



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 12, 2007

Ms. Carol Longoria  
Public Information Coordinator  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2007-16407

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# 295601.

The University of Texas Southwestern Medical Center at Dallas (the "university") received a request for nine categories of information related to ricin research at the university. You state that some responsive information will be provided to the requestor. You also state that the university has no information responsive to categories seven and nine of the request.<sup>1</sup> You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by an attorney for the requestor. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

You claim that the information in Tab 8 is excepted from disclosure under section 552.108 of the Government Code, which provides in part:

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). Sections 552.108(a)(2) and (b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) or section 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *Id.* § 552.108(a)(2), (b)(2). In this instance, you state that the submitted information pertains to criminal cases that “to date have not resulted in a conviction or deferred adjudication.” However, you additionally state that “[r]elease of these reports would interfere with law enforcement and crime prevention[.]” Upon review, we determine that the university has failed to demonstrate that the information at issue relates to concluded investigations or prosecutions that did not result in conviction or deferred adjudication. Therefore, no portion of the information in Tab 8 may be withheld under section 552.108(a)(2) or section 552.108(b)(2) of the Government Code.

You claim that some of the submitted information in Tab 8 consists of privileged attorney client communications. Section 552.107 of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1).

The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You have marked information in one of the police reports in Tab 8 that you seek to withhold under the attorney-client privilege. Upon review, we find that the marked information is not a communication of legal advice or opinion, or a confidential client communication. Thus, such information is not within the attorney-client privilege. Accordingly, the university may not withhold such information based on section 552.107 of the Government Code.

You next raise section 552.101 of the Government Code as an exception to disclosure. This section excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 51.914 of the Education Code. Section 51.914 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 [the Act], 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; [or]

(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). 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 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.194 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988). Moreover, section 51.914 is applicable only to information “developed in whole or in part at a state institution of higher education.” Educ. Code § 51.914(1).

The university seeks to withhold portions of the submitted information in Tabs 12 and 13 on the basis of section 51.914. You assert that the information at issue concerns procedures, scope of work, and testing locations that relate to a product, device, or process developed by university researchers. You claim that the information at issue reveals the substance of the research. You state that such information has the potential for being sold, traded, or licensed for a fee. Based on your representations and our review of the information in question, we find that some of the information you claim is confidential under section 51.914 falls within the scope of the statute. We have marked the information that is confidential under section 51.914 and must be withheld under section 552.101 of the Government Code. The remaining information in Tabs 12 and 13 is not confidential under section 51.914, and may not be withheld under section 552.101 on that basis.

You also raise section 552.101 in conjunction with certain provisions of the Texas Homeland Security Act. Specifically, you claim that portions of the submitted information are subject to sections 418.177, 418.178, 418.181, and 418.182 of the Government Code. The fact that

information may relate to a governmental body's security concerns or emergency management activities does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

Section 418.181 of the Government Code provides that "[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *Id.* § 418.181. You claim that the university's ricin facility is "critical infrastructure" as defined by section 421.001(2) of the Government Code. You assert that the facility is a "select agent facility, the safeguard of which is vital to preventing use of select agents in terroristic attacks or related criminal activity." You further assert that "because of the toxicity of ricin and the lack of any cure for ricin poisoning . . . catastrophic health effects or mass casualties . . . would occur if . . . the facility itself is attacked in a way that would release the toxin in the surrounding community." Upon review, we agree that the university's ricin facility is "critical infrastructure" as defined by section 421.001(2).

You claim that the security assessments and alarm logs identify technical details of particular vulnerabilities of the ricin facility to an act of terrorism, and assert that an individual reading this information would be able to "pinpoint vulnerabilities [such as] potential weaknesses in types of hinges or locks used . . . patterns in [police] responses, frequency and reason for false alarms, [and] alarm locations[, and would be able to] use this information . . . in planning an attack on the facility. You state that the e-mails in Tab 10 "discuss the same details found in the security assessments and alarm logs[, and] address the operations, specifications, or locations of security measures in place at the ricin facility." Further, you state that release of the security plan, incident response plan, and laboratory guide "would assist in identifying possible vulnerabilities by providing a blueprint for current measures and procedures, allowing for planning and exploitation of those responses in a potential terrorist attack on the facility." Finally, you argue that release of the inventory information in Tab 12 "would reveal who has access to critical infrastructure, the location [and] amounts [of ricin] held in the facility . . . and how these amounts are held within the facility."

Based on your representations and our review of the submitted information, we find that you have sufficiently demonstrated that some of the information at issue falls within the scope of section 418.181 of the Government Code. We have marked the information that is confidential under section 418.181 and must be withheld under section 552.101 of the Government Code. However, you have failed to demonstrate how the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act

of terrorism. Therefore, none of the remaining information may be withheld under section 552.101 in conjunction with section 418.181.

Section 418.177 of the Government Code provides that information is confidential if it

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Gov't Code § 418.177. You seek to withhold the security assessments and alarm acknowledgments in Tab 9, police report number 020599 in Tab 8, and the inventory information in Tabs 11 and 12 under section 552.101 as information made confidential by section 418.177. You assert that the information at issue pertains to a ricin facility, and that the facility is critical infrastructure for purposes of section 418.177. You explain that these records are maintained by the university for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity. You state that the assessments and alarm acknowledgments were created "to identify and evaluate the risk or vulnerability of access controls and other security measures to damage, disablement, or breach, and to recommend specific measures for improving these access controls and other security measures." You claim that "should an incident occur with the facility, [the police report] might be useful in identifying leads to investigate." Finally, you assert that the inventory information "would aid in any criminal investigation [and] would influence recommendations regarding what security measures should be used."

Upon review, we find that some of the information at issue is maintained by the university for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity. Further, we determine that this information relates to a risk or vulnerability assessment. Therefore, we have marked the information that is confidential under section 418.177 of the Government Code and must be withheld under section 552.101 of the Government Code. However, we find that you have not demonstrated how any of the remaining information is related to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See id.* Thus, no portion of the remaining information may be withheld under section 552.101 on this basis.

Section 418.178 of the Government Code provides as follows:

(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.

*Id.* § 418.178. The fact that information may generally relate to biological toxins does not make the information *per se* confidential under section 418.178. *See* ORD 649 at 3.

You have marked information that you assert is confidential under section 418.178 of the Government Code. You contend that some of the information in question reveals the location of biological agents or toxins that have potential for use in terrorist plots and thus is protected by section 418.178(b)(1) and (2)(B). You also argue that section 418.178(b)(2)(B) encompasses responsive information that relates to antidote research for exposure to certain bio-toxins. We note that section 418.178 is applicable only to (1) information that is more than likely to assist in the construction or assembly of an explosive weapon or weapon of mass destruction and (2) information indicating the specific location of certain materials that are potentially useful in constructing or assembling such a weapon or of unpublished information relating to a potential vaccine or a device that detects biological agents or toxins. We have marked information revealing the location of toxins that is confidential under section 418.178 of the Government Code and must therefore be withheld under section 552.101. As the university has failed to demonstrate that section 418.178 encompasses any of the remaining information at issue, the university may not withhold any other information on that basis.

Section 418.182(a) of the Government Code states as follows:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

*Id.* § 418.182(a). You contend that some of the remaining information pertains to “specifications of the security and safety measures in place” at the ricin facility. Based on

your representations and our review of the submitted information, we have marked information that the university must withhold under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code. However, you have failed to demonstrate how the remaining information is protected under section 418.182, and it may not be withheld under section 552.101 on that basis.

We note that some of the remaining information may be subject to section 552.117(a)(1) of the Government Code, which excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. But a pager, fax, or cell phone number provided to an employee at public expense may not be withheld under section 552.117. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cell phone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We note that the protection of section 552.117 is applicable only to information that a governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information held by their employers); *see also id.* § 552.024 (establishing election process for Gov't Code § 552.117). The information that you seek to withhold under section 552.117 in Tab 8 is contained in a law enforcement record of a criminal investigation. The university's police department holds the information in question as a law enforcement agency, rather than as an employer. Therefore, the university may not withhold any of the submitted information in Tab 8 under section 552.117. However, if any of the employees whose information is at issue in Tabs 10 and 11 made a timely election to keep his or her personal information confidential, the university must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members pursuant to section 552.117(a)(1) of the Government Code. The university may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential.

Section 552.130 of the Government Code excepts from public disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See* Gov't Code § 552.130(a)(1). We agree that most of the information that you have marked in Tab 8 must be withheld under section 552.130. However, you have marked an insurance policy number under section 552.130; this information does not relate to a motor vehicle operator's or driver's license or permit, and thus, section 552.130 is not applicable to this information.

Finally, we note that a portion of the remaining information is excepted from disclosure under section 552.136 of the Government Code. This section states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is

confidential.” Gov’t Code § 552.136. Thus, the university must withhold the insurance policy number we have marked in Tab 8 under section 552.136 of the Government Code.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. We have marked the information that the university must withhold under section 552.101 of the Government Code in conjunction with sections 418.177 - .182 of the Government Code. If any of the employees whose information is at issue in Tabs 10 and 11 made a timely election to keep his or her personal information confidential, the university must withhold the employee’s home address and telephone number, social security number, and any information that reveals whether the employee has family members pursuant to section 552.117(a)(1) of the Government Code. With the exception of the insurance policy number, the information that you have marked in Tab 8 must be withheld under section 552.130 of the Government Code. The university must withhold the marked insurance policy number in Tab 8 under section 552.136 of the Government Code. The remaining submitted 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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 Office of the Attorney General 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/mcf

Ref: ID# 295601

Enc. Submitted documents

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