



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2012

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

OR2012-19222

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# 472295 (CPRIT PIR No. 2013-02).

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 fifteen 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 Atumida, Inc. ("Atumida"); Argos Therapeutics ("Argos"); Azaya Therapeutics, Inc. ("Azaya"); BINAFOR, Biophysical Corporation ("Biophysical"); C4 Imaging, LLC ("C4 Imaging"); Cell>Point, LLC ("Cell>Point"); Evestra, Inc. ("Evestra"); Formula Pharmaceuticals, Inc. ("Formula"); Molecular Templates, Inc. ("Molecular Templates"); Remicalm, LLC ("Remicalm"); Rxi Pharmaceuticals Corporation ("Rxi"); Serene Oncology, LLC ("Serene"); Tosk, Inc. ("Tosk"); and Visualase, Inc. ("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 Argos, Cell>Point, Formula, Molecular

Templates, and Remicalm. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the information at issue was the subject of a previous request for information, in response to which this office issued Open Records Letter No.-2012-19152 (2012). In that ruling, we held that the institute may withhold certain information under section 552.111 of the Government Code. We have no indication that the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the institute may continue to rely on Open Records Letter No. 2012-19152 as a previous determination and withhold or release the previously ruled upon information in accordance with it. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Atumida, Azaya, BINAFOR, Biophysical, Evestra, Rxi, Serene, Tosk, or 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 Atumida, Azaya, BINAFOR, Biophysical, Evestra, Rxi, Serene, Tosk, or Visualase.

Next, we note Molecular Templates and Remicalm argue against the release of information that was not submitted by the institute. This ruling does not address information that was not submitted by the institute and is limited to the information the institute has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

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 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.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.

In summary, the institute may continue to rely on Open Records Letter No. 2012-19152 as a previous determination and withhold or release the previously ruled upon information in accordance with this ruling. The institute may withhold the information we have marked

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

under section 552.111 of the Government Code. The institute 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, 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# 472295

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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