



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 23, 2009

Mr. Scott A. Kelly  
Deputy General Counsel  
The Texas A&M University System  
200 Technology Way, Suite 2079  
College Station, Texas 77845

OR2009-16684

Dear Mr. Kelly:

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# 362091.

The Texas A&M University System (the "system") received a request for all agreements from January 1, 2005 to the present between the system and Ceres, Incorporated ("Ceres"), expressly including any Material Transfer Agreements. You claim the marked information in the submitted contracts is excepted from disclosure under section 552.101 of the Government Code. You also state release of some of the requested information may implicate the proprietary interests of Ceres. Thus, pursuant to section 552.305 of the Government Code, you notified Ceres of the request and of its right to submit arguments to this office as to why its information should not be released. 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 to disclosure under in certain circumstances). We also received comments from the requestor. *See* Gov't Code § 552.304 (providing an interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

First, the system and Ceres argue the applicability of section 552.101 of the Government Code to the information the system marked. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either

constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 51.914 of the Education Code. Section 51.914 of the Education Code 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[.]

Educ. Code § 51.914(1). As noted in Open Records Decision No. 651, 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.” Open Records Decision No. 651 at 9 (1997). 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 system’s assertion that the information has this potential. *But see id.* at 9 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.914(1) 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).

The submitted information consists of contracts between the system and Ceres pertaining to a joint research and commercialization agreement for the production of sorghum, a plant with applications in the so-called bioenergy industry. These contracts outline the terms pursuant to which research, development, and production of sorghum are to be conducted by the system and Ceres. We have marked the portions of these contracts that reveal the details of this research. The system must withhold this marked information under section 552.101 in conjunction with section 51.914(1) of the Education Code.<sup>1</sup> However, the remaining information you marked in the body of the Sponsored Research Agreement consists of contract terms governing the system’s disclosure of Ceres’ proprietary information to third parties. Further, the remaining information you marked in the submitted Technical Plan and Breeding Program Description documents consists of general background facts and

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<sup>1</sup>As our ruling is dispositive for this information, we need not address Ceres’ remaining arguments against its disclosure.

objectives, not technical details about how to achieve such goals. Because this remaining information does not reveal the specifics of any actual research, we determine the remaining information you marked may not be withheld under section 51.914(1).

Ceres also argues section 51.914(2) applies to the remaining information the system marked. Section 51.914(2) protects

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 [. . .] corporation [. . .] that has been disclosed to an institution of higher education solely for the purposes of a written research contract [. . .] that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(2). As discussed above, the remaining information you marked relates to negotiated terms of the system's agreement with Ceres, as well as general facts and objectives regarding the research to be conducted. Ceres does not explain how the remaining information is its proprietary information that it transferred to the system. In fact, the system represents this information was provided to Ceres by the system. Accordingly, we find Ceres has not established the applicability of section 51.914(2) to the remaining information the system marked under section 51.914, and it may not be withheld under section 552.101 of the Government Code.

Ceres next asserts the information it marked in the remaining documents is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret 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." *See* Gov't Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). 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.<sup>2</sup> Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* Open Records Decision 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Ceres contends the remaining marked information in the Technical Plan and Breeding Program Description, which it marked as "research-related" information, is subject to section 552.110(a). However, the remaining information in these documents consists of general facts and objectives regarding the research to be conducted by the system and Ceres pursuant to the terms of the Sponsored Research Agreement, and is specific to this contract. Accordingly, we find this information does not meet the definition of a trade secret, and

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<sup>2</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

section 552.110(a) is inapplicable to the "research-related" information. *See* Restatement of Torts § 757 cmt. b.

Ceres additionally claims the information it marked as "transactional terms" in the Intellectual Property Rights Agreement is a trade secret. Ceres describes these terms as "particular contractual terms regarding the relationship between Ceres and [the system]." Thus, based on Ceres' representations and our review, we find the marked terms are specific to the joint research and commercialization agreement at issue. Contractual terms pertaining to a specific contract do not meet the definition of a trade secret, as such terms pertain to a single event in the conduct of a business. *Id.* Additionally, although Ceres states the marked terms are made confidential by the confidentiality terms of the Intellectual Property Rights Agreement itself, the confidentiality provision in this agreement acknowledges that information must be released as required by the Act. *See* Intellectual Property Rights Agreement, art. 3, para. B. Accordingly, the marked information in the Intellectual Property Rights Agreement may not be withheld under section 552.110(a).

Ceres also argues the marked "budgetary information" in the Sponsored Research Agreement, and amendments and appendix thereto, is protected by section 552.110(a). However, like the "transactional terms" discussed above, all the information Ceres marked as "budgetary information" pertains to the particular Sponsored Research Agreement at issue. Thus, we conclude the marked "budgetary information" does not meet the definition of a trade secret, and may not be withheld under section 552.110(a). *See* Restatement of Torts § 757 cmt. b.

Ceres next claims the information marked as "transactional terms" and "budgetary information" is protected by section 552.110(b). Upon review of Ceres' arguments, however, we find Ceres has not explained how the release of information pertaining to particular contract with a governmental body will likely result in competitive injury to the company. Thus, the marked "budgetary information" may not be withheld under section 552.110(b). Furthermore, Ceres has made only conclusory allegations that release of the submitted "transactional terms" would result in substantial damage to the company's competitive position. Thus, Ceres has not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See generally* Open Records Decision Nos. 661 at 5-6 (1999), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, none of Ceres' remaining information may be withheld under section 552.110(b).

In summary, the system must withhold the information we marked under section 552.101 in conjunction with section 51.914(1) of the Education Code. The remaining 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](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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", with a long horizontal line extending to the right.

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 362091

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)