



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

October 23, 2012

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

OR2012-16941

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# 468730 (CPRIT PIA Request No. 2012-33).

The Cancer Prevention and Research Institute of Texas (the "institute") received a request for six categories of information pertaining to four specified grants. You state some information has been released to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. In addition, you state release of the requested information may implicate the proprietary interests of Caliber Biotherapeutics ("Caliber"), Gradalis, Inc. ("Gradalis"), Kalon Biotherapeutics, LLC ("Kalon"), Pulmotect, Inc. ("Pulmotect"), and individuals involved in the Gradalis grant. 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 Caliber, Gradalis, and Kalon. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state the grant funding applications concerning Gradalis and Caliber were the subject of previous requests for rulings, in response to which this office issued Open Records Letter Nos. 2012-01568 (2012) and 2012-01891 (2012), respectively. In those rulings, we held, with the exception of information the institute releases under section 102.262(a) of the Health and Safety Code, 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. As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed as to Gradalis's and Caliber's applications, the institute must continue to rely on Open Records Letter Nos. 2012-01568 and 2012-01891 as previous determinations and withhold Gradalis's and Caliber's applications in accordance with those rulings. *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.

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, we have only received comments from Caliber, Gradalis, and Kalon explaining why their requested information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the requested 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. Consequently, the institute may not withhold any of the requested information on the basis of proprietary interests the remaining third parties may have in the information.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues

among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You state the information you have marked relates to internal communications reflecting the deliberative and policymaking processes of the institute's appointed committee for cancer research. Based upon your representations and our review of the information at issue, we agree the information we have marked consists of advice, opinions, and recommendations related to policymaking. Thus, we find the information we have marked is excepted from disclosure under section 552.111 of the Government Code and the institute may withhold this information from disclosure on that basis.<sup>1</sup> However, we find the remaining information at issue consists of information that is purely factual in nature. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the remaining information at issue. Consequently, the institute may not withhold any of the remaining information at issue under section 552.111 of the Government 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 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.

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<sup>1</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

(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.

Heath & 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 grant funding applications concerning Kalon and Pulmotect, which you have marked, are confidential under section 102.262(b)(1). The information at issue consists of successful grant funding applications for cancer research and prevention services. The 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

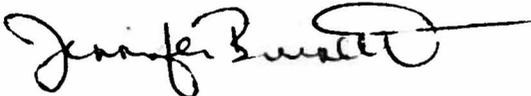
information, including computer programs . . . that has a potential for being sold, traded, or licensed for a fee” and is therefore generally subject to section 102.262. However, we note that, pursuant to section 102.262(a), any information listed in section 102.262(a) is public information and may be 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 you have marked under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code.<sup>2</sup>

In summary, with respect to Gradalis’s and Caliber’s applications, the institute must continue to rely on Open Records Letter Nos. 2012-01568 and 2012-01891 as previous determinations and withhold Gradalis’s and Caliber’s applications in accordance with those rulings. The institute may withhold the information we have marked under section 552.111 of the Government Code. With the exception of information the institute releases under section 102.262(a) of the Health and Safety Code, the institute must withhold the information you have marked in Kalon’s and Pulmotect’s applications under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code. 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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/tch

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<sup>2</sup>Because our ruling is dispositive, we do not address Kalon’s arguments against disclosure of this information.

**Ref: ID# 468730**

**Enc. Submitted documents**

**c: Requestor  
(w/o enclosures)**

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