The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 5, 2006

Ms. Carol Longoria
The University of Texas System
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2006-07076

Dear Ms. Longoria:

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# 253114.

The University of Texas Health Science Center at Houston (the "university") received a request for the following information relating to specified checks: (1) the calculation used to determine the payment amount for each check; (2) a copy of the invoice submitted by the university to Wireless Generation ("Wireless") for each payment; (3) a copy of the contract, agreement, or memorandum of understanding that requires the payment; (4) an indication of whether the royalty fee was assessed per student or per teacher; (5) an identification of the school campus which gave rise to the royalty payment becoming due; and (6) a statement of whether the royalty payment was for sales within the state of Texas or outside the state of Texas. You state that you have no responsive information regarding item 2 of the request.[1] You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.104 of the Government Code. Furthermore, pursuant to section 552.305 of the Government Code, you notified Wireless, the interested third party, of the request and of its opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why

[1]We note that 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 dism'd); Open Records Decision No. 452 at 3 (1986).

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 to disclosure in certain circumstances). We have received correspondence from Wireless. We have considered the arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, that information responsive to item 3 of the request was the subject of prior rulings of this office, issued as Open Records Letter Nos. 2006-05958 (2006) on June 7, 2006 and 2006-06741 (2006) on June 26, 2006. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 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); 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 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 ruling was based have not changed since the issuance of the ruling). Those prior rulings conclude that this same information may not be withheld under section 552.101 or 552.110 of the Government Code and must be released. We understand that the pertinent facts and circumstances have not changed since the issuance of Open Records Letter Nos. 2006-05958 and 2006-06741. Thus, we determine the university must release the information responsive to item 3 of the request in accordance with these prior rulings. We now address your arguments for the remaining submitted information.

The university contends that the submitted information is excepted from disclosure under 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," and encompasses information made confidential by other statutes. Gov't Code § 552.101. You assert that the submitted information is 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 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 at issue pertains to the university's research efforts and discoveries. You assert that the information gained from these studies has the potential to be sold, traded, or licensed for a fee. We note, however, that the information at issue is 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 No. 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 the information at issue under section 552.101 in conjunction with section 51.914.

The university also contends that the submitted information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace

interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988). After reviewing your arguments, we find that the university has failed to demonstrate the applicability of section 552.104 to the submitted information. We therefore conclude that the university may not withhold any of the information at issue under section 552.104 of the Government Code.

Wireless contends that portions of the submitted information are excepted from disclosure under 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 id.* § 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 id.* § 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. 1958); Open Records Decision Nos. 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 No. 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. *See id.*; *see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Having considered Wireless' arguments and reviewed the submitted information, we find that the information you have highlighted in yellow in Exhibit 6 must be withheld pursuant to section 552.110(a). However, Wireless has not established by specific factual evidence that any of the remaining information is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause Wireless substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"); Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110(b), business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Specifically, we

note that the some of the information Wireless seeks to withhold includes pricing information. We note that the pricing information of a winning bidder is generally not excepted under section 552.110. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Thus, the university may not withhold any of the remaining information under section 552.110 of the Government Code.

In summary, the university must withhold the information you have highlighted in yellow in Exhibit 6 pursuant to section 552.110 of the Government Code. The remaining 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, 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*, 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 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 10 calendar days of the date of this ruling.

Sincerely,

Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/krl

Ref: ID# 253114

Enc. Submitted documents

c: Mr. Rudy Colmenero
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COPY

CAUSE NO. D-1-GN-06-002701

WIRELESS GENERATION, INC., Plaintiff,	§	IN THE DISTRICT COURT OF
V.	§	
GREG ABBOTT, IN HIS CAPACITY AS TEXAS ATTORNEY GENERAL, Defendant,	§	TRAVIS COUNTY, TEXAS
and	§	
MITCHELL & COLMENERO, LLP, Intervenor/Defendant.	§	53rd JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas
JUN 26 2008
At ___ M.
Amalia Rodriguez-Mendoza, Clerk

FINAL JUDGMENT

On this day came on to be heard the above-entitled and numbered cause wherein Wireless Generation, Inc., is Plaintiff, Greg Abbott, Attorney General of Texas, is Defendant and Mitchell & Colmenero, LLP, is Intervenor. This is a lawsuit under the Public Information Act, Tex. Gov't Code § 552.325 (West 2004). Waiving the hearing on the remaining issues in this case, the parties request that the Court enter a Final Judgment, as to the availability of the remaining information at issue (text in red highlights on the Bates Numbered pages, initialed by counsel for Defendant (BKL) and for Plaintiff (AB) and identified below), and incorporating the Agreed Interlocutory Order, filed on December 12 2007, from which said Final Judgment all parties agree and stipulate that they will not appeal.

IT IS THUS ORDERED, DECREED AND ADJUDGED THAT:

1. The Court's Interlocutory Order, filed on December 12 2007, is part of this Final Judgment as if set out here verbatim;

2. Plaintiff has withdrawn its objections to the disclosure of the remaining information at issue in Plaintiff's Exhibits 14, 15, 16, 17, and 18, because it is now stale or about to become stale. Plaintiff shall disclose Plaintiff's Exhibits 14, 15, 16, 17, and 18 to Intervenor, in unredacted form.

3. For the same reason, Plaintiff has also withdrawn its objections to the disclosure of the remaining information at issue in Plaintiff's Exhibit 19 (Bates Numbered pages WG000824, 825, 826, 827, 833, 834, 841, 842, 843, 844, 845, 846, 847), Exhibit 20 (Bates Numbered pages WG000013, 22, 26, 28, 31, 36, 38), and Exhibit 21, (Bates Numbered pages WG0000 58, 82, 93, 117-118, 128, 130, 135, 137-38, 140, 142, 153-54, 155, 160, 166, 182, 183, 194, 196, 207, 209, 219, 221, 415, 419, 431, 435, 442, 443, 444, 447, 449, 471, 673, and 675). Plaintiff shall disclose Bates Numbered pages WG000013, 22, 26, 28, 31, 36, 38, 58, 82, 93, 117-118, 128, 130, 135, 137-38, 140, 142, 153-54, 155, 160, 166, 182, 183, 194, 196, 207, 209, 219, 221, 415, 419, 431, 435, 442, 443, 444, 447, 449, 471, 673, 675, 824, 825, 826, 827, 833, 834, 841, 842, 843, 844, 845, 846 and 847, with the remaining information at issue unredacted. Only information excepted from disclosure on these Bates numbered pages by the Interlocutory Order (text in green highlights) shall be redacted.

4. Plaintiff shall disclose the information delineated in paragraphs 2 through 3 of this Judgment to Intervenor, within 10 days from the date of this Final Judgment, in the form provided in paragraphs 2 through 3 of this Judgment.

5. Plaintiff shall provide a duplicate copy of the Bates Numbered pages delineated in this Judgment to The University of Texas System's Public Information Coordinator, in the form provided by this Final Judgment and given to the requestor, within 10 days from the date of this Judgment.

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

All relief not expressly granted is denied; and

This Final Judgment finally disposes of all claims between Plaintiff, Defendant and Intervenor and is a final judgment.

SIGNED this 26th day of June, 2008.

JUDGE PRESIDING

APPROVED AND AGREED:

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ATTORNEY FOR INTERVENOR MITCHELL & COLMENERO, LLP

This Final Judgment finally disposes of all claims between Plaintiff, Defendant and Intervenor and is a final judgment.

SIGNED this _____ day of June, 2008.

_____
JUDGE PRESIDING

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