



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2006

Mr. Paul J. Mascot
Assistant General Counsel
Texas Department of State Health Services
1100 West 49th Street
Austin, Texas 78756

OR2006-00476A

Dear Mr. Mascot:

This office issued Open Records Letter No. 2006-00476 (2006) on January 13, 2006. We have since been informed by an attorney representing Janssen Pharmaceutica ("Janssen") and Johnson & Johnson that his clients did not receive notice of the request for information from the Texas Department of State Health Services (the "department") and therefore did not have an opportunity to submit arguments to this office explaining why information pertaining to those companies should be withheld from disclosure. Further, the department has also informed this office that certain clinical research protocols that were submitted for our review in that ruling were previously the subject of another request for information, in response to which this office issued Open Records Letter No. 2005-10464 (2005) on November 18, 2005. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on January 13, 2006. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 240274.

The department received a request for the following information pertaining to Terrell State Hospital ("Terrell") for the past five years: (1) all contracts, agreements, arrangements or memos related to research conducted at Terrell; (2) any and all budgets for the "Clinical Research Unit"; (3) all "IRB Board Meeting" minutes, including attachments; (4) any payments related to research conducted at Terrell; (5) any donations from any pharmaceutical company or researcher; and (6) any schedules detailing research conducted at Terrell. You state that the department is releasing some requested information. However, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code.¹ You also believe that the request may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, that the department notified the following third parties of the request for information and of their right to submit arguments to this office as to why the information should not be released: Shire Pharmaceutical Development, Inc. ("Shire"); Pfizer Inc. ("Pfizer"); Janssen; Solvay Pharmaceuticals, Inc. ("Solvay"); AstraZeneca Pharmaceuticals LP ("AstraZeneca"); Eli Lilly & Company ("Lilly"); Johnson & Johnson; and Bristol-Myers Squibb Company ("Bristol-Myers"). See Gov't Code § 552.305(d); see also 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 to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered arguments submitted by Lilly, Janssen, and Johnson & Johnson.

First, you inform us that the some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2005-10464 (2005).² We note that, among other records that were ordered released, some of Janssen's information was ordered released in the prior ruling. We understand Janssen to now claim that its information, including the information ordered released in the prior ruling, is protected as confidential trade secret information under section 552.110(a) of the Government Code. Because trade secret information under section 552.110(a) is deemed confidential by law, we will address Janssen's claim under section 552.110(a) for the information that was subject to Open Records Letter No. 2005-10464, as well as for the remaining information pertaining to the company. Otherwise, as you indicate that there has not been a change in the law, facts, or circumstances on which this prior ruling was based, we conclude that the department must continue to rely on our decision in Open Records Letter No. 2005-10464 with respect to the remaining information that was subject to that

¹Although you do not raise section 552.117 of the Government Code in your brief to this office, we note that you have marked information in the submitted documents that you believe is subject to this section.

²Specifically, you inform us that certain of the clinical research protocols, or portions thereof, prepared by Lilly, AstraZeneca, Janssen, Johnson & Johnson, Solvay, and Shire that are responsive to this request for information were subject to Open Records Letter No. 2005-10464.

ruling.³ See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001) (setting forth the four criteria for a "previous determination").

Next, we must address the department's procedural obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), within fifteen business days of receiving an open records request, a governmental body that wishes to withhold information from disclosure must submit to this office a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(4). You state that the department received the written request for information on October 24, 2005. Based on this date, the fifteenth business day following the department's receipt of the request was November 15, 2005.⁴ However, the department did not submit copies of some of the information it seeks to withhold until November 22, 2005. We therefore find that the department failed to comply with the procedural requirements of section 552.301 with respect to this portion of the submitted information. See *id.*

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. See Open Records Decision No. 150 at 2 (1977). Here, the third-party interests at issue and the department's claims under sections 552.101, 552.117, and 552.137 can provide compelling reasons to withhold information. We will therefore address the submitted arguments for all of the information at issue, including the information that was not timely submitted.

We note, however, that 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) to submit its reasons, if any, as to why requested information relating to that party should be withheld

³The four criteria for this type of "previous determination" are (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

⁴We note that November 11, 2005 was a holiday.

from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the following companies have not submitted comments explaining why their information should be withheld from disclosure: Shire; Pfizer; Solvay; AstraZeneca; and Bristol-Myers. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. 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 (1990). Accordingly, the department may not withhold any of the submitted information on the basis of any proprietary interest that these companies may have in the information.

However, Johnson & Johnson, Janssen, and Lilly have submitted arguments to this office objecting to the release of their information. Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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." See Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] 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. 1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private party's claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts

the claim as a matter of law.⁵ See Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). See Open Records Decision No. 402 at 3 (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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. See Open Records Decision No. 661 at 5-6 (1999).

Johnson & Johnson claims that its information is protected under section 552.110(a). Having considered Johnson & Johnson’s arguments, we find that Johnson & Johnson has presented a *prima facie* claim that its information qualifies as trade secret information under section 552.110(a). Having received no arguments that rebut this claim as a matter of law, we conclude that the department must withhold Johnson & Johnson’s protocols under section 552.110(a).

Janssen also claims that its information is protected under section 552.110(a). As mentioned above, some of Janssen’s information was subject to the previous request for information, in response to which this office issued Open Records Letter No. 2005-10464. In that ruling, we concluded that the department must release the information pertaining to Janssen because the company failed to submit arguments to this office explaining why its information should be withheld from disclosure. We also note that since the previous ruling was issued on November 18, 2005, Janssen has not disputed this office’s conclusion regarding the release of its information that was subject to Open Records Letter No. 2005-10464, and we presume that, in accordance with that ruling, the department has released to the requestor Janssen’s information that was at issue. In this regard, we find that Janssen has not taken necessary measures to guard the secrecy of the information that was at issue in Open Records Letter No. 2005-10464 in order for this office to conclude that it now qualifies as a trade secret. See 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), 180 at 3 (1977). Accordingly, we conclude that

⁵The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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).

the department may not withhold under section 552.110(a) of the Government Code any of Janssen's information that was at issue in Open Records Letter No. 2005-10464.

The remaining information pertaining to Janssen was not subject to Open Records Letter No. 2005-10464, and we have no indication that the company has otherwise failed to take measures to guard the secrecy of this information. As such, having considered Janssen's arguments, we find that the company has presented a *prima facie* claim that this information does qualify as trade secret information under section 552.110(a). Having received no arguments that rebut this claim as a matter of law, we conclude that the department must withhold the remaining information pertaining to Janssen under section 552.110(a).

Lilly argues that its information is excepted from disclosure under section 552.110(b). Having considered the company's arguments, we find that Lilly has made the required showing that release of the information in question would be likely to cause the company substantial competitive harm. We therefore conclude that the department must withhold Lilly's protocols under section 552.110(b).

We next address the department's arguments under section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that other statutes make confidential. Gov't Code § 552.101. You contend that some of the submitted information is protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. See HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); see also Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. See 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. See Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. See 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." See Open Records Decision No. 681 at 8 (2004); see also Gov't Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101. Open Records Decision No. 681 at 9 (2004);

see also Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold protected health information from the public only if an exception in the Act applies.

You contend that the submitted records contain information that is subject to section 611.002 of the Health and Safety Code. This section applies to “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” Health & Safety Code § 611.002; *see also* Health & Safety Code § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). Upon review, we find that most of the information that you seek to withhold on this basis is confidential under section 611.002 and must therefore be withheld from disclosure under section 552.101. However, we find that the remainder of this information is not subject to chapter 611 of the Health and Safety Code; we have marked this information accordingly. Thus, other than the information we have marked, the department must withhold the information it has marked and highlighted under section 552.101 in conjunction with section 611.002. None of the remaining information at issue may be withheld on this basis.

You also contend that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code on the basis of section 576.005 of the Health and Safety Code. Section 576.005 makes confidential records of a mental health facility that directly or indirectly identify a present, former, or proposed patient unless disclosure is permitted by other state law. Health & Safety Code § 576.005. Upon review of your representations and this information, we find that none of the remaining information at issue is subject to section 576.005 of the Health and Safety Code. Therefore, none of this remaining information may be withheld under section 552.101 of the Government Code on this basis.

Next, you contend that some of the remaining submitted information is subject to the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA governs access to medical records and provides in relevant part as follows:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Upon review, however, we find that none of the remaining submitted information constitutes medical records subject to the MPA. Thus, none of the submitted information may be withheld from disclosure on this basis.

We next address your claim under common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy. However, we find that none of the remaining information at issue is protected by common-law privacy, and thus none of it may be withheld under section 552.101 on this basis.

Next, you have marked information in resumes that you believe is subject to section 552.117 of the Government Code. Specifically, 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. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, to the extent such information pertains to current or former department employees who made timely elections for confidentiality under section 552.024, the department must withhold the information you have highlighted, as well as the additional information we have marked, pursuant to section 552.117(a)(1) of the Government Code.

We note that the remaining information at issue includes account numbers that are subject to section 552.136 of the Government Code.⁶ Section 552.136 states that "[n]otwithstanding

⁶The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.136 also provides a compelling reason to withhold information for purposes of section 552.302.

any other provision 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. Therefore, pursuant to section 552.136, the department must withhold the submitted bank account numbers based on our markings.

Lastly, you claim that the e-mail addresses you have highlighted are subject to section 552.137 of the Government Code. This section excepts from disclosure “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 consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). We note that subsection (c) specifically excludes an e-mail address “provided to a governmental body on a letterhead.” *Id.* at § 552.137(c)(4). Section 552.137 also does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. Likewise, this section is not applicable to an institutional e-mail address or an Internet website address.

We note that you have highlighted an e-mail address contained in a letterhead, an Internet website address, and a generic list-serve e-mail address. This information, which we have marked, may not be withheld under section 552.137. *See id.* Otherwise, the remaining e-mail addresses you have highlighted do not appear to be one of the types specifically excluded by section 552.137(c). In addition, you inform us that the department has not received any consents for the release of the e-mail addresses at issue. Therefore, other than the information we have marked, the department must withhold the e-mail addresses you have highlighted under section 552.137.

To conclude, with the exception of the information pertaining to Janssen, the department must continue to rely on our decision in Open Records Letter No. 2005-10464 with respect to the information that was subject to that ruling. With respect to the remaining information at issue, the department must withhold the following: (1) Johnson & Johnson’s protocols pursuant to section 552.110(a) of the Government Code; (2) the portion of Janssen’s information not subject to Open Records Letter No. 2005-10464 pursuant to section 552.110(a) of the Government Code; (3) Lilly’s protocols pursuant to section 552.110(b) of the Government Code; (4) with the exception of the documents we have marked, the information you have marked and highlighted under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code; (5) the information we have marked under section 552.101 in conjunction with common-law privacy; (6) pursuant to section 552.117(a)(1) of the Government Code, the information you have highlighted and we have marked to the extent it pertains to current or former department employees who made a timely election for confidentiality under section 552.024 of the Government Code; (7) the bank account numbers pursuant to section 552.136 of the Government Code; and (8) other than the information we have marked, the e-mail addresses you have highlighted under section 552.137 of the Government Code. The remaining submitted 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 ten 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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*, 342 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 Office of the Attorney General 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. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



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RBR/krl

Ref: ID# 240274

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