



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2009

Mr. Scott A. Kelly
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OR2009-12172

Dear Mr. Kelly:

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# 352101.

Texas A&M University (the "university") received a request for background information on the National Center for Therapeutics Manufacturing (the "NCTM"), to include legal memoranda or legal documents pertaining to the NCTM, and relationships between the university and Introgen and XOMA. You claim portions of the requested information are excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110 and 552.137 of the Government Code. You also indicate release of some of the requested information may implicate the proprietary interests of XOMA. Thus, pursuant to section 552.305 of the Government Code, you have notified XOMA of the request and of its right to submit arguments to this office as to why its information should not be released. 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 under in certain circumstances). We have received comments from a representative of XOMA. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We 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.

Initially, we address your argument under section 552.104 of the Government Code, which you raise for Exhibits B-1 and B-2. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of this exception is to protect a governmental body's interests in certain competitive situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive situations once a contract has been awarded. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You inform us the requested information relates to the NCTM, which will be owned by the university partnering with a private pharmaceutical manufacturer that will operate the facility. You state that the university is in the process of selecting Construction Manager at Risk Services ("CMAR") for the NCTM. You state that Exhibit B-2 consists of an analysis of the finalists for the CMAR position. You explain that, because the NCTM is in development at this time and the selection process has not yet been finalized, release of Exhibit B-2 would create the potential for harm to the university's ability to negotiate final agreements for the CMAR position. Based on your representations and our review, we conclude the university may withhold Exhibit B-2 under section 552.104 of the Government Code. We note the university may no longer withhold Exhibit B-2 on this basis once the CMAR position has been finalized and awarded.

You state the submitted business plan in Exhibit B-1 present an overall view of the NCTM, and that this plan is the collaborative effort of the university and its component institutions that are working with a potential private partner that will oversee operations at the NCTM. You contend that the release of this information would also, like the release of Exhibit B-2, create the potential for harm to the university's ability to negotiate final agreements for the CMAR position. However, upon review, we find that you have not demonstrated how release of this information would result in actual or specific harm to the university in a particular competitive situation. Therefore, we conclude the university may not withhold Exhibit B-1 under section 552.104. Accordingly, we will consider the other exceptions raised for this information.

XOMA claims that section 552.110 of the Government Code is applicable to Exhibit B-1. Section 552.110 of the Government Code 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 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* ORD 232. 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.

See ORD 552. 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. *See* Open Records Decision No. 402 (1983). We note that pricing information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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.* § 552.110(b); *see also* ORD 661 at 5-6.

XOMA informs us that it has disclosed, on a confidential basis, certain proprietary information to the university, some of which has been included in, or used in the preparation of Exhibit B-1. Accordingly, XOMA seeks to withhold portions of Exhibit B-1 under section 552.110. Upon review, we find that XOMA has established that the information it seeks to withhold relating to an unpublished patent application is a trade secret under section 552.110(a). Therefore, the university must withhold the information we have marked under section 552.110(a). However, we find that XOMA has not established that any of the remaining information it seeks to withhold constitutes a trade secret under section 552.110(a). *See* ORD 552 at 5-6. Thus, the university may not withhold any of the remaining information in Exhibit B-1 under section 552.110(a) of the Government Code.

We further determine that XOMA has established that release of the financial information we have marked in Exhibit B-1 would cause the company substantial competitive harm. Therefore, the university must withhold this information under section 552.110(b) of the Government Code. However, XOMA has made only conclusory allegations that release of the remaining information it seeks to withhold would cause it substantial competitive harm. *See* Gov’t Code § 552.110; ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, we conclude that none of the remaining information in Exhibit B-1 may be withheld under section 552.110(b) of the Government Code.

You also contend, as does XOMA, that Exhibit B-1 is confidential under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t

Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 51.914 of the Education Code, which provides in part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

(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;

(3) the plans, specifications, blueprints, and designs, including related proprietary information, of a scientific research and development facility that is jointly financed by the federal government and a local government or state agency, including an institution of higher education, if the facility is designed and built for the purposes of promoting scientific research and development and increasing the economic development and diversification of this state.

Educ. Code § 51.914(1)-(2). As noted in Open Records Decision No. 651, 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." Open Records Decision No. 651 at 9 (1997). 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.* 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 university's assertion that the information has this potential. *See id.*; *but see id.* at 9 (university's determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that 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 contend that sections 51.914(1), (2), and (3) are applicable to Exhibit B-1. In particular, you state that Exhibit B-1 relates to a plan for research that “*will be developed* by an institution of higher education, and moreover, it is research that [has] a potential for being sold, licensed, or traded for a fee.” (Emphasis added). Upon review, we find that you have not demonstrated that the information at issue reveals the substance of research developed at the university as contemplated by section 51.914(1). We also find that the you have not demonstrated, and the submitted information does not reflect, that sections 51.914(2) or (3) are applicable to the information at issue. XOMA also contends that sections 51.914(1), (2), and (3) except Exhibit B-1 from disclosure. Specifically, XOMA contends that portions of Exhibit B-1 were disclosed to the university on a confidential basis. However, we find that XOMA has not established that the remaining information that XOMA seeks to withhold consists of proprietary information disclosed to the university under a contract or grant containing a provision prohibiting the university from disclosing the information. *Id.* 51.914(2). Nor do we find that XOMA has established that section 51.914(1) or (3) apply to the information at issue. Consequently, we determine that the university may not withhold the remaining information in Exhibit B-1 under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

We now turn to your argument under section 552.107 of the Government Code for Exhibit B-3. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain that Exhibit B-3 consists of a series of e-mails between university administrators and a university attorney. You have identified the privileged parties. You further state the communications were made in the course of providing professional services to university administrators, and that the communications were intended to be and have remained confidential. Based on your representations and our review of the information at issue, we conclude the e-mails in Exhibit B-3 consist of privileged attorney-client communications that the university may withhold under section 552.107 of the Government Code.

Finally, you raise section 552.137 of the Government Code for portions of Exhibit B-4. Section 552.137 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). Gov’t Code § 552.137(a)-(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses you have marked in the remaining information are not of a type specifically excluded by section 552.137(c). Therefore, the university must withhold the e-mail addresses you have marked, as well as the e-mail address we have marked, in accordance with section 552.137, unless the university receives consent for their release.

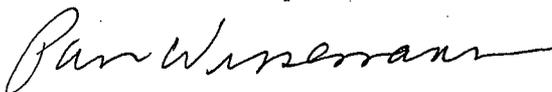
In summary, the university may withhold Exhibit B-2 under section 552.104 of the Government Code. The university must withhold the information we have marked in Exhibit B-1 under section 552.110 of the Government Code. The university may withhold Exhibit B-3 under section 552.107(1) of the Government Code. The university must withhold the marked e-mail addresses in Exhibit B-4 under section 552.137 of the Government Code, unless the university receives consent for their release. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



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Assistant Attorney General
Open Records Division

PW/jb

Ref: ID# 352101

Enc. Submitted documents

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(w/o enclosures)

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