



February 25, 2002

Mr. Don W. Brown
Texas Higher Education Coordinating Board
P.O. Box 12788
Austin, Texas 78711

OR2002-0906

Dear Mr. Brown:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158926.

The Texas Higher Education Coordinating Board (the "THECB") received a request for information pertaining to Dr. John P. Wagner's Technology Development and Transfer Proposal No. 000512-0324-2001 and information concerning other proposals in the Environmental Science and Engineering program of the 2001 Advanced Research Program/Advanced Technology Program. You state that the first request was received on November 5, 2001. You provided some responsive documents to the requestor, but asked the requestor for clarification regarding other requested documents. On December 4, 2001 you state that you received an e-mail from the requestor with a clarifying letter attached. You then sent your request for decision to this office on December 14, 2001 in accordance with 552.301. You inform us that you provided the requestor with information pertaining to request item 1, but seek to withhold from disclosure request items 2, 3, 4, 5, 6, 10, and portions of 7. You state that there are no records responsive to request item 9¹ and inform us that item 8 is a request for an explanation, not a record.² We note that the requestor, in a letter to our office dated January 16, 2002, has stated that he does not want the full proposals, but wishes to receive the pre-proposals, and the summary sheet and cover sheet

¹The Act does not require the governmental body to prepare new information in response to a request. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex.App.—Eastland 2000, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975).

²The Act does not require a governmental body to prepare answers to questions or do legal research. See Open Records Decision Nos. 563 at 8 (1990) (considering request for federal and state laws and regulations), 555 at 1-2 (1990) (considering request for answers to fact questions).

for the full proposals. Therefore, you need not release the full proposals to the requestor. You claim that the identified portions of the requested information are excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.111 of the Government Code.

Pursuant to section 552.305 of the Government Code, you notified third parties who were proposers and reviewers in the Technology Development and Transfer (TD&T) program of their right to submit arguments to this office as to why the requested information should be withheld from disclosure. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). Some of the third parties have submitted comments arguing that portions of the proposals are excepted from disclosure under the Public Information Act. Other parties have argued that certain information pertaining to the proposal reviews and the review process should not be released to the public. We have considered the exceptions claimed and reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). Section 552.022(a) provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code § 552.022(a)(1), (3). Portions of the submitted information constitute completed reports and evaluations prepared for THECB. Some of the documents in Exhibit A constitute information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by the system. This section 552.022 information is public information unless it is made confidential under other law or, in the case of a completed report or evaluation, the information is excepted from disclosure under section 552.108. You do not raise section 552.108.

You claim that information in Exhibits C and D is excepted under section 552.111. Section 552.111 is not other law for purposes of section 552.022. Thus, section 552.111 is inapplicable to the completed evaluations.

You claim that the information in Exhibits A, B, and C is excepted from disclosure based on section 552.101 of the Government Code. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes such as the Education Code. Section 51.914 of the Education Code provides in pertinent part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, 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[.]

(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). You raise section 51.914(2) for information in the pre-proposals in Exhibits B and C. You have not established that the information is “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.” Therefore, we find section 51.914(2) inapplicable to the submitted information. The purpose of section 51.914(1) is to protect the “actual or potential value” of technological and scientific information developed in whole or in part at a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting former Education Code section 51.911). Whether particular scientific information has “a potential for being sold, traded, or licensed for a fee” is a

question of fact that this office is unable to resolve in the opinion process. *See* Open Records Decision No. 651 (1997). 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.* Representatives of the University of Texas at El Paso, and the University of Texas at Arlington, argue that the information related to pre-proposals submitted by scientists at those universities constitutes technical and scientific information developed in whole or in part at an institution of higher education that has the potential for being sold, traded or licensed for a fee. Therefore, we find that the information of those universities, which we have marked, is confidential under section 51.914(1) of the Education Code. None of the other entities who submitted pre-proposals have submitted to this office any arguments or demonstrated whether its scientific information has a “potential for being sold, traded, or licensed for a fee.”³ Accordingly, we cannot conclude that section 51.914 applies to the other universities’ information in Exhibits B and C. We have marked the information the THECB must withhold from disclosure pursuant to section 552.101 in conjunction with section 51.914(1) of the Education Code.

You argue that information that identifies individual reviewers of TD&T pre-proposals or reveals personal information regarding each reviewer is excepted from disclosure under section 552.101. As noted above, section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The

³As the requestor modified his request on January 16, 2002, the full proposals are not responsive to the request. While a representative of Texas A&M University (“TAMU”) submitted arguments related to the proposals submitted by TAMU scientists, he makes no argument for protection of the pre-proposals. Therefore, we cannot find that TAMU pre-proposals are excepted under section 51.914.

scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

In this case, the reviewers' identities and their resumes are not the types of information protected by constitutional or common law privacy. Therefore, this information may not be withheld based on section 552.101 in conjunction with constitutional or common law privacy.

You also claim that the information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). In this case, you have not shown the existence of an open bidding situation, or otherwise demonstrated how the release of the information would give an advantage to a competitive bidder. Gov't Code §552.301(e)(1)(A) (requiring a governmental body to explain the applicability of a raised exception). Therefore, section 552.104 does not apply.

You claim that the information in the pre-proposals is excepted from disclosure under section 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law.⁴ *See Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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) excepts from disclosure “[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.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See Open Records Decision No. 639 at 4 (1996)* (to prevent disclosure of commercial or financial

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other 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)*.

information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure). After reviewing THECB's brief to this office, and the third parties' comments and briefs submitted to us, we conclude that neither THECB, nor any third party, has demonstrated the applicability of either aspect of section 552.110 to the submitted information. Accordingly, we conclude that THECB may not withhold the requested information from disclosure under section 552.110.

We note that the submitted information contains e-mail addresses that are excepted from disclosure under section 552.137. Section 552.137 provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the THECB to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the THECB must withhold the e-mail addresses in the submitted information under section 552.137. We have marked representative samples in Exhibit A-4 to show the types of e-mail addresses that must be withheld under section 552.137.

In summary, the information in Exhibits B and C which we have marked must be withheld pursuant to section 552.101 in conjunction with section 51.914 of the Education Code. The e-mail addresses of members of the public must be withheld unless the individuals have affirmatively consented to their release. The remainder of the information must be released to the requestor.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

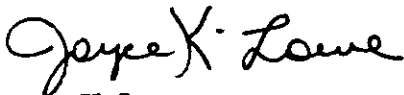
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 158926

Enc: Submitted documents

c: Mr. John P. Wagner
Texas A & M University
College of Engineering
Department of Nuclear Engineering
College Station, Texas 77843-3133
(w/o enclosures)

All Third Parties
(w/o enclosures)