



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

This ruling has been modified by court action
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2009

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West 7th Street
Austin, Texas 78701-2902

**The ruling you have requested has
been amended as a result of
litigation and has been attached to
this document.**

OR2009-02951A

Dear Ms. Chatterjee:

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# 343438.

This office issued Open Records Letter No. 2009-02951 (2009) on March 6, 2009. Subsequent to that ruling, you informed this office that you discovered additional responsive information. You have now submitted the additional information and ask this office to reconsider Open Records Letter No. 2009-02951. We note that a governmental body is prohibited from asking this office to reconsider a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Furthermore, you have not demonstrated that this office made an error in issuing the prior ruling. Nevertheless, we have determined that the prior ruling should be corrected for purposes of due process. *See id.* §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2009-02951 and serves as the correct ruling. We have considered your request and will reconsider the previously issued ruling.

The University of Texas Medical Branch at Galveston ("UTMB") received a request for specified material transfer agreements ("MTAs") from 2005 through 2008. You explain that some of the responsive information "is not readily available due to Hurricane Ike, which

destroyed many paper and electronic documents.”¹ You claim the requested MTAs are not subject to the Act. In the alternative, you claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. You also believe that the requested information may contain proprietary information subject to exception under the Act. You state, and provide documentation showing, that you notified interested third parties of UTMB’s receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor.² See Gov’t Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). Battelle, Najit, Pittsburgh, and NIH have responded to this notice.³ We have considered the submitted arguments and reviewed the submitted information.⁴ We have also considered comments submitted by the requestor. See Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that some of the submitted information, which we have marked, is not responsive to the request for information because it falls outside the requested time period. UTMB need not release non-responsive information in response to this request, and this ruling will not address that information. Additionally, in its brief to this office, NIH argues to withhold from public disclosure portions of a contract between NIH and UTMB, which UTMB did not submit as information responsive to this request for MTAs. This ruling is limited to the information submitted as responsive by UTMB, and we need not address NIH’s arguments against disclosure of the contract between NIH and UTMB. See Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²UTMB notified the following third parties pursuant to section 552.305: Battelle Memorial Institute (“Battelle”); Najit Technologies, Inc. (“Najit”); University of Pittsburgh (“Pittsburgh”); Philadelphia Health & Education Corp. d/b/a Drexel University College of Medicine (“Drexel”); Case Western Reserve University (“Case Western”); U.S. Army Medical Research Institute of Infectious Diseases (“U.S. Army”); U.S. Army Medical Research and Materiel Command (“Material Command”); The University and Community College System of Nevada (“Nevada”); National Institute of Allergy and Infectious Diseases (“NIAID”); and National Institute of Health (“NIH”).

³In correspondence to this office, we understand Najit to assert the same arguments as UTMB.

⁴We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, we address UTMB's assertion that some of the responsive MTAs are not subject to the Act. The Act is applicable to "public information." *See id.* § 552.021. "Public information" is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all information in the physical possession of a governmental body is public information that is encompassed by the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). In this instance, you explain that UTMB contracted with NIH and NIAID to serve as a virus repository for emerging viruses and arboviruses. You state that the MTAs provide the method by which the viruses are distributed to qualified investigators pursuant to this contract. You argue that because the MTAs are executed pursuant to UTMB's contract with NIH/NIAID, UTMB employees are acting as federal agents, and thus the MTAs are not subject to the Act. *See* Open Records Decision No. 561 (1979). However, upon review of the contract between NIH/NIAID and UTMB, it explicitly states that UTMB acts independently and "not as an agent of [NIH/NIAID]." Thus, we find that the submitted information is maintained in connection with the transaction of official business by or for UTMB. Accordingly, we conclude that the responsive information is subject to the Act.

You also argue that the MTAs are confidential because NIAID's website indicates that the MTAs are to be treated "confidential," and some of the MTAs contain confidentiality provisions. We note that information is not confidential under the Act simply because a party anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); *see also* Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the responsive information is encompassed by an exception to disclosure, it must be released to the requestor, notwithstanding any expectation or agreement to the contrary.

You 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).

In this case, you represent that the information at issue pertains to UTMB’s research efforts and discoveries. You assert that the information gained from these studies has the potential to be sold, traded, or licensed for a fee. We note, however, that the information at issue relates to research projects developed by parties who do not meet the definition of a state

institute of higher education for purposes of this statute. *See id.* §§ 51.001, 61.003. You have not explained, nor can we discern, how this information relates to research being developed in whole or in part at UTMB. *See* Open Records Decision No. 497 (1988) (stating that information related to research is not protected if it does not reveal details about research). Accordingly, UTMB may not withhold the information at issue under section 552.101 in conjunction with section 51.914.

You also raise section 552.101 in conjunction with certain provisions of the Texas Homeland Security Act. Specifically, you claim that portions of the responsive information are subject to sections 418.178 and 418.181 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 418.178 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 claim the responsive information is confidential under section 418.178 of the Government Code. You contend that 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). 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 select agents that is confidential under section 418.178 of the Government Code and must therefore be withheld under section 552.101. As UTMB has failed to demonstrate that section 418.178 encompasses any of the remaining information at issue, none of it may be withheld on that basis.

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. In this instance, although you seek to withhold the remaining information under section 418.181 of the Government Code, you have not demonstrated that the MTAs concern critical infrastructures for purposes of section 418.181. *See id.* § 421.001 (defining “critical infrastructure” to “include all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). Likewise, you have not demonstrated that the remaining information reveals the vulnerability of any critical infrastructure to an act of terrorism. *See id.* §§ 418.181, 421.001. Thus, section 418.181 is not applicable to the remaining information, and none may be withheld on this basis.

We now turn to the arguments submitted by the third parties. We initially note that an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Drexel; Case Western; U.S. Army; Material Command; Nevada; or NIAID. Thus, none of those parties has demonstrated that any of the remaining responsive information is confidential or proprietary for the purposes of the Act, and UTMB may not withhold any of the remaining information at issue on the basis of any interest that any of those parties may have in the information. *See id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We understand Batelle to claim that its employees names are protected under section 552.101 of the Government Code in conjunction with common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). Having considered Batelle's arguments, we conclude that UTMB may not withhold any of Batelle's remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. See Open Records Decision No. 554 at 2-3 (1990) (names of private entity's employees not protected by common-law privacy under statutory predecessor to Gov't Code § 552.101).

We also understand Batelle to raise section 552.102 of the Government Code for its employees names. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). This exception is applicable only to information that relates to public officials and employees. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to section 552.102). Because the information at issue relates to employees of a private entity, UTMB may not withhold any of the information at issue under section 552.102(a) of the Government Code.

Pittsburgh asserts portions of a specified MTA are excepted under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret is:

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 single or ephemeral events in the conduct 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.

RESTATEMENTS OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776.

There are six factors to be assessed in determining whether information qualifies as 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 others 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). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *See also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of the submitted arguments and information, we find Pittsburgh has failed to demonstrate how any portion of its information meets the definition of a trade secret, nor has Pittsburgh demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Accordingly, we determine no portion of the specified MTA is excepted under section 552.110(a) of the Government Code. Further, we find Pittsburgh has made only conclusory allegations that release of its information would result in substantial damage to its competitive position. Thus, Pittsburgh has not demonstrated substantial competitive injury would likely result from the release of any of its information. *See* ORD 661 at 5-6. Therefore, we determine none of Pittsburgh's information is excepted under section 552.110(b) of the Government Code.

In summary, UTMB must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The remaining responsive information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 343438

Enc. Submitted documents

cc: Requestor

(w/o enclosures)

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APR 30 2014

At S. 39am M.
Amalia Rodriguez-Mendoza, Clerk

Cause No. D-1-GN-09-001460

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|---------------------------------|---|-------------------------|
| THE UNIVERSITY OF TEXAS MEDICAL | § | IN THE DISTRICT COURT |
| BRANCH AT GALVESTON AND THE | § | |
| UNIVERSITY OF TEXAS SYSTEM, | § | |
| <i>Plaintiffs,</i> | § | |
| . | § | 353rd JUDICIAL DISTRICT |
| v. | § | |
| | § | |
| GREG ABBOTT, ATTORNEY GENERAL | § | |
| OF TEXAS, | § | |
| <i>Defendant.</i> | § | TRAVIS COUNTY, TEXAS |

AGREED FINAL JUDGMENT

This is a suit under the Public Information Act (PIA), Texas Government Code Chapter 552, in which Plaintiffs The University of Texas Medical Branch at Galveston and The University of Texas System (collectively University), sought to withhold certain information from public disclosure. The parties, the University and Defendant Greg Abbott, Attorney General of Texas (Attorney General), agree to the entry and filing of this Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that in compliance with section 552.325(c), the Attorney General sent a letter by certified mail and electronic mail to the requestor, Mr. Edward Hammond, on April 8, 2014, providing reasonable notice of this setting (*see* attached mail receipt). The requestor was informed of the parties' agreement that the University must withhold portions of the information at issue. The requestor was also informed of his right to intervene in the suit to contest the University's right to withhold this information. The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. The “information at issue” means the information requested by Mr. Edward Hammond on November 10, 2008 and is Bates-stamped U000001 through U000545.

2. “Select agent” is a biological agent or toxin identified or listed as a select agent under federal law, including under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. L. No. 107-188), and regulations adopted under that Act. *See* Tex. Gov’t Code § 552.151(a).

3. The phrase “appears or will appear on published research” in Tex. Gov’t Code § 552.151(c) and this Agreed Final Judgment means the research regarding any select agent has been published or has been approved for publication by a journal or publisher on or before the date of the public information request, November 10, 2008.

4. The University must redact from the information at issue the specific locations within an approved facility wherein select agents are located, as shown in the University’s proposed redactions submitted to the Court *in camera* as Exhibit 4 to Plaintiffs Motion for Partial Summary Judgment; and the University must redact from the information at issue the personal identifying information of non-faculty members and of non-employees of the University, as shown in the University’s proposed redactions in the same Exhibit 4. The identifying information described in this paragraph is confidential pursuant to Tex. Gov’t Code § 552.151(a)(1), (2), and (3).

5. The University may redact from the information at issue personal identifying information of its faculty members or employees under Tex. Gov’t Code

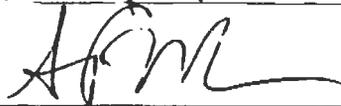
§ 552.151(a)(2) or (3), but the University must disclose the identity of an individual faculty member or employee if the person's name appears or will appear on published research regarding any select agent on or before the date of the public information request, November 10, 2008. The appearance, or approval for publication, of the faculty member's or employee's name on published research after the date of the public information request does not affect the University's right to redact the University faculty member's or employee's personal identifying information from the information at issue, unless approval for that publication occurred before the date of the public information request. This identifying information is withheld pursuant to Tex. Gov't Code § 552.151(a)(2) and (3).

6. All court costs and attorney fees are taxed against the party incurring the same;

7. All relief not expressly granted is denied; and

8. This Agreed Final Judgment finally disposes of all claims between the University and the Attorney General and is a final judgment.

SIGNED the 30 day of April, 2014.



PRESIDING JUDGE

AGREED:



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