



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2012

Ms. Kristen Pauling Doyle
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OR2012-19282

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# 472365 (CPRIT PIR No. 2013-04).

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-six 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 America Stem Cell, Inc. ("America Stem Cell"); AROG Pharmaceuticals, LLC ("AROG"); Asuragen, Inc. ("Asuragen"); Aviara Pharmaceuticals, Inc. ("Aviara"); Bellicum Pharmaceuticals, Inc. ("Bellicum"); BioNumerik Pharmaceuticals, Inc. ("BioNumerik"); BioTech USA, Inc. ("BioTech"); CB2 Pharma, Inc. ("CB2"); Evestra, Inc. ("Evestra"); Leonardo BioSystems, Inc. ("Leonardo"); Lexicon Pharmaceuticals, Inc. ("Lexicon"); Microtransponder, Inc. ("Microtransponder"); Moleculin, LLC ("Moleculin"); Norwell, Inc. ("Norwell"); Oncolix, Inc. ("Oncolix"); Ovna Medical, Inc. ("Ovna"); p53, Inc. ("p53"); Peloton; PHusis Therapeutics, Inc. ("PHusis"); Receptor Logic, Inc. ("Receptor Logic"); Research Point; Rules-Based Medicine ("Rules-Based"); Savara, Inc. ("Savara"); Seno Medical Instruments, Inc. ("Seno"); ViroXis Corporation ("ViroXis"); and Vivante GMP Solutions, Inc. ("Vivante"). 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 AROG, Asuragen, BioNumerik, Norwell, Oncolix, and Seno. We have considered the submitted arguments and reviewed the submitted information.

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 Aviara, Bellicum, BioTech, CB2, Evestra, Leonardo, Lexicon, Microtransponder, Moleculin, Ovna, Peloton, Phusis, Receptor, Research Point, Rules-Based, Savara, ViroXis, or Vivante 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 America Stem Cell, Aviara, Bellicum, BioTech, CB2, Evestra, Leonardo, Lexicon, Microtransponder, Moleculin, Ovna, p53, Pelton, Phusis, Receptor, Research Point, Rules-Based, Savara, ViroXis, or Vivante.

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.

BioNumerik and Norwell argue against disclosure of some of the remaining information 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 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

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

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 776 (Tex. 1958). 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.² 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 the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular proposal or contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b; *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3.

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. *See id.*; *see also* ORD 661 at 5.

We understand Norwell to contend the remaining information constitutes a trade secret under section 552.110(a) of the Government Code. After reviewing the company's arguments and the information at issue, we conclude Norwell has failed to establish a *prima facie* case that any of the remaining information is a trade secret protected by section 552.110(a). *See*

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

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). Thus, the institute may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

BioNumerik and Norwell also contend portions of the remaining information are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, however, we find both BioNumerik and Norwell have not made the specific factual or evidentiary showing required by section 552.110(b) establishing that the release of any of the remaining information would cause either company substantial competitive harm. See ORD 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). Accordingly, the institute may not withhold any portion of the remaining information under section 552.110(b).

In summary, the institute may withhold the information we have marked 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,



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Assistant Attorney General
Open Records Division

JWG/dls

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