

Academic Component Institutions:
The University of Texas at Arlington
The University of Texas at Austin
The University of Texas at Brownsville
The University of Texas at Dallas
The University of Texas at El Paso
The University of Texas-Pan American
The University of Texas of the Permian Basin
The University of Texas at San Antonio
The University of Texas Institute of Texan Cultures at San Antonio
The University of Texas at Tyler



Health Component Institutions:
The University of Texas Southwestern Medical Center at Dallas
The University of Texas Medical Branch at Galveston
The University of Texas Health Science Center at Houston
The University of Texas Health Science Center at San Antonio
The University of Texas M.D. Anderson Cancer Center
The University of Texas Health Center at Tyler

THE UNIVERSITY OF TEXAS SYSTEM

Office of General Counsel

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Opinion Committee

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June 13, 1994

FILE # MC-26968-94

I.D.# 26968

The Honorable Dan Morales
Attorney General
State of Texas
Supreme Court Building
P. O. Box 12548
Austin, Texas 78711

RQ-752

Attention: Ms. Madeleine B. Johnson
Chief, Opinion Committee

Re: Request for Open Records Decision concerning
background data for certain reports produced by faculty
of The University of Texas at Austin

Dear General Morales:

This letter is to request an Open Records Decision on behalf of the Board of Regents of The University of Texas System concerning a request for information addressed to two members of the faculty of The University of Texas at Austin.

On June 2, 1994, a letter making a request for information under the Texas Open Records Act (the "Act") was received by Mr. Paul T. Chippindale and Dr. David M. Hillis at their offices in the Department of Zoology of The University of Texas at Austin ("UT"). The letter was addressed jointly to Chippindale and Hillis (the "Investigators"), as well as to Andrew H. Price of the Texas Parks and Wildlife Department ("TPW"). The letter was signed by Mr. J.B. Ruhl of the Fulbright & Jaworski law firm and dated May 24, 1994. (Mr. Ruhl's request incorporated his May 17, 1994 request addressed

to the U.S. Fish and Wildlife Service ["FWS"], to which the FWS replied that it did not have the requested data. Copies of both request letters are attached and are hereinafter collectively called the "request letter.") Mr. Ruhl has asked the recipients of the request letter to provide him with a broad spectrum of background data concerning certain published reports related to the proposed ruling by FWS to list the Barton Springs salamander as an endangered species under the federal Endangered Species Act.

Specifically, Mr. Ruhl has requested the Investigators to provide the "opportunity to review and copy all field notes, raw data, and other background information" used in compiling the reports described in the request, which Mr. Ruhl had categorized into four groups of reports. These reports are summarily described and shall be referred to for the purposes of this letter as follows:

Report #1 - An article by Chippindale, Price, and Hillis concerning a new species of salamander, published in Herpetologica in 1993.

Report #2 - Two reports by other named researchers concerning the Edwards Aquifer and Barton Springs and compiled for the U.S. Geological Survey, published in 1985 and 1986.

Report #3 - Three Central Texas Salamander Studies reported by TPW to FWS (based on work performed by Chippindale and Hillis under a contract with TPW), published in 1989, 1990, and 1992.

Report #4 - A report by other named researchers concerning urbanization and water quality in the Austin area, published by the U.S. Geological Survey in 1990.

Upon receiving the request letter, the Investigators notified the Executive Vice President and Provost of U.T. Austin, as required by institutional policy on Open Records requests. Consultation between the Investigators and U.T. officials revealed that neither the Investigators nor U.T. have any connection with Report #2 or Report #4, nor do the Investigators or U.T. have any of the requested background information concerning those two reports. This letter will therefore concern itself solely with the Mr. Ruhl's request for background information concerning Report #1 and Report #3, which were authored by the Investigators.

Some portions of the requested background material for Reports #1 and #3 are already available to the public. The raw data in support of the salamander collection localities have been

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entered into a distributional database at TPW. The preserved salamander specimens collected by the Investigators will be available in the Texas Memorial Museum. For the purposes of assisting UT in drafting this opinion request, the Investigators have voluntarily assembled all of the materials in their custody which fall within the scope of Mr. Ruhl's request.

However, the Investigators and UT contend, and UT will demonstrate in the following paragraphs, that the requested background information for Reports #1 and #3 is not "public information," as defined in Section 552.021 of the Act, because this data is the product of the Investigators' scholarly research and consequently their private property, in which UT asserts no interest and no right of access, pursuant to the Intellectual Property Policy of the U.T. Board of Regents. In the alternative, if it should be determined that any portion of the requested data is public information, UT contends and will demonstrate that the data is excepted from disclosure pursuant to Section 552.101 of the Act because it is information considered to be confidential under Section 51.914 of the Texas Education Code.

Because there has been no previous determination that the requested information is public information or that it is included within one of the exceptions in the Open Records Act, and being within the ten-day limit period specified by Section 552.301 of the Act, U.T. respectfully requests that you render a written decision determining whether the information in question is public information or is excepted from disclosure under one of the exceptions in the Open Records Act. The data in the custody of the Investigators that could come under the scope of the request letter is voluminous, and in the case of some tangible samples, fragile, therefore copies of representative samples of the disputed data coming within the scope of Mr. Ruhl's request are attached hereto; they are marked as "Item 1" through "Item 17."

To provide you with the background information necessary to evaluate the information that is the subject of this opinion request, the discussion below will first describe (i) the Intellectual Property Policy of the U.T. Board of Regents, as it concerns sponsored research and scholarly publications by U.T. faculty members; and (ii) nature of the sponsored research contracts with TPW that produced Report #3. Following this background information, U.T. will cite the reasons relied upon by The University of Texas System to permit the information to be withheld from public disclosure, and provide arguments and authorities in support of those assertions.

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In accordance with the directions of the Sixty-Ninth Legislature in S.C.R. 92, the U.T. Board of Regents has adopted an Intellectual Property Policy to encourage development of inventions and other intellectual creations and to protect the respective interests of the public, the creator, and the research sponsor, if any, in those creations. The UT Intellectual Property Policy comprises Part Two, Chapter XII of the Rules and Regulations of the Board of Regents of The University of Texas System. (A copy of the UT Intellectual Property Policy and related Guidelines adopted by the Board is attached hereto for reference as Exhibit "A.")

The UT Intellectual Property Policy, as stated in Subsection 2.2, applies to all UT institutions and employees, persons using UT facilities under UT supervision, graduate degree candidates and fellows. However, the Policy does not apply to intellectual property described in Subsection 2.3, which states

The Board will not assert an interest in faculty produced textbooks, scholarly writing, art works, musical compositions and dramatic and non-dramatic literary works that are related to the faculty member's professional field unless such work is commissioned by the [University of Texas] System or a component institution of the System or is a work for hire pursuant to Subsection 2.4. (Emphasis added.)

Subsection 2.4 of the Policy provides that the Board has sole ownership of all intellectual property that it commissions or is produced as a work for hire for System or a UT institution. Faculty research that is sponsored by an outside entity is, by definition under the Board's Policy, neither commissioned by UT nor a work for hire produced for UT.

The Investigators' research which produced Report #3 for TPW is an example of the type of scholarly work referred to as "sponsored research." Report #1, in contrast, is an example of a scholarly writing by faculty members that is neither commissioned by UT nor a UT work for hire, but was submitted by the Investigators for publication in a scholarly journal as a part of the peer review process specified by TPW in its contract for the Investigators work. In accordance with its Policy, the U.T. Board of Regents may assert no interest in either Report #1 and Report #3. Consequently, UT has no right of access to the background information used in producing the Reports, except to the extent that the Investigators choose to make the information available to the public. The unpublished background information is the private property of the Investigators.

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Although the contract through which TPW obtained Report #3 was an Interagency Contract between TPW (as Receiving Agency) and U.T. Austin (as Performing Agency), the work under the Contract was performed by the Investigators and UT has no interest in the resulting report. Copy of the Contracts are attached as Exhibit "B." The reason that UT is the contracting party in many sponsored research projects is the prohibition against use of state resources except for public purposes and in return for proper compensation. The Board's Rules, Part One, Chap. III, Section 31, require that no UT resources may be used in performance of a contract of grant unless it is administered and controlled by the UT institution. Further, no UT employee can enter into any outside employment unless the nature of the work is approved by UT administration. Board's Rules, Part One, Chap. III, Section 13.7. Copies of the cited Rules are attached as Exhibit "C."

It is typical in sponsored research contracts or grants for the UT institution to be named as the performing party, even though the institution's sole duties are to see that the work is performed and to act as fiscal agent to handle the funding of the work. The U.T. Austin Handbook of Operating Procedures at Section 5.08.2 specifies that faculty members are responsible for making the original proposals to perform sponsored research and also for the management of the project. These Procedures further require that all such proposals must be approved by UT administration and that UT will be responsible for performance of the work and fiscal management of funds. However, Section 5.10 of the Procedures states that it is the responsibility of each research investigator to maintain the integrity of projects by keeping accurate records of all experimental protocols, data, and findings. Copies of the cited Procedures are attached as Exhibit "D."

The Board of Regents and U.T. Austin assert no right to own, control, or have access to the records or background data produced by its faculty in the course of producing research and scholarly writings under sponsored research contracts. In fact, if a UT faculty member should leave the UT institution, any unexpended sponsored research funds attributable to that faculty member's research in progress would typically be sent by UT to the researcher's new institution, subject to the approval of the research sponsor. Similarly, UT would have no right to retain any of the information compiled or data supporting that faculty member's research. Although the material may be physically located on UT premises, it is the personal property of the researcher, under the UT Intellectual Property Policy.

The work product TPW was to receive, and did receive, under the contracts that produced Report #3, was "one or more manuscripts incorporating the results of the study and submitted to peer-reviewed scientific journals." The TPW contracts did not require that TPW would receive ownership or even access to the background information or raw data used in producing the final report.

For the reasons described above, UT contends that the requested background information for Reports #1 and #3 is not "public information," as defined in Section 552.021 of the Act. The information was not collected, assembled, or maintained by UT. Neither was it collected, assembled, or maintained by the Investigators on behalf of UT. Finally, UT does not own the information, nor have a right of access to it. Pursuant to the policies and Rules of the UT Board of Regents, this data is the product of the Investigators' scholarly research and therefore their private property, in which UT asserts no interest.

If, however, it should be determined that any portion of the requested data is public information, then UT contends that the data is excepted from disclosure pursuant to Section 552.101 of the Act because it is information considered to be confidential under Section 51.914 of the Texas Education Code. This amendment was added to the Education Code by the Sixty-Ninth Legislature to remove all uncertainty as to the ability of institutions of higher education to protect the "actual or potential value" of technological or scientific information developed in whole or in part at state institutions in response to requests for information under the Open Records Act. Because there is potential for certain animal DNA sequences, such as those identified in the Investigators' raw data, to be sold, traded, or licensed for a fee, this data comes within the scope of the confidentiality provided by 51.914 of the Texas Education Code, and are therefore exempted from disclosure Section 552.101 of the Act.

Finally, UT suggests that, unless it is legal under the Open Records Act for the faculty members of Texas' public institutions of higher education to maintain in confidence the results of their scholarly research and writing, such as the information in question here, public institutions will find it impossible to attract and retain scholars of the first rank for their faculty. The purposes of the Open Records Act were never intended to destroy the rights of scholars to maintain their academic freedom and protect the integrity of their scholarly labors.

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Your consideration of this request for decision and the foregoing arguments and authorities is appreciated.

Very truly yours,



Max J. Werkenthin

Enclosures: (1) Request Letter
(2) Items of Disputed Information
(3) Exhibit "A"
(4) Exhibit "B"
(5) Exhibit "C"
(6) Exhibit "D"