



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2012

Ms. Kristen Pauling Doyle
General Counsel
Cancer Prevention & Research Institute of Texas
P.O. Box 12097
Austin, Texas 78711

OR2012-01568

Dear Ms. Doyle:

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# 442460 (CPRIT No. 2012-02).

The Cancer Prevention & Research Institute of Texas (the "institute") received a request for the grant applications from and resulting contracts with private companies who successfully applied for grants.¹ You state some information has been released to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. In addition, you state release of the requested information may implicate the proprietary interests of Apollo Endosurgery ("Apollo"), Bellicum Pharmaceuticals, Inc. ("Bellicum"), Gradalis, Mirna Therapeutics, Inc. ("Mirna"), Myriad RBD, Inc. ("Myriad"), and Peloton Therapeutics, Inc. ("Peloton"). Accordingly, you provide documentation showing you have notified these third parties of the request and their right to submit arguments to this office. *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). We have received comments from Apollo, Bellicum, Mirna, Myriad, and

¹You state, and provide documentation showing, you sought and received clarification of the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear or large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

Peloton. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state the information concerning two additional companies, InGeneron, Inc. (“InGeneron”) and Visualase, Inc. (“Visualase”), was the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2010-07059A (2010). In that ruling, we held, in part, that the institute must withhold the information InGeneron and Visualase indicated in their applications under section 552.110(b) of the Government Code and the information Visualase indicated under section 552.110(a) of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed as to InGeneron’s and Visualase’s information subject to section 552.110 of the Government Code, the institute must continue to rely on Open Records Letter No. 2010-07059A as a previous determination and withhold InGeneron’s and Visualase’s information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). As to the remaining information at issue, we will consider the submitted arguments against disclosure.

We next address the institute’s procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving the request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See* Gov’t Code § 552.301(b). Pursuant to section 552.301(e), within fifteen business days of receipt of the request the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov’t Code § 552.301(e). You inform us the institute received the instant request for information on October 21, 2011 and that the institute was closed on November 11, 2011. Thus, the institute’s ten-business-day deadline was November 4, 2011, and the fifteen-business-day deadline was November 14, 2011. However, we received by interagency mail the institute’s request for a ruling on November 8, 2011, after the ten-business day deadline, and the remaining required information on November 16, 2011, after the fifteen-business-day deadline. The institute has provided no evidence these communications were deposited into interagency mail within the applicable deadlines. *See id.* § 552.308(b) (state agency meets deadline if the request, notice, or other writing is sent by interagency mail and the agency provides evidence sufficient to establish that the request was deposited in interagency mail within the deadline period). Consequently, we find the institute failed to comply with section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). In this instance, third-party interests are at stake, and you raise section 552.101 of the Government Code, which can provide a compelling reason to withhold information. Therefore, we will consider the submitted arguments against disclosure.

We next note some of the information Bellicum, Mirna, Peloton, and Myriad seek to withhold was not submitted by the institute for our review. This ruling does not address information beyond what the institute has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the institute submitted as responsive to the request for information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. Section 102.262 of the Health and Safety Code addresses the confidentiality of certain information pertaining to grants made by the institute. Section 102.262 provides:

(a) 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.

(b) In order to protect the actual or potential value of information submitted to the institute by an applicant for or recipient of an institute grant, the following information submitted by such applicant or recipient is confidential

and is not subject to disclosure under Chapter 552, Government Code, or any other law:

(1) all information, except as provided in Subsection (a), that is contained in a grant award contract between the institute and a grant recipient, 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 by an applicant for or recipient of an institute grant, regardless of whether patentable or capable of being registered under copyright or trademark laws, that has a potential for being sold, traded, or licensed for a fee; and

(2) the plans, specifications, blueprints, and designs, including related proprietary information, of a scientific research and development facility.

Health & Safety Code § 102.262. 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.” *Id.* § 102.262(b). 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* Open Records Decision No. 651 at 10 (1997). Thus, this office has stated that in considering whether requested scientific information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a party’s assertion that the information has this potential. *See id.* at 9-10 (construing Education Code section 51.914(1)). *But see id.* at 10 (finding determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review).

You assert the information at issue is confidential under section 102.262(b)(1). The information at issue consists of successful grant funding applications for cancer research and prevention services. These applications outline the proposed research, its cost, and its commercial and financial implications. The institute states each funded application concerns “the discovery and/or use of state-of-the-art technologies, tools, products, devices or processes for cancer research.” The institute informs us that applications are funded because the institute believes them to have “the potential for generating income for the state.” The institute argues that premature disclosure of this information would directly reveal the substance of the research and could destroy valuable licensing and patent opportunities. Based upon these representations and our review, we find the information at issue relates to “a product, device, or process, the application or use of such a product, device, or process and . . . technological and scientific information, including computer programs . . . that has a potential for being sold, traded, or licensed for a fee” and is therefore generally subject to section 102.262. However, we note that, pursuant to section 102.262(a), any information listed in section 102.262(a) is public information and may be disclosed. Health & Safety

Code § 102.262(a). The institute states it publishes this information, as well as the title and a non-technical summary for each funded project, on its website. Therefore, with the exception of information that is subject to section 102.262(a), the institute must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code.²

In summary, with respect to InGeneron's and Visualase's information, the institute must continue to rely on Open Records Letter No. 2010-07059A as a previous determination and withhold that information in accordance with it. With the exception of information the institute releases under section 102.262(a), the institute must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 442460

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²Because our ruling is dispositive, we do not address the third parties' remaining arguments against disclosure.

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