



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 18, 2012

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

Mr. R. Brooks Moore  
Managing Counsel, Governance  
Office of General Counsel  
The Texas A&M University System  
301 Tarrow Street, 6<sup>th</sup> Floor  
College Station, Texas 77840 7896

OR2012-16667

Dear Mr. Moore:

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# 468212 (TAMU# 12-334).

Texas A&M University (the "university") received a request for information pertaining to two specified studies, including research data, notes, preliminary findings, opinions, evaluations, reports, correspondence, contracts, and agreements, as well as records reflecting donations from AlzChem AG ("AlzChem"). You state the university has no information responsive to the portion of the request seeking records reflecting donations from AlzChem. You indicate some of the requested information will be released. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state, and provide documentation showing, you notified AlzChem of the request for information and of its 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). We have received comments from AlzChem. We have considered the submitted arguments and reviewed the submitted representative

sample of information.<sup>1</sup> We have also received and considered comments from the requestor.<sup>2</sup> *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address AlzChem's argument that, pursuant to section 51.914 of the Education Code, the submitted information is not subject to the Act. Subsection 51.914(a) provides, in relevant part, the information to which it applies is "confidential and is not subject to disclosure under [the Act]." *See* Educ. Code § 51.914(a). Subsection 51.914(b) provides, in relevant part, the information to which it applies "is not subject to [the Act]." *See id.* § 51.914(b). However, subsections 51.914(a) and (b) do not remove the information at issue from the Act's application. We interpret the language of these subsections to mean the types of information protected by section 51.914 are subject to the Act's application. We also note the Act applies to "public information," which is defined in section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). In this instance, the university submitted the information at issue for our review, and does not claim the information is not subject to the Act. Therefore, we find the information is subject to the Act, and must be released unless it falls within an exception to disclosure under the Act. Accordingly, we will consider the submitted arguments against disclosure of the information at issue.

Next, we note the submitted information contains medical records. 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. Section 552.101 encompasses information made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>Although the requestor asserts AlzChem failed to comply with the procedural requirements of section 552.305 of the Government Code, we note a violation of section 552.305 does not result in the legal presumption that the requested information is public under section 552.302 of the Government Code.

confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

*Id.* § 159.002(a)-(c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Upon review, we find the information we have marked constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Thus, the medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the university receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 of the Government Code also encompasses section 51.914 of the Education Code, which provides in part:

(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under [the Act] or otherwise:

...

(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[.]

...

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003 [of the Education Code].

Educ. Code § 51.914(a)(2), (b). We note 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).

The university has marked information within the submitted documents that it and AlzChem each claim is confidential pursuant to section 51.914(a)(2). The university explains the marked information, including the marked portions of the final research agreement between the university and AlzChem, include specific details of research methods and results. The university states the information was disclosed by AlzChem to the university under the research agreement. We note the research agreement prohibits the university from disclosing proprietary information to third parties. Based on these representations and our review of the information at issue, we find the university and AlzChem have demonstrated the applicability of section 51.914(a)(2) of the Education Code to portions of the submitted information, which we have marked. Therefore, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 51.914(a)(2) of the Education Code. However, we find neither the university nor AlzChem has demonstrated any portion of the remaining information at issue, which consists of portions of the consent form, diet and medical history inventories, the university's notice of award, the remainder of the research agreement, the identities of faculty involved in the research, and budgetary information, reveals details about the research at issue or is otherwise confidential under section 51.914(a)(2). AlzChem claims the submitted information is also subject to section 51.914(b) of the Education Code. As stated above, section 51.914(b) states certain information is confidential "unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant." We note the submitted information is subject to an executed license, sponsored research agreement, or research contract or grant. Thus, the information is not subject to section 51.914(b). Accordingly, none of the remaining information may be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. 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 some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984), 343 (1982). Upon review, we find portions of the remaining information, which we have marked, are highly intimate or embarrassing and not of legitimate public interest. Therefore, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and not of legitimate public concern, or the information pertains to an individual who has been de-identified and whose privacy interests are thus protected. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

AlzChem claims the remaining information is subject to section 552.110(b) of the Government Code, which 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.*; *see also* Open Records Decision No. 661 at 5 (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).

Upon review, we find AlzChem has made only conclusory allegations that the release of any of the remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

In summary, the medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the university receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914(a)(2) of the Education Code and common-law privacy. 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](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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 468212

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Robert F. Johnson III  
Counsel for AlzChem AG  
Gardere Wynne Sewell LLP  
600 Congress Avenue, Suite 3000  
Austin, Texas 78701-2978  
(w/o enclosures)

DEC 23 2013

At 2:02pm M.  
Amalia Rodriguez-Mendoza, Clerk

ALZCHEM AG,  
*Plaintiff,*

v.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS,  
*Defendant,*

and

ALL AMERICAN PHARMACEUTICAL  
& NATURAL FOODS, CORP.  
*Intervenor.*

§ IN THE DISTRICT COURT  
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§ 126<sup>th</sup> JUDICIAL DISTRICT  
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§ TRAVIS COUNTY, TEXAS  
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§

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff, AlzChem AG, ("AlzChem"), Defendant Greg Abbott, Attorney General of Texas (Attorney General), and Intervenor, All American Pharmaceutical & Natural Foods, Corporation (All American), appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

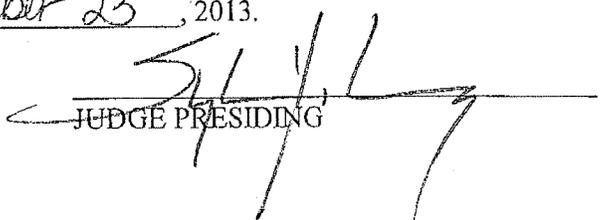
This is an action brought by Plaintiff AlzChem to challenge Letter Ruling OR2012-16667 (the "Ruling"). Texas A&M University ("the University") received a request from All American pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain documents related to a research project sponsored by AlzChem and conducted by an employee of the University. These documents contain information designated by AlzChem as confidential and proprietary information exempt from disclosure under the PIA ("AlzChem Information"). The University requested a ruling from the Open Records Division of the Office of the Attorney General ("ORD"). ORD subsequently issued the Ruling, ordering the release of some of the AlzChem Information. The University holds the information that has been ordered to be disclosed.

The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor/Intervenor has in writing voluntarily withdrawn the request for information, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

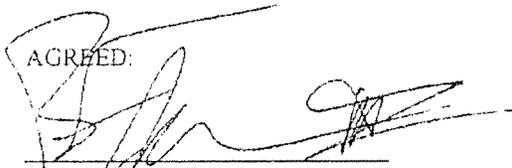
**IT IS THEREFORE ORDERED** that:

1. Because the request was withdrawn, no information should be released in reliance on Letter Ruling OR2012-16667. Letter Ruling OR2012-16667 should not be cited for any purpose as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the signing of this Final Judgment, the Office of the Attorney General shall notify the University in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall instruct the University that pursuant to Tex. Gov't Code § 552.301(g), it shall not rely upon Letter Ruling OR2012-16667 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any information in reliance on said Ruling, and if the University receives any future requests for the same or similar AlzChem Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2012-16667.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

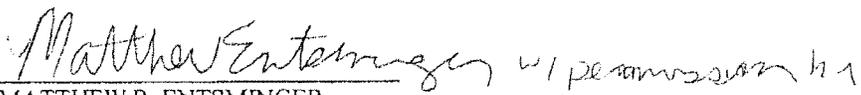
SIGNED on December 23, 2013.

  
JUDGE PRESIDING

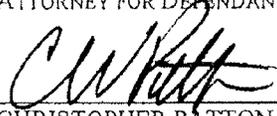
AGREED:

  
ROBERT F. JOHNSON III  
State Bar # 10786400  
Gardere Wynne Sewell LLP  
600 Congress Avenue, Suite 3000  
Austin, Texas 78701-2978  
Telephone: (512) 542-7127  
Facsimile: (512) 542-7327

ATTORNEYS FOR PLAINTIFF, ALZCHEM AG

  
MATTHEW R. ENTSMINGER  
State Bar No. 24059723  
Open Records Litigation  
Administrative Law Division  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: (512) 475-4151  
Facsimile: (512) 457-4686  
[Matthew.Entsminger@texasattorneygeneral.gov](mailto:Matthew.Entsminger@texasattorneygeneral.gov)  
*with permission by Kirby J. Smith TX Bar: 24014140*

ATTORNEY FOR DEFENDANT, GREG ABBOTT

  
CHRISTOPHER PATTON  
State Bar No. 24083634  
CHRISTOPHER J. SCHWEGMANN  
State Bar No. 24051315  
LYNN TILLOTSON PINKER & COX, L.L.P.  
2100 Ross Avenue, Suite 2700  
Dallas, Texas 75201  
Telephone: (214) 981-3800  
Facsimile: (214) 981-3839

ATTORNEYS FOR INTERVENOR  
ALL AMERICAN PHARMACEUTICAL &  
NATURAL FOODS, CORP.