ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2012

Ms. Zeena Angadicheril
Ms. Neera Chatterjee
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2012-07224

Dear Ms. Angadicheril and 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# 452356 (OGC#142110).

The University of Texas at Austin (the "university") received a request for all documents containing voluntary disclosures to the federal government by the university since January 1, 2005 of intentional or unintentional violations of export controls, including deemed exports, and all responses the university received from the federal government to those disclosures, including any resolution of the matters. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You further state release of the requested information may implicate the interests of third parties. Accordingly, you notified the following third parties of the request for information and of their right to submit arguments stating why their information should not be released: Progeny Systems Corporation ("Progeny"); the United States Department of State ("USDOS"); the United States Department of Commerce ("USDOC"); the National Geospatial Intelligence Agency ("NGA"); and Naval Sea Systems Command ("NAVSEA"). *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have received comments from Progeny. We have also received comments from the requestor's attorney. *See id.* § 552.304 (interested party may submit written comments stating why information should

or should not be released). We have considered all of the submitted arguments and reviewed the submitted information.

Initially, we note you inform this office the university has reached an agreement with the requestor to redact certain information, which you have marked. Therefore, the information you have marked is not responsive to the present request for information. This decision does not address the public availability of non-responsive information and such information need not be released in response to the present request.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice 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 ruling, we have not received comments from USDOS, USDOC, NGA, or NAVSEA. Thus, we have no basis to conclude USDOS, USDOC, NGA, or NAVSEA has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of the requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the university may not withhold any of the information at issue on the basis of any proprietary interest USDOS, USDOC, NGA, or NAVSEA may have in the information.

Section 552.101 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 federal statutes. The university and Progeny each raise section 552.101 in conjunction with the federal Arms Export Control Act, section 2778 of title 22 of the United States Code, and its associated Code of Federal Regulations provisions, specifically section 126.10 of title 22 of the Code of Federal Regulations. The Arms Export Control Act authorizes the President of the United States to "control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services." 22 U.S.C. § 2778(a)(1). The International Traffic in Arms Regulations, subchapter M of chapter I of title 22 of the Code of Federal Regulations, implement that authority. *See* 22 C.F.R. § 120.1(a). Section 122.1 of title 22 of the Code of Federal Regulations requires certain manufacturers and exporters of defense articles and defense services to register with the Directorate of Defense Trade Controls (the "DDTC"). *See id.* § 122.1; *see also id.* §§ 120.6 (defining "defense article"), .9 (defining "defense service"). Registration is a means by which registrants provide information to the federal government regarding who is involved in certain manufacturing and exporting activities and is generally a precondition to the issuance of a license under subchapter M. *See id.* § 122.1(c). Parts 123 and 125 of title 22 of the Code of Federal Regulations require any person or company who intends to export or import a defense article or technical data to

obtain prior approval via a license from the DDTC. *See id.* pts. 123, 125; *see also id.* § 120.10 (defining "technical data"). Sections 123.1 and 126.13 prescribe the requirements for completion of a license application. *See id.* §§ 123.1(a), 126.13. Section 126.10(b) provides:

> (b) Determinations required by law. Section 38(e) of the Arms Export Control Act (22 U.S.C. 2778) [now found at 22 U.S.C. § 2778(e)] provides by reference to certain procedures of the Export Administration Act that certain information required by the Department of State in connection with the licensing process may generally not be disclosed to the public unless certain determinations relating to the national interest are made in accordance with the procedures specified in that provision, except that the names of the countries and types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless the President determines that release of such information would be contrary to the national interest. Registration with the [DDTC] is required of certain persons, in accordance with Section 38 of the Arms Export Control Act. The requirements and guidance are provided in the ITAR pursuant to parts 122 and 129. Registration is generally a precondition to the issuance of any license or other approvals under this subchapter, to include the use of any exemption. Therefore, information provided to the Department of State to effect registration, as well as that regarding actions taken by the Department of State related to registration, may not generally be disclosed to the public. Determinations required by Section 38(e) shall be made by the Assistant Secretary for Political–Military Affairs.

Id. § 126.10(b). Section 126.10(b) states that certain information provided in connection with the licensing process may generally not be disclosed to the public. *Id.*

You and Progeny argue the submitted information, consisting of voluntary disclosures of possible violations of the Arms Export Control Act and the federal government's responses to the disclosures, relates to the licensing process, affects registration, or involves actions related to registration. You and Progeny argue these voluntary disclosures relate to licensing in that the only manner in which the university can secure a license for the matters related to the submitted documents was to first file a voluntary disclosure and then proceed with a license submission. Further, you argue it was through the voluntary disclosure process that the Department of State was able to understand the transactions at issue and advise the university on the method to proceed with licensing requirements. Upon review, we find the creation of the information at issue and its submission to the federal government were not in connection with the licensing process. Parts 123 and 125, which list the requirements for a license, do not require a voluntary disclosure of a violation of the Arms Export Control Act or the International Traffic in Arms Regulations as a part of the licensing process. *See generally id.* pts. 123, 125. Accordingly, the university may not withhold the information

it has marked under section 552.101 of the Government Code in conjunction with the Arms Export Control Act and section 126.10(b) of title 22 of the Code of Federal Regulations.

You also raise section 552.101 in conjunction with the federal Export Administration Regulations, specifically section 766.11 of title 15 of the Code of Federal Regulations, as an exception to disclosure of a marked portion of the submitted information. Section 766.11 concerns an administrative law judge's discretion in protecting sensitive information in administrative enforcement proceedings and provides:

> (a) Protective measures. It is often necessary for [the Bureau of Industry and Security] to receive and consider information and documents that are sensitive from the standpoint of national security, foreign policy, business confidentiality, or investigative concern, and that are to be protected against disclosure. Accordingly, and without limiting the discretion of the administrative law judge to give effect to any other applicable privilege, it is proper for the administrative law judge to limit discovery or introduction of evidence or to issue such protective or other orders as in the judge's judgment may be consistent with the objective of preventing undue disclosure of the sensitive documents or information. Where the administrative law judge determines that documents containing the sensitive matter need to be made available to a respondent to avoid prejudice, the judge may direct [the Bureau of Industry and Security] to prepare an unclassified and nonsensitive summary or extract of the documents. The administrative law judge may compare the extract or summary with the original to ensure that it is supported by the source document and that it omits only so much as must remain classified or undisclosed. The summary or extract may be admitted as evidence in the record.

15 C.F.R. § 766.11(a). You argue the information you have marked reveals confidential business details involving the university and third parties. However, section 766.11(a) applies to an administrative law judge's handling of information in an administrative proceeding and does not expressly make any information confidential. Statutory confidentiality requires express language making information confidential or stating information shall not be released to the public. A confidentiality requirement will not be implied from statutory structure. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987). Accordingly, the university may not withhold the responsive information you have marked under section 552.101 of the Government Code in conjunction with section 766.11(a) of title 15 of the Code of Federal Regulations.

Progeny argues its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the Defense Federal Acquisition Regulation Supplement ("DFARS"). *See* 48 C.F.R. ch. 2. DFARS applies to purchases and contracts by the United States Department of Defense (the "USDOD"). *See id.* § 201.104. In order

to safeguard classified information, contracts under DFARS are required to have a clause found at section 252.204-7000 regarding the disclosure of information when "the contractor will have access to or generate unclassified information that may be sensitive and inappropriate for release to the public." *Id.* § 204.404-70(a). Progeny states it received a contract from an agency of the USDOD and the contract included the said required clause. Section 252.204-7000 prescribes the exact wording of the clause to be used:

> Disclosure of Information
>
> (a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless--
> (1) The Contracting Officer has given prior written approval; or
> (2) The information is otherwise in the public domain before the date of release.
> (b) Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.
> (c) The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

Id. § 252.204-7000. Progeny asserts its information is confidential pursuant to these DFARS provisions. However, these provisions require contractual disclosure of information clauses be used, but do not expressly make information confidential. As discussed above, statutory confidentiality requires express language making information confidential or stating information shall not be released to the public. *See* ORD 658, 478. Accordingly, the university may not withhold Progeny's information under section 552.101 of the Government Code in conjunction with these DFARS provisions.

The remaining responsive information contains the university's Federal Express shipping account number.[1] Section 552.136 provides "[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(b). An access device number is one that may be used to 1) obtain money, goods, services, or another thing of value, or 2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a)

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[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(defining "access device"). We find the account number we have marked is an access device for purposes of section 552.136. Accordingly, the university must withhold the information we have marked under section 552.136 of the Government Code.

In summary, the university must withhold the information we have marked under section 552.136 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, toll free at (888) 672-6787.

Sincerely,

Jessica Marsh
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 452356

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