



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

December 20, 2012

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

OR2012-18673A

Dear Mr. Moore:

This office issued Open Records Letter No. 2012-18673 (2012) on November 19, 2012. Since that time, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on November 19, 2012. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 478588 (SO-12-095).

The Texas A&M University System (the "system") received a request for (1) records that the system and the Texas Plant-Expressed Vaccine Consortium (the "consortium") submitted to the Defense Advanced Research Projects Agency ("DARPA") to apply for funding of Project GreenVax, (2) all records covering the award of funding by DARPA to Project GreenVax, including a contract and/or memorandum of agreement between the federal government and the system and/or the consortium, (3) all records submitted to and received from DARPA about Project GreenVax following the awarding of funds, including milestones and results of the project, and (4) all correspondence between two named individuals and DARPA about Project GreenVax. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state the submitted information may implicate the proprietary interests of Caliber BioTherapeutics, LLC, formerly known as GreenVax, LLC ("Caliber"). Accordingly, you inform us you notified Caliber of the request and of the company's right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain

circumstances). We have received comments from an attorney for Caliber. We have considered the submitted arguments and reviewed the submitted information.

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, such as section 51.914 of the Education Code, which provides, in pertinent 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[.]

Educ. Code § 51.914(a)(2). We note that 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).

You state the submitted information relates to an agreement between the consortium and DARPA. You explain the submitted information details a research project sponsored by DARPA relating to Caliber's proprietary product/process and related scientific information. You state this information was disclosed to the system under the research agreement and related consortium agreement, which prohibit the system from disclosing proprietary information to outside parties. Based on your representations and our review, we agree the information you have marked in the submitted documents and the information on the submitted CD in its entirety is confidential under section 51.914 of the Education Code, and the system must withhold it under section 552.101 of the Government Code.<sup>1</sup> Caliber asserts portions of the remaining information are confidential under section 51.914 of the Education Code. However, we find Caliber has not demonstrated any portion of the remaining information reveals details about the research at issue or is otherwise confidential under section 51.914. Accordingly, none of the remaining information may be withheld under section 552.101 on that basis.

---

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

Caliber asserts the remaining information is 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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 *Huffines*, 314 S.W.2d at 776. 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.<sup>2</sup> 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 that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the

---

<sup>2</sup>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 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).

necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Caliber has failed to demonstrate how any portion of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* 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). Therefore, the system may not withhold any of Caliber’s remaining information pursuant to section 552.110(a) of the Government Code. Furthermore, we find Caliber has not demonstrated with specific factual evidence how release of any of its remaining information would cause it substantial competitive injury. *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 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). Consequently, the system may not withhold any of Caliber’s remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who timely requests confidentiality for the information under section 552.024 of the Government Code. *See* Gov’t Code §§ 552.117(a)(1), .024. Section 552.117(a)(1) encompasses an employee’s personal cellular telephone number as long as the cellular service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov’t Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials’ and employees’ private vehicles and intended for official business). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the

---

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. Accordingly, if the system employees whose information is at issue timely elected to keep their information confidential pursuant to section 552.024 and the cellular telephone service is not paid for by a governmental body, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The system may not withhold this information under section 552.117 if the employees did not timely elect to keep their information confidential or if the cellular telephone service is paid for by a governmental body.

In summary, the system must withhold the information you have marked in the submitted documents and the information on the submitted CD in its entirety under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The system must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if the employees whose information is at issue timely elected to keep their information confidential pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body. The system must release the remaining information.

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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division  
NK/bhf

**Ref: ID# 471370**

**Enc. Submitted documents**

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

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