



ATTORNEY GENERAL OF TEXAS
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Ms. Kristen Pauling Doyle
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OR2012-17083

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# 468911 (CPRIT 2012-35).

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 Apollo Endosurgery ("Apollo"), Cell Medica Limited ("Medica"), Houston-Area Incubator ("Houston"), and Myriad-RBM ("Myriad"). 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 Medica and Apollo. We have also received comments from an attorney for the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, you state the grant funding applications concerning Apollo and Myriad were the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2012-01568 (2012). In that ruling, we held that 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 ruling was based have changed as to Apollo's and Myriad's applications, the institute must continue to rely on Open Records Letter No. 2012-01568 as a previous determination and withhold or release Apollo's and Myriad's applications in accordance with that ruling.¹ 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 not received any comments from Houston or Myriad explaining why any of their requested information should not be released. Therefore, we have no basis to conclude these companies 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 Houston or Myriad 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).

¹Because our ruling is dispositive, we do not address Apollo's arguments against disclosure of this information.

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.² 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:

²As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

- (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.

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 application concerning Medica, which you have marked, is confidential under section 102.262(b)(1). The information at issue consists of a successful

grant funding application for cancer research and prevention services. The application outlines 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.³

Apollo states portions of its remaining information are 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. *See* Gov’t Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him 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 A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates

³Because our ruling is dispositive, we do not address Medica’s or Apollo’s arguments against disclosure of this information.

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 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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). We note 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.*; *see also* ORD 661 at 5.

Apollo asserts portions of its remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Apollo has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find Apollo has not demonstrated the necessary factors to establish

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

a trade secret claim for its information. *See* ORD 402. Therefore, none of Apollo's information may be withheld under section 552.110(a).

Apollo further argues portions of its remaining information consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Apollo has made only conclusory allegations that the release this information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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). Further, we note the pricing information of a winning bidder, such as Apollo, is generally not excepted under section 552.110(b). This office considers prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Consequently, the institute may not withhold any of Apollo's remaining information under section 552.110(b) of the Government Code.

We note portions of the remaining information may be subject to section 552.117 of the Government Code.⁵ Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose information is at issue timely elected to keep his information confidential pursuant to section 552.024 and the cellular telephone service is not paid for by a governmental body, the institute must withhold the information we have marked under section 552.117(a)(1). The institute may not withhold this information under

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117 if the employee did not timely elect to keep his information confidential or if the cellular telephone service is paid for by a governmental body.

In summary, with respect to Apollo's and Myriad's application information, the institute must continue to rely on Open Records Letter No. 2012-01568 as a previous determination and withhold or release that information in accordance with it. 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 under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code. The institute must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee whose information is at issue made a timely election and the cellular telephone service is not paid for by a governmental body. As no further exceptions to disclosure are raised, 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, toll free at (888) 672-6787.

Sincerely,



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Open Records Division

SO/som

Ref: ID# 468911

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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