



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

May 16, 2017

Mr. R. Brooks Moore  
Deputy General Counsel  
Office of General Counsel  
Texas A&M University System  
301 Tarrow Street, 6<sup>th</sup> Floor  
College Station, Texas 77840-7896

OR2017-10646

Dear Mr. Moore:

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# 658117 (Ref. No. R000228-020117).

Texas A&M AgriLife Research ("TALR") received a request for specified e-mails involving named individuals and third parties and specified contracts.<sup>1</sup> You state you have released some information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release of some of the submitted information may implicate the interests of the Texas Parks and Wildlife Department (the "department") and the proprietary interests of BIO-WEST, Inc. ("BIO-WEST"). Accordingly, you state, and provide documentation showing, you notified

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<sup>1</sup>You state TALR sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You also inform us TALR sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. See Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. See *id.* § 552.263(a). TALR received the required deposit on February 27, 2017. See *id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

the department and BIO-WEST of the request and of their right to submit arguments to this office explaining why their information should not be released.<sup>2</sup> See Gov't Code §§ 552.304, .305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from BIO-WEST explaining why the submitted information should not be released. Therefore, we have no basis to conclude BIO-WEST has a protected proprietary interest in the submitted information. See *id.* § 552.110; 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 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. Accordingly, TALR may not withhold the submitted information on the basis of any proprietary interest BIO-WEST may have in the information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses section 51.914 of the Education Code, which provides, in pertinent part, the following:

(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

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<sup>2</sup>As of the date of this letter, we have not received comments from the department explaining why any of the submitted information should not be released.

<sup>3</sup>We 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.

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.” ORD 651 at 9-10. Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See id.* at 10. Thus, this office has stated 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.* 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 seek to withhold the information you marked in Exhibit B-1 under section 51.914(a)(1). We understand TALR is part of an institution of higher education. *See* Educ. Code § 61.003(8). You state Exhibit B-1 contains the details and results of research being conducted by TALR. Additionally, you state this information “has the potential to be sold, traded, or licensed for a fee.” Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of section 51.914 of the Education Code to information you marked in Exhibit B-1. Accordingly, TALR must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 51.914(a)(1) of the Education Code.

Section 552.101 of the Government Code also encompasses section 403.454 of the Government Code. Section 403.452 of the Government Code grants the Texas Comptroller of Public Accounts (the “comptroller’s office”) the authority to “promote compliance with federal law protecting endangered species and candidate species in a manner consistent with this state’s economic development and fiscal stability[.]” *See* Gov’t Code §§ 403.452(a), .451 (defining “endangered species” and “candidate species”). The comptroller’s office has the authority to develop or coordinate the development of a habitat conservation or candidate conservation plan and may implement and monitor these plans. *See id.* § 403.452(a)(1), (6). Section 403.454 provides:

Information collected under this subchapter by an agency, or an entity acting on the agency’s behalf, from a private landowner or other participant or potential participant in a habitat conservation plan, proposed habitat conservation plan, candidate conservation plan, or proposed candidate conservation plan is not subject to [the Act] and may not be disclosed to any person, including a state or federal agency, if the information relates to the specific location, species identification, or quantity of any animal or plant life

for which a plan is under consideration or development or has been established under this subchapter. The agency may disclose information described by this section only to the person who provided the information unless the person consents in writing to full or specified partial disclosure of the information.

*Id.* § 403.454. You explain the information at issue relates to “an ongoing endangered species research project funded by the [comptroller’s office].” You inform us the information you marked in Exhibit B-2 was collected by the comptroller’s office or by TALR on behalf of the comptroller’s office “from a participant in a habitat conservation plan and relates to the specific location and species identification for which a plan has been developed under chapter 403, subchapter Q.” We understand the participant has not consented to the release of their information. Upon review, we agree the information you marked is confidential and must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 403.454 of the Government Code.

In summary, TALR must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 51.914(a)(1) of the Education Code. TALR must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 403.454 of the Government Code. TALR must release the remaining information.

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](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,



Ian Lancaster  
Assistant Attorney General  
Open Records Division

IML/sb

Ref: ID# 658117

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)