university did not seek a ruling within the statutory time period. You claim, however, that the requestor "graciously agreed to extend the deadline to produce the documents or request an ORD to February 13, 2004[.]" We note that if a governmental body does not seek to withhold responsive information from disclosure, it may negotiate with the requestor the date and hour the information will be made available. *See id.* § 552.221(d). A requestor does not, however, have the authority to waive a governmental body's statutory obligation to seek an open records decision in accordance with section 552.301. Thus, the university's delay in seeking a ruling results in the presumption that the requested information is public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ). In order to overcome this presumption of openness, the university must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. Since the applicability

of section 552.101 provides such a compelling reason, we will address the arguments against disclosure.

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 marked portions of the submitted documents are 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 information at issue outlines laboratory procedures developed by Dr. Ghetie for producing and purifying ricin toxin. Although you acknowledge that recipes for making ricin are commonly known and available to the public, you assert that the information at issue reveals unique procedures developed by Dr. Ghetie for use in connection with his ongoing research related to the use of immunotoxins in potentially treating human diseases and ricin poisoning. You further claim, and have submitted documentation showing, that the university can potentially sell or license this information for a fee to third parties. Based on your arguments and our review of the submitted information, we agree that the information you have marked directly reveals the substance of research or proposed research. Accordingly, the university must withhold the information at issue from disclosure under section 552.101 of the Government Code.

As our ruling on this issue is dispositive, we need not address your additional arguments against disclosure. 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).

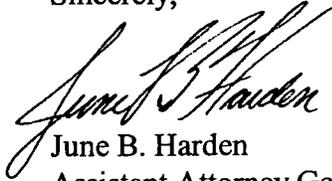
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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# 199873

Enc: Submitted documents

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