ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2012

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

OR2012-17275

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# 469145 (Request No. 2012-37).

The Cancer Prevention & Research Institute of Texas (the "institute") received a request to inspect the institute awarded grants and certain records pertaining to the grants for Asuragen, Bellicum Pharmaceuticals ("Bellicum"), Ingeron, Mirna Therapeutics ("Mirna"), Molecular Templates ("MTEM"), Peloton Therapeutics ("Peloton"), and Visualase. You state you have released some information to the requestor. You claim 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 Asuragen, Bellicum, Ingeron, Mirna, MTEM, Peloton, and Visualase. 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 Asuragen, Bellicum, Mirna, and MTEM. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the requested information concerning Bellicum, Ingeron, Mirna, MTEM, Peloton, and Visualase was the subject of a previous requests for a ruling, in response to which this office issued Open Records Letter Nos. 2012-01568 (2012), 2012-01891 (2012), and 2010-07059A (2010). You state the law, facts, and circumstances on which the prior rulings were based have not changed as to requested information at issue. Accordingly, the institute must continue to rely on Open Records Letter Nos. 2012-01568, 2012-01891, and 2010-07059A as previous determinations and withhold or release

Bellicum's, Ingeron's, Mirna's, MTEM's, Peloton's, and Visualase's information 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.

We next note some of the information Bellicum and Mirna 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.

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 id.* § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Ingeron, Peleton, and Visualase explaining why each third party's submitted information should not be released. Therefore, we have no basis to conclude that these third parties have 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 Ingeron, Peleton, or Visualase.

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 some of the information at issue, which 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.[1] 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:
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> (1) the applicant's name and address;
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> (2) the amount of funding applied for;
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> (3) the type of cancer to be addressed under the proposal; and

[1]As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

> (4) any other information designated by the institute with the consent of the grant applicant.
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> (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:
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> (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
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> (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 information 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 at issue 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 at issue under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code.[2] Asuragen and Mirna state some of the remaining information is confidential under section 102.262 of the Health and Safety Code. However, upon review, we find Asuragen and Mirna have failed to demonstrate how section 102.262 of the Health and Safety Code is applicable to the remaining information at issue. Accordingly, the institute may not withhold any of the remaining information under section 552.101 on that basis.

Asuragen and Mirna claim portions of the remaining information are excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. 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 a "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 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). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the

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[2]Because our ruling is dispositive, we do not address the remaining arguments against disclosure of this information.

exception, and no one submits an argument 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.[3] Open Records Decision No. 402 (1983).

Section 552.110(b) protects "commercial 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 section requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; ORD 661 at 5-6.

Upon review, we find Asuragen and Mirna have failed to establish a *prima facie* case that any of the remaining information meets the definition of a trade secret, nor have Asuragen and Mirna demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b, ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Accordingly, none of the remaining information may be withheld under section 552.110(a) of the Government Code. Furthermore, we find Asuragen and Mirna have made only conclusory allegations that release of any of the remaining information would cause substantial competitive injury, and have not made a factual or evidentiary showing in support of such allegations. *See* Gov't Code § 552.110; ORD 661 at 5-6 (business entity must show specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, the institute may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the institute must continue to rely on Open Records Letter Nos. 2012-01568, 2012-01891, and 2010-07059A as previous determinations and withhold or release Bellicum's, Ingeron's, Mirna's, MTEM's, Peloton's, and Visualase's information in accordance with those rulings. The institute may withhold the information we have marked

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[3]The 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 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 [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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

under section 552.111 of the Government Code. 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. 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,

Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 469145

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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