



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2012

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

OR2012-17916

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# 470303 (CPRIT PIA Request No. 2012-39).

The Cancer Prevention & Research Institute of Texas (the "institute") received a request for the intellectual property and management due diligence records for 15 specified awarded grants. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503.¹ In addition, you inform us the release of this information may implicate the proprietary interests of Asuragen, Inc. ("Asuragen"); Apollo Endosurgery ("Apollo"); Bellicum Pharmaceuticals, Inc. ("Bellicum"); Caliber Biotherapeutics ("Caliber"); Cell Medica, Inc., formerly known as TexCite ("Cell Medica"); Gradalis; Houston Area Translation Research Consortium; Ingeneron, Inc.; Kalon Biotherapeutics, L.L.C.; Mirna Therapeutics, Inc. ("Mirna"); Molecular Templates, Inc. ("Molecular Templates"); Peloton Therapeutics, Inc.; Pulmotect, Inc.; Rules-Based Medicine; Visualse, Inc.; and seven named individuals. Accordingly, you notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Asuragen, Bellicum, Cell Medica, Mirna, Molecular Templates, and attorneys for Apollo,

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 (2002), 677 (2002).

Caliber, and Gradalis. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address Bellicum's representation that some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-01568 (2012). In this prior ruling, we ruled upon the availability of certain successful grant funding applications for cancer research and prevention services. However, the information at issue in the present request consists of intellectual property and management due diligence records related to the grant funding applications and not the actual applications. Thus, we find the information at issue in the institute's request for this ruling is not the same as that on which the previous ruling is based. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (listing elements of first type of previous determination under section 552.301(a)). Therefore, the institute may not rely on Open Records Letter No. 2012-01568 in disposing of the submitted information. Accordingly, we will consider the arguments with regard to the public availability of all the submitted information.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of completed reports that are subject to section 552.022(a)(1). Although you assert this information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, pursuant to section 552.022(a)(1), the institute may not withhold the submitted information under sections 552.107 or 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your claim under Texas Rule of Evidence 503 for the submitted information. We also will consider the arguments under section 552.101 of the Government Code because this section makes information confidential under the Act.

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.

(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).

The submitted information consists of intellectual property and management due diligence records related to successful grant funding applications for cancer research that were created by attorneys and consultants working on behalf of the institute. This information assesses the applicants’ intellectual property estates and their management, regulatory, and business operations. You assert the submitted information is confidential under section 102.262(b)(1). You inform us this information “is sourced directly from the underlying application and/or submitted by the applicant to the” attorneys or consultants working on the institute’s behalf and concerns “the technological and scientific information provided by the applicants[.]” You also inform us the information at issue relates to “the discovery and/or use of state-of-the-art technologies, tools, products, devices or processes for cancer research.” Further, you inform us this information is funded because the institute believes it to have “the potential for being sold or licensed for a fee, which will generate income for the state.” You argue premature disclosure of the submitted information would directly reveal the substance of the research and could destroy valuable licensing and patent opportunities. Based upon your representations and our review, we find this information 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, 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). We understand the institute 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) of the Health and Safety Code, the institute must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code.²

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,

²Because our ruling is dispositive, we need not address the remaining arguments against disclosure.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 470303

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Dr. Lauren Becnel
Baylor College of Medicine
1 Baylor Plaza MS-BCM305
Houston, Texas 77030
(w/o enclosures)

Caliber BioTherapeutics, LLC
C/O Mr. Mark Early Vinson & Elkins
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
(w/o enclosures)

Apollo Endosurgery
C/O Mr. Paul. S. Radich
Andrews Kurth Attorneys LLP
111 Congress Avenue, Suite 1700
Austin, Texas 78701
(w/o enclosures)

Gradalis, Inc.
C/O Mr. Mark Early
Vinson & Elkins LLP
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
(w/o enclosures)

Dr. James Mapes
Rules Based Medicine
3300 Duval Road
Austin, Texas 78759
(w/o enclosures)

Dr. Robert Ullrich
UTMB
301 University Boulevard
Galveston, Texas 77555
(w/o enclosures)

Dr. William E. Fisher
1709 Dryden, Suite 1500
Houston, Texas 77030
(w/o enclosures)

Dr. Charles P. Reynolds
3601 4th Street, MS 9445
Lubbock, Texas 79430
(w/o enclosures)

Ms. Tina Crombie
Head of Business Administration
Cell Medica Limited
27 Fitzroy Square
London, T1T 6ES
United Kingdom
(w/o enclosures)

Dr. Eric Poma
Chief Executive Officer
Molecular Templates, Inc.
Suite 201
111 West Cooperative Way
Georgetown, Texas 78626
(w/o enclosures)

Dr. Michael Coleman
Ingeneron, Inc.
8275 El Rio, Suite 130
Houston, Texas 77054
(w/o enclosures)

Dr. Amy L. McGuire
Baylor College of Medicine, 315
One Baylor Plaza
Houston, Texas 77030
(w/o enclosures)

Mr. Ken Moseley
Vice President
IP & Legal Affairs
Bellicum Pharmaceuticals, Inc.
7913 Brightman Lane
Austin, Texas 78733-3435
(w/o enclosures)

Dr. Mary C. Farach-Carson
Houston Area
Translational Research Consortium
Rice University
6100 Main Street, MS 601
Houston, Texas 77005
(w/o enclosures)

Mr. Andrew Strong
Kalon Biotherapeutics, LLC
4480 TAMU
College Station, Texas 77843
(w/o enclosures)

Dr. Ashok Gowda
Visualese, Inc.
8056 El Rio Street
Houston, Texas 77054
(w/o enclosures)

Dr. Gustavo Ayala
Baylor College of Medicine, 315
One Baylor Plaza
Houston, Texas 77030
(w/o enclosures)

Dr. Tim Kutzkey
Peloton Therapeutics
1700 Owens Street
San Francisco, California 94158
(w/o enclosures)

Ms. Ana C. Ward
Senior Vice President
General Counsel
~~Asuragen, Inc.~~
Mirna Therapeutics, Inc.
2150 Woodward Street, Suite 100
Austin, Texas 78744
(w/o enclosures)

Dr. Brenton Scott
Pumotect, Inc.
3900 Essex Lane, Suite 250
Houston, Texas 77027
(w/o enclosures)

Dr. Richard Gibbs
Human Genome Sequencing Center
Baylor College of Medicine, N1619
~~One Baylor Plaza~~
Houston, Texas 77030
(w/o enclosures)