



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 4, 2005

Ms. Carol Longoria  
The University of Texas System  
Office of General Counsel  
201 W. Seventh Street  
Austin, TX 78701-2902

OR2005-03843

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 223304.

The M.D. Anderson Cancer Center (the "center") received a request for "all records including but not limited to health certificates, transfer records, travel itineraries, dates of departure and/or arrival" regarding any chimpanzees or bonobos into our out of the center for a specific time period. You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. You argue that the information submitted in Tab 5 is excepted from disclosure under section 552.101 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 represent that the information in Tab 5 contains “primate-related records with information regarding [the center’s] care and treatment of primates that could, were it publicly disclosed, be appropriated by third parties and sold or licensed for a fee.” Based on our review, we conclude, however, that the information in Tab 5 does not reveal the substance of the research at issue and is not confidential under section 51.914. Accordingly, the submitted information may not be withheld under section 552.101 on that basis. *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). We now address whether any of this remaining information may be withheld under the other exceptions you raise.

You claim that the submitted information in Tab 5 is excepted from disclosure pursuant to section 552.101 in conjunction with section 161.032 of the Health and Safety Code. Section 161.032 provides in relevant part:

The records and proceedings of a medical committee are confidential and are not subject to court subpoena . . . Records, information, or reports of a medical committee, medical peer review committee, or compliance officer . . . are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a). A “medical committee” means “any committee . . . of (1) a hospital; (2) a medical organization; [and] (3) a university medical school or health science center.” *Id.* § 161.031(a). However, the confidentiality afforded records under section 161.032 does not extend to “records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.” Health & Safety Code § 161.032(c). The phrase “documents made or maintained in the regular course of business” has been construed to refer to routine records the creation

of which did not entail a “deliberative process.” See *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 9 (Tex. 1996) (citing *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988)). In *Jordan v. Court of Appeals for Fourth Supreme Judicial District*, 701 S.W.2d 644, 648 (Tex. 1985), the court stated that records “gratuitously submitted to a committee or which have been created without committee impetus and purpose are not protected.”<sup>1</sup> See *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1 at 9-10 (discussing business records and holdings in *Barnes* and *Jordan*). Therefore, even if records are submitted to or created by a medical committee, medical peer review committee, or compliance officer, the records are not generally confidential if made or maintained in the regular course of business so as to be devoid of a deliberative process. See Health & Safety Code § 161.032(c).

You state that the submitted information in Tab 5 comprises records and proceedings of M.D. Anderson’s Institutional Animal Care and Use Committee (the “committee”). You further state that the committee’s responsibilities include making “decisions regarding when and how animals will be transitioned out of [the center’s] facilities.” However, we find that the documents in Tab 5 are forms governed by Title 7, chapter 54 of the United States Code and regulations promulgated thereunder. See generally 7 U.S.C. §§ 2136-2156 (relating to the transportation, sale, and handling of certain animals); 7 C.F.R. § 238(h) (relating to health certificate by licensed veterinarian for animals to be transported in commerce). We therefore conclude that the records at issue are maintained in the regular course of business by the center and are not confidential under section 161.032. See Health & Safety Code § 161.032(c); *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d at 9-10.

We now consider your argument under section 552.104 of the Government Code. This sections excepts from disclosure information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989), 463 at 2 (1987). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a

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<sup>1</sup>*Barnes* and *Jordan* both relied upon the predecessor statute to 161.032 of the Health & Safety Code, section 3 of article 447d, Vernon’s Texas Civil Statutes, which provided, in part, that “records made or maintained in the regular course of business” were not confidential.

competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988). Having considered your arguments, we find you have failed to establish the applicability of section 552.104 to the information at issue. We therefore conclude that the submitted information in Tab 5 may not be withheld under section 552.104 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). You argue that the submitted information in Tab 5 relates to vendors the center has selected to provide transportation of primates and that "this is at the very least commercial or financial information the disclosure of which would likely cause substantial competitive harm." You further state that some of the information at issue "may also constitute trade secrets as these processes and procedures are unique." After reviewing your arguments and the submitted information, we determine that you have provided only conclusory or generalized allegations that substantial competitive injury would likely result from disclosure. Further, you have not established that the submitted information constitutes a trade secret. *See* Open Records Decision Nos. 639 at 4 (1996) (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), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Therefore, none of the information at issue may be withheld under section 552.110.

We note that a portion of the submitted information identifies researchers or individuals associated with the center. You seek to withhold this information pursuant to section 552.101 in conjunction with the doctrine of common-law privacy. Section 552.101 encompasses common-law privacy, which ordinarily protects information only if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). However, information may also be withheld under section 552.101 in conjunction with common-law privacy upon a showing of certain "special circumstances." *See* Open Records Decision No. 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special

circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.* In this instance, we find the information you have provided is insufficient to demonstrate the existence of special circumstances. You have not shown that release of the identifying information of the individuals whose names appear in the information at issue would subject these individuals to an imminent risk of harm. Therefore, we determine that such information is not excepted from disclosure under section 552.101 in conjunction with the doctrine of common-law privacy.

We note, however, that the submitted information also includes the cell phone number of a center employee. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. We note that section 552.117 also encompasses a personal cell telephone number, provided that the cell phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov’t Code § 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform our office that the employee at issue elected to keep personal information confidential under section 552.024. You further state that the cell phone was not issued or paid for by the center. We, therefore, conclude that the telephone number that we have marked must be withheld under section 552.117(a)(1). 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Elizabeth A. Stephens  
Assistant Attorney General  
Open Records Division

EAS/krl

Ref: ID#223304

Enc. Submitted documents

c: Ms. Barbara Stagno  
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(w/o enclosures)