



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 22, 2012

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

OR2012-07715

Dear Ms. Angadicheril:

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# 454366 (OGC# 142536).

The University of Texas (the "university") received a request for all electronic mail sent or received by a named university employee for a specified time period and all electronic mail sent to a received by another named university employee, which contain seven specified words, for a specified time period. You indicate the university will release some information to the requestor. You state the university will redact some of the requested information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You also state the university will redact e-mail addresses from the requested information under section 552.137 of the Government Code pursuant to

¹We note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A copy of the DOE's letter to this office is posted on the Attorney General's website at: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Open Records Decision No. 684 (2009).² You contend some of the submitted information is not subject to the Act. You claim the remaining information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.³

You contend some of the submitted information is not subject to the Act. The Act is applicable only to “public information.” See Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as consisting of

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 the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); see Open Records Decision No. 462 at 4 (1987). You state some of the submitted information, which you have marked, consists of personal messages that have no connection with the university’s business and constitute incidental uses of e-mail by university employees. You also state these communications were not collected or assembled and are not maintained pursuant to any law or ordinance or in connection with the transaction of university business. You explain the university has an e-mail and internet usage policy that recognizes and allows incidental use of electronic mail by employees. Based on your representations and our review of the information at issue, we find the personal communications you have marked do not constitute public information for purposes of section 552.002 of the Government Code. See Open Records Decision No. 635 at 4 (1995) (Gov’t Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). We therefore conclude the marked

²Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

³We assume 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 those records contain substantially different types of information than that submitted to this office.

personal information is not subject to the Act and need not be released in response to this request for information.

Section 552.101 of the Government Code exempts 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 other statutes make confidential. section 51.914 of the Education Code, which provides in part:

(a) In order to protect the actual or potential value, the following information is confidential and is not 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[.]

...

(b) Information maintained by or for an institution of higher education that would reveal the institution’s plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, “institution of higher education” has the meaning assigned by Section 61.003 [of the Education Code].

Educ. Code § 51.914(a)(1)-(2), (b). 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.” ORD 651 at 9. Furthermore, whether particular scientific information has such a potential is a question of fact 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 the information has this potential. *See id.* *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 section 51.914 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).

You have marked the remaining information the university seeks to withhold under section 51.914. You explain this information consists of drafts of research, research articles, a manuscript authored or co-authored by university employees, and related correspondence. You state the manuscript, research, and articles are expected to be, but have not yet been, published. You also state these materials are related to research projects and contain scientific and other information that has the potential for being sold, traded, or licensed for a fee to other researchers or third parties interested in the information. Based on your representations and our review of the information at issue, we conclude the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

In summary, the university need not release the submitted e-mail communications you have marked that are not subject to section 552.002 of the Government Code and must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 454366

Enc. Submitted documents

cc: Requestor
(w/o enclosures)