

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 1, 2005

Mr. Jeffrey S. Young  
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Texas Tech University System  
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Lubbock, Texas 79430-6246

OR2005-00935

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 216935.

Texas Tech University Health Sciences Center (the "university") received a request for five categories of information pertaining to the contractual, consulting, and research relationships between Wyeth Pharmaceuticals ("Wyeth") and the university. You state that you have no responsive information regarding three categories of the request. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.117, and 552.1235 of the Government Code.<sup>1</sup> Additionally, pursuant to section 552.305 of the Government Code, you have notified Wyeth, an interested third party, of this request for information, of the fact that the request for information may implicate its proprietary interests, and of its right to submit arguments to this office explaining why the requested information should not be released.

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<sup>1</sup> We note that the present request specifically excludes patient records. Therefore, to the extent that you have submitted such information for our review, we find that it is non-responsive. This decision does not address your arguments under sections 552.101 and the Health Insurance Portability and Accountability Act of 1996 regarding the non-responsive information, which the university is not required to release.

*See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information, some of which consists of representative samples.<sup>2</sup>

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Gov't Code § 552.101. You contend that Exhibits D, E, and F are confidential pursuant to section 51.914 of the Education Code, which 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). 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

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<sup>2</sup> We assume that 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 that those records contain substantially different types of information than that submitted to this office.

a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting statutory predecessor to section 51.914). 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* 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 governmental body’s representation that the information has this potential. *See id.*

In this case, you represent that the information in Exhibits D, E, and F directly reveals the substance of three research studies regarding the safety and efficacy of two experimental drugs, and you contend that release of the information at issue would facilitate appropriation of this research by third parties. You further advise that the information gained from these studies has the potential to be sold, traded, or licensed for a fee to other researchers or institutions, or private entities. Based on your representations and our review, we agree that some of the information in Exhibits D, E, and F, which we have marked, reveals the substance of the research at issue and is therefore confidential under section 51.914 of the Education Code and excepted under section 552.101.<sup>3</sup> We note, however, that the remaining information in Exhibits D, E, and F contains only general background material, correspondence, invoices, and other information tangential to the proposed research. You have not explained, nor can we discern, how the release of this information would reveal the details of the research at issue. *See* Open Records Decision Nos. 557(1990) (stating that working titles of experiments are not per se protected by section 51.914 because release would not permit person to appropriate research nor does information directly reveal substance of proposed research); 497 (1988) (stating that information related to research is not protected if it does not reveal details about research). Accordingly, the university may not withhold this information under section 552.101 in conjunction with section 51.914.

You also raise section 552.101 in conjunction with section 161.032 of the Health and Safety Code for portions of the remaining information in Exhibits D, E, and F. Section 161.032 provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

....

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing

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<sup>3</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure, or comments submitted by Wyeth, regarding this information.

body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

. . . .

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital . . . .

Health & Safety Code § 161.0315(a), (c), (f). Section 161.031(a) defines a "medical committee" as "any committee . . . of (3) a university medical school or health science center . . . ." Health & Safety Code § 161.031(a). Section 161.031(b) provides that the "term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution." Health & Safety Code § 161.031(b). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital, medical organization [or] university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services . . . ." Health & Safety Code § 161.0315(a).

You inform us that the university's Institutional Review Board (the "IRB") is a committee established pursuant to federal law.<sup>4</sup> Federal regulations define an IRB as

any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects. The primary purpose of such review is to assure the protection of the rights and welfare of the human subjects . . . .

21 C.F.R § 56.102(g). Thus, we conclude that the university's IRB is a medical committee created pursuant to federal law, and consequently, the IRB falls within the definition of "medical committee" set forth in section 161.031 of the Health and Safety Code.

Having concluded that the IRB constitutes a medical committee, we agree that portions of the remaining information in Exhibits D, E, and F, which the university has marked, are confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. *See Jordan v. Court of Appeals*, 701

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<sup>4</sup> See 42 U.S.C. § 289(a) (providing that Secretary of Health and Human Services shall by regulation require that each entity which applies for grant, contract, or cooperative agreement for any project or program which involves conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to Secretary that it has established "Institutional Review Board" to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

S.W.2d 644, 647-48 (Tex. 1985) (determining that statutory predecessor extended to documents prepared by or at direction of committee in order to conduct open and thorough review, and privilege extends to minutes of committee meetings, correspondence between members relating to deliberation process, and any final committee product); *see also* Open Records Decision No. 591 (1991) (concluding that purpose of predecessor statute was to encourage frank discussion by medical professionals). Accordingly, the university must withhold the documents it has marked in the remaining information under section 552.101 in conjunction with section 161.032 in their entirety.<sup>5</sup>

The university also asserts section 552.117 of the Government Code for portions of the remaining information in Exhibits D, E, and F. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). For employees who timely elected to keep their personal information confidential, you must withhold this information, which you have marked, under section 552.117(a)(1) of the Government Code. The university may not withhold this information under section 552.117(a)(1) for employees who did not make a timely election to keep the information confidential.

If section 552.117 of the Government Code is inapplicable, the submitted social security numbers must be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the remaining submitted information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Government Code on the basis of that federal provision. We caution, however, that section 552.352 of the Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the university pursuant to any provision of law enacted on or after October 1, 1990.

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<sup>5</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure, or comments submitted by Wyeth, regarding this information.

Next, we consider the arguments that we received from Wyeth. Initially, Wyeth contends that the university and Wyeth “signed a contract containing confidentiality provisions obligating [the university] to keep Wyeth information in confidence.” However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the remaining information in Exhibits D, E, and F falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Wyeth also raises section 552.110 of the Government Code. 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 also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others 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 to [its competitors];
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 (1982), 306 (1982), 255 (1980), 232 (1979). 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. Open Records Decision No. 552 (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) protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*

Upon review of Wyeth’s arguments and the remaining information in Exhibits D, E, and F, we determine that Wyeth has not demonstrated that any portion of the information at issue meets the definition of a trade secret, nor has Wyeth demonstrated the necessary factors to establish a trade secret claim for this information. We therefore determine that no portion of the remaining information in Exhibits D, E, and F is excepted from disclosure under section 552.110(a). We find, however, that Wyeth has made a specific factual or evidentiary

showing that the release of a portion of Exhibit E, which we have marked, would cause the company substantial competitive harm. Thus, this marked information must be withheld pursuant to section 552.110(b). We conclude, however, that Wyeth has failed to demonstrate that any other portion of Exhibit D, E, or F constitutes commercial or financial information, the release of which would cause Wyeth substantial competitive harm. Gov't Code § 552.110(b); Open Records Decision No. 661 at 5-6 (1999); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Accordingly, pursuant to section 552.110, the university must withhold only those portions of Exhibit E that we have marked.

Both Wyeth and the university also raise section 552.1235 of the Government Code. Section 552.1235(a) excepts from disclosure "the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). "Institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 of the Education Code defines an "institution of higher education" as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.

The university informs us that it is included in the definition of a general academic institution. Thus, we agree the university qualifies as an "institution of higher education" under section 61.003 of the Education Code. Further, because section 552.1235 of the Government Code does not provide a definition of "person," we look to the definition provided in the Code Construction Act. *See* Gov't Code § 311.005. "Person" includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. Gov't Code § 311.005(2). Upon review of the remaining information, we agree that the university must withhold the identifying information of donors who made a gift, grant or donation of money or property to the university pursuant to section 552.1235 of the Government Code. Although both Wyeth and the university also argue that "the disclosure of the amounts in question would disclose the identity of the donor/grantor[.]" we note that section 552.1235 does not except from disclosure the amount or value of an individual gift, grant, or donation. *See* Gov't Code § 552.1235(b). Further, upon review, we find that the donation amounts in question do not reveal the identity of the donor/grantor. Accordingly, the university may not withhold the donation amounts in the remaining information.

Finally, we note that the remaining information also contains bank account numbers.<sup>6</sup> Section 552.136 of the Government Code states that "[n]otwithstanding any other provision

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<sup>6</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The university must, therefore, withhold the account numbers that we have marked under section 552.136.

In summary, the university must withhold the marked information in Exhibits D, E, and F pursuant to section 552.101 in conjunction with sections 51.914 of the Education Code and 161.032 of the Health and Safety Code. The university must also withhold the marked section 552.117 information in Exhibits D, E, and F for university employees who made a timely election pursuant to section 552.024. If section 552.117 is not applicable, the social security numbers may be confidential under federal law. The university must withhold the information we have marked under section 552.110(b) of the Government Code, as well as the donor identifying information we have marked pursuant to section 552.1235. Finally, the university must withhold the bank account numbers we have marked under section 552.136 of the Government Code. The remaining submitted information must be released.

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 Dep't of Pub. 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,



Lauren E. Kleine  
Assistant Attorney General  
Open Records Division

LEK/jev

Ref: ID# 216935

Enc. Submitted documents

c: Mr. G. Sean Jez  
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SEP 19 2006

At 8:38A. M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GN500444

WYETH PHARMACEUTICALS, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	
	§	
GREG ABBOTT, ATTORNEY GENERAL	§	TRAVIS COUNTY, TEXAS
OF TEXAS,	§	
Defendant,	§	
and	§	
	§	
FLEMING AND ASSOCIATES, L.L.P.,	§	
Intervenor.	§	126 <sup>TH</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the parties presented to the Court this agreed final judgment. Plaintiff Wyeth Pharmaceuticals, Inc., and Defendant Greg Abbott, Attorney General of Texas announce to the Court that all matters of fact and things in controversy between them have been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. Fleming & Associates, L.L.P. (Fleming), the requestor in this lawsuit, intervened. The parties represent to the Court that Fleming was invited to join in the settlement, but nonsuited its claims instead and withdrew his request for the information. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Donor information relating to Wyeth contained in Texas Tech University Health Sciences Center (TTUHSC) documents is excepted from disclosure by Tex. Gov't Code § 552.1235.
2. The donor information referenced in paragraph 1 of this Agreed Final Judgment is delineated in Exhibit A to this Agreement. Notwithstanding paragraph 1 of this Agreed Final Judgment, TTUHSC should make available to the requestor a list of all donations (without the names

or other identifying information of the donors) from all or some specified class of donors if the requestor so desires. To the extent that these documents reference other financial payments between TTUHSC and Wyeth, section 552.1235 does not make such financial payments excepted from disclosure.

3. As delineated in Exhibit A to this Agreed Final Judgment, certain information in documents that are responsive to the request for information is excepted from disclosure as follows:

a. protocol numbers, full or partial, protocol title, full or short, drug name, account name, specific protocol information, all as marked by the Attorney General, and Wyeth's form for serious adverse event under Tex. Gov't Code § 552.110(b);

b. federal express number under Tex. Gov't Code § 552.136; and

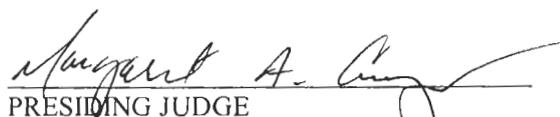
c. review board correspondence, under Tex. Health & Safety Code § 161.032.

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between all of the parties and is a final judgment.

SIGNED this the 19 day of September, 2006.

  
PRESIDING JUDGE

APPROVED:



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**EXHIBIT A**

TAB	ITEM	BASIS FOR WITHHOLDING
G.12	Federal Exp. #	Gov't Code § 552.136
G.58	Institutional Review Board correspondence	Health & Safety Code §161.032
A.1, A.2, B	Donor information	Gov't Code § 552.1235
C.1 - C.4	protocol number	Tex.Gov't Code § 552.110(b)
C.5	protocol number & drug name	Tex.Gov't Code § 552.110(b)
C.6	Account name	Tex.Gov't Code § 552.110(b)
<b>Wyeth Study Manuals</b>		
K.	protocol number & K-19, 24-33	Tex.Gov't Code § 552.110(b)
R.1	drug name, protocol number & short protocol title	Tex.Gov't Code § 552.110(b)
R.21	Wyeth Serious Adverse Event form	Tex.Gov't Code § 552.110(b)
<b>1. Study Documents</b>		
Q.1	drug name, indication, protocol number	Tex.Gov't Code § 552.110(b)
Q.2-7, Q.9 S.1-S.16	protocol number, protocol title, protocol short title, drug name, protocol information, as marked on each page	Tex.Gov't Code § 552.110(b)
Q.8		not responsive & contains private patient info
<b>2. Study Documents</b>		
D. G.2-17, G.19-60, G. 64 H.	protocol number, full and partial	Tex.Gov't Code § 552.110(b)
G. 36, H	plus protocol information, as marked	Tex.Gov't Code § 552.110(b)