



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 31, 2017

Ms. Ana Vieira Ayala
Assistant General Counsel & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2017-02129

Dear Ms. Ayala:

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# 643733 (OGC# 172690).

The University of Texas at Arlington (the "university") received a request for specified application materials submitted by named professors. You state the university does not possess some of the requested information.¹ You state the university will release some information to the requestor. You state the university will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2(1990), 452 at 3 (1986), 362 at 2 (1983).

United States Code.² You claim the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

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. Section 552.101 encompasses information protected by other statutes, such as section 51.914 of the Education Code. Section 51.914(a)(1) reads as follows:

(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[.]

Educ. Code § 51.914(a)(1). 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.” *See generally* ORD 651 at 9-10. 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 governmental body’s assertion that the information has this potential. *See id.* However, a governmental body’s determination that information has a potential for being sold, traded, or licensed for a fee is subject to judicial review. *See id.*

You claim the information you have marked is confidential under section 51.914(a)(1) of the Education Code. You state the university is an institution of higher education. You state the

²The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that 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 that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General’s website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

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.

named professor is an employee of the university. You state the submitted application by the named professor includes class materials, tests, and projects given to students who have paid for the class. You state the information at issue consists of information that relates to a product, device, or process created by the named professor in connection with her research grant from the National Science Foundation. Additionally, you state the information at issue discusses the named professor's research and how her research can be applied to the classroom and how her teaching can be applied to her research. You explain the information you marked consists of a product developed by the university that has been sold for a fee and has the potential to be sold, traded, or licensed for a fee. Based on your representations and our review, we find you have demonstrated the applicability of section 51.914 of the Education Code to the information at issue. Accordingly, 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.

Section 552.122 of the Government Code excepts from disclosure “[a] test item developed by an educational institution that is funded wholly or in part by state revenue[.]” Gov’t Code § 552.122(a). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated.” *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(a) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4–5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold the submitted exam and project questions you marked under section 552.122 of the Government Code. You assert the questions test the knowledge and abilities of students in a particular area. You also inform us the named professor uses the submitted questions on a continuing basis. Based on your representations and our review, we find the submitted questions are “test items” under section 552.122(a) of the Government Code. Therefore, the university may withhold the information you have marked under section 552.122(a) of the Government Code.

In summary, the university must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The university may withhold the information you marked under section 552.122(a) of the Government 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Kavid Singh". The signature is written in a cursive style with a large initial 'K'.

Kavid Singh
Assistant Attorney General
Open Records Division

KVS/som

Ref: ID# 643733

Enc. Submitted documents

c: Requestor
(w/o enclosures)