



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2012

Ms. Kristen Pauling Doyle
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P.O. Box 12097
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OR2012-19152

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# 472127 (CPRIT PIR No. 2013-01).

The Cancer Prevention & Research Institute of Texas (the "institute") received a request from two requestors for all records used in or related to the reviews of twenty-four specified applications, the names of the panels assigned to review each application, and the names of individuals assigned to each review panel. You state you have released some information to the requestors. 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 Access Pharmaceuticals, Inc. ("Access"); America Stem Cell; Aminex Therapeutics, Inc. ("Aminex"); ApoCell, Inc. ("ApoCell"); ARMADA Protocol Guidance Systems, Inc. ("ARMADA"); AROG Pharmaceuticals, LLC ("AROG"); Asuragen, Inc. ("Asuragen"); BioSpiral, Ltd. ("BioSpiral"); Bryan Oncor, Inc. ("Bryan"); C4 Imaging, LLC ("C4 Imaging"); Canopy Edge, Inc. ("Canopy"); Chilton Biosciences ("Chilton"); Cortene, Inc. ("Cortene"); Eleos, Inc. ("Eleos"); Gradalis, Inc. ("Gradalis"); invivis Pharmaceuticals ("invis"); Mentrik Biotech, LLC ("Mentrik"); MetronomX, Inc. ("MetronomX"); NanoLite Systems, Inc. ("NanoLite"); Paxman Coolers, Ltd. ("Paxman"); PLx Pharma, Inc. ("PLx Pharma"); Python Medical ("Python"); Savara, Inc. ("Savara"); Texas A&M University ("A&M"); and Womens3D, Inc. ("Womens3D"). 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, C4 Imaging, and Gradalis. We have considered the submitted arguments and reviewed the submitted information. We have also considered comments received from an attorney representing the requestors. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note a portion of the submitted information is not responsive to the instant request. The request seeks information pertaining to the applications of twenty-four named companies. You have submitted information pertaining to companies not named in the request. This information is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, nor is the institute required to release non-responsive information to these requestors.¹

Next, we 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 A&M, Access, America Stem Cell, Aminex, ApoCell, ARMADA, AROG, BioSpiral, Bryan, Canopy, Chilton, Cortene, Eleos, Invis, Mentrik, MetronomX, NanoLite, Paxman, PLx Pharma, Python, Savara, or Womens3D 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 A&M, Access, America Stem Cell, Aminex, ApoCell, ARMADA, AROG, BioSpiral, Bryan, Canopy, Chilton, Cortene, Eleos, Invis, Mentrik, MetronomX, NanoLite, Paxman, PLx Pharma, Python, Savara, or Womens3D.

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*

¹ As such, we do not address Gradalis' arguments against disclosure.

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 committees 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.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.

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.

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

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 472127

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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Dallas, Texas 75201-2975
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C4 Imaging, L.L.C.
c/o Ms. Lori Rixley Winland
Locke Lord, L.L.P.
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