



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2010

Ms. Kristen Pauling Doyle
General Counsel
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P.O. Box 12097
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OR2010-07059A

Dear Ms. Doyle:

This office issued Open Records Letter No. 2010-07059 (2010) on May 17, 2010. We have examined this ruling and determined that we will correct the previously issued ruling. *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 Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 17, 2010. *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 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# 388164.

The Cancer Prevention & Research Institute of Texas (the "institute") received a request for: (1) copies of grant or funding applications approved by the institute for a specified period of time; (2) communications between the institute and the University of Texas M. D. Anderson Cancer Center ("M.D. Anderson") pertaining to any approved applications; and (3) communications between two named individuals. You state the institute has released

some of the requested information. You claim that most of the submitted information is excepted from disclosure under sections 552.101, 552.110, and 552.137 of the Government Code. Further, you state that release of this information may implicate the interests of third parties. Accordingly, you state, and provide documentation showing, you notified Baylor College of Medicine ("BCM"); Baylor University ("Baylor"); InGeneron, Inc. ("InGeneron"); Methodist Hospital Research Institute ("Methodist"); Rice University ("Rice"); the Texas Life Science Foundation; and Visualase, Inc. ("Visualase") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You also notified Texas A&M University; Texas A&M University System Health and Science Center ("TA&MHSC"); Texas Tech University Health Science Center; the University of North Texas Health Science Center at Fort Worth; the University of Texas at Austin ("UT"); the University of Texas at Dallas; the University of Texas Health Science Center at Houston ("UTHSC"); the University of Texas Health Science Center at San Antonio; M. D. Anderson; and the University of Texas Southwestern Medical Center at Dallas ("UTSW").¹ *See* Gov't Code §§ 552.304 (interested third party may submit written comments regarding availability of requested information). We have received arguments from BCM, Baylor, InGeneron, Methodist, Rice, and Visualase. We have also received comments from TA&MHSC, UT, UTHSC, M. D. Anderson, UTSW, and Abbott Laboratories ("Abbott").² We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that Abbott, UT, and UTSW seek to withhold information the institute has not submitted. Because such information was not submitted by the institute, this ruling does not address that information and is limited to the information submitted as responsive by the institute. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

We note that, as of the date of this letter, this office has not received comments from Texas Tech University Health Science Center; the University of North Texas Health Science Center at Fort Worth; the University of Texas at Dallas; or the University of Texas Health Science Center at San Antonio. Therefore, the institute may not withhold any of the submitted information based upon the interests of these governmental bodies.

¹We note Texas A&M University informs this office that it does not object to disclosure of its information, which consists of a single grant funding application.

²Abbott has submitted a brief arguing against disclosure of its proprietary information, which is contained within one of the funding applications submitted by Texas Tech University Health Science Center.

We also note 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from the Texas Life Science Foundation explaining why its submitted information should not be released. Therefore, we have no basis to conclude that the Texas Life Science Foundation has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the institute may not withhold any portion of the submitted information based upon the proprietary interests of the Texas Life Science Foundation.

Next, we understand Methodist to argue its information may not be disclosed because it was submitted to the institute with the understanding and expectation it would be confidential. In addition, Abbott argues its information is subject to a Materials Transfer Agreement that contains an explicit agreement of confidentiality. 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 Gov't Code § 552.110). Consequently, unless Methodist's and Abbott's information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

The institute, BCM, Methodist, M. D. Anderson, and Rice each claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 102.262 of the Health and Safety Code. Section 552.101 exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 102.262 states:

The following information is public information and may be disclosed under Chapter 552, Government Code:

- (1) the applicant's name and address;

- (2) the amount of funding applied for;
- (3) the type of cancer to be addressed under the proposal; and
- (4) any other information designated by the institute with the consent of the grant applicant.

Health & Safety Code § 102.262. The institute, BCM, Methodist, M. D. Anderson, and Rice argue that, with the exception of the information listed in subsections one through four, the remaining information in the submitted funding applications is confidential and not subject to disclosure under the Act. In general, section 552.101 only excepts information from disclosure where the express language of a statute makes certain information confidential or states that information shall not be released to the public. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). The plain language of section 102.262 makes certain types of information public. This section does not expressly make any information confidential. Further, we note that information cannot be withheld from public disclosure by negative implication simply because a statute designates other specific information as public information. Open Records Decision No. 525 at 4 (1989). Therefore, because section 102.262 is not a confidentiality provision, the submitted information may not be withheld under section 552.101 on that basis. We note, however, that pursuant to section 102.262, the institute has the discretion to release the types of information listed in that section.

The institute, TA&MHSC, UT, UTHSC, M. D. Anderson, and UTSW each argue that portions of the submitted information are subject to section 51.914 of the Education Code, which is encompassed by section 552.101. Section 51.914 provides in relevant 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[.]

Educ. Code § 51.914(1). 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 system’s assertion that the information has this potential. *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(1) 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).

The information the institute, TA&MHSC, UT, UTHSC, M. D. Anderson, and UTSW seek to withhold consists of grant funding applications for cancer research and prevention services. These applications outline the proposed research, its cost, and its commercial and financial implications. TA&MHSC, UT, UTHSC, M. D. Anderson, and UTSW, each a state institution of higher education, inform us that their applications consist of information developed by them which has the potential for being sold, traded, or licensed for a fee. Further, TA&MHSC, UT, UTHSC, M. D. Anderson, and UTSW each indicate that disclosure of this information would directly reveal the substance of the research and permit third parties to appropriate it. Accordingly, we find the institute must withhold the information TA&MHSC, UT, UTHSC, M. D. Anderson, and UTSW have indicated under section 51.914(1) of the Education Code.³ However, we find that the institute has not explained how or why section 51.914 would be applicable to any of the information it seeks to withhold. Therefore, the institute may not withhold any of the remaining information under section 552.101 on the basis of section 51.914 of the Education Code.

Although the institute argues that some of the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the institute’s arguments under section 552.110. However, Abbott, Baylor, BCM, InGeneron, Methodist, Rice, and Visualase each argue that some of their information is 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. Gov’t Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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”

³As our ruling is dispositive, we need not address M.D. Anderson’s remaining arguments against disclosure.

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 the 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. Open Records Decision No. 552 at 2 (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.* § 552.110(b); ORD 661.

Abbott, BCM, InGeneron, Methodist, Rice, and Visualase raise section 552.110(b) for portions of their submitted information. Upon review of the submitted arguments and the information at issue, we find that Abbott, BCM, InGeneron, Methodist, Rice, and Visualase have each established that release of the information they seek to withhold under section 552.110(b) would result in substantial damage to their competitive positions. Accordingly, the institute must withhold the information Abbott, BCM, InGeneron, Methodist, Rice, and Visualase have indicated under section 552.110(b).⁴

Baylor, BCM, and Visualase argue that portions of their submitted information are subject to section 552.110(a). Upon review of the submitted arguments and the information at issue, we determine that Baylor, BCM, and Visualase have each established a *prima facie* case that the information they seek to withhold constitutes trade secrets. Accordingly, the institute must withhold the information Baylor, BCM, and Visualase have indicated pursuant to section 552.110(a) of the Government Code.

The institute asserts that some of the remaining information consists of personal e-mail addresses that are subject to section 552.137 of the Government Code. 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). *See* Gov’t Code § 552.137(a)-(c). We note section 552.137(c)(3) states section 552.137(a) does not apply to an e-mail address “contained in a response to a request for bids or proposals, [or] contained in a response to similar invitations soliciting offers” *Id.* § 552.137(c)(3). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the institute must withhold the e-mail addresses we

⁴As our ruling is dispositive for this information, we need not address the remaining arguments raised by Abbott, InGeneron, Methodist, Rice, and Visualase against disclosure of this information.

have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.⁵

We note that some of the remaining submitted information is subject to common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or 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. *Id.* at 683. This office has found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 545 (1990) (finding financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989).

We note that some of the remaining non-governmental entities have submitted the salary information of their employees. Upon review, we find that the salary information pertaining to private employees, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the institute must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Finally, we note that some of the materials at issue are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the institute must withhold: (1) the information TA&MHSC, UT, UTHSC, M. D. Anderson, and UTSW have indicated under section 552.101 of the Government Code

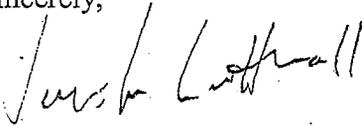
⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

in conjunction with section 51.914 of the Education Code; (2) the information Abbott, BCM, InGeneron, Methodist, Rice, and Visualase have indicated under section 552.110(b) of the Government Code; and (3) the information Baylor, BCM, and Visualase have indicated under section 552.110(a) of the Government Code. Unless the institute receives consent for release of the e-mail addresses we have marked, they must be withheld under section 552.137. The institute must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The remaining information must be released, but any information subject to copyright may only be released in accordance with federal copyright law.

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, toll free, at (888) 672-6787.

Sincerely,



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JL/dls

Ref: ID# 388164

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