



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2012

Ms. Kristen Pauling Doyle
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OR2012-19335

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# 472368 (CPRIT PIR No. 2013-03).

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 thirty 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 ApoCell, Inc. ("ApoCell"); Beta Cat Pharmaceuticals, LLC ("Beta Cat"); CerRx, Inc. ("CerRx"); DNAiTx, LLC ("DNAiTx"); Galena Biopharma, Inc. ("Galena"); Geneius, Inc. ("Geneius"); gmsbiotech; Heat Biologics, Inc. ("Heat Biologics"); Ibris, Inc. ("Ibris"); IDEV Technologies, Inc. ("IDEV"); Immune Design Corp. ("Immune Design"); Incellerate, LLC ("Incellerate"); Lab7 Systems ("Lab7"); LaserGen, Inc. ("LaserGen"); Molecular Templates, Inc. ("Molecular Templates"); Moleculin, LLC ("Moleculin"); Nanospectra Biosciences, Inc. ("Nanospectra"); Oncolix, Inc. ("Oncolix"); p53, Inc. ("p53"); Propep Surgical ("Propep"); Rescue Therapeutics, Inc. ("Rescue"); Resonant Sensors, Inc. ("Resonant"); Respira Therapeutics, Inc. ("Respira"); Santalis Pharmaceuticals ("Santalis"); Tarix Oncology ("Tarix"); Tosk, Inc. ("Tosk"); Vegenix Pty, Ltd. ("Vegenix"); Viator Technologies, Inc. ("Viator"); WHPM/Hemosure ("WHPM"); and Xenex Healthcare Services ("Xenex"). 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 Beta Cat, CerRx, DNAiTx, Galena, IDEV, LaserGen, Molecular Templates, Respira, and Xenex. 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 ApoCell, Geneius, gmsbiotech, Heat Biologics, Ibris, Immune Design, Incellerate, Lab7, Moloculin, Nanospectra, Oncolix, p53, Propep, Rescue, Resonant, Respira, Santalis, Tarix, Tosk, Vegenic, Viator, and WHPM 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 ApoCell, Geneius, gmsbiotech, Heat Biologics, Ibris, Immune Design, Incellerate, Lab7, Moloculin, Nanospectra, Oncolix, p53, Propep, Rescue, Resonant, Respira, Santalis, Tarix, Tosk, Vegenic, Viator, and WHPM.

Section 552.111 of the Government Code exempts 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 exempts 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.

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

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

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).

Xenex asserts the remaining information is confidential under section 102.262(b)(1). However, upon review, we find Xenex has failed to demonstrate that any of the remaining information relates to “a product, device, or process, the application or use of such a product, device, or process, [or] . . . technological and scientific information, including computer programs, developed in whole or in part by an applicant for or recipient of an institute grant, . . . that has a potential for being sold, traded, or licensed for a fee[.]” Therefore, we find Xenex has not established that any of the remaining information is confidential under section 102.262(b)(1) of the Health and Safety Code, and the institute may not withhold it under section 552.101 of the Government Code on that basis.

CerRx and Xenex assert some of 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, 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 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; *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 RESTATEMENT OF TORTS § 757 cmt. b. 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 Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude 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)*.

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,

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 (1939); *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

CerRx and Xenex assert some of the remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude CerRx and Xenex have failed to establish a *prima facie* case that any portion of the remaining information meets the definition of a trade secret. We further find CerRx and Xenex have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, none of the remaining information at issue may be withheld under section 552.110(a).

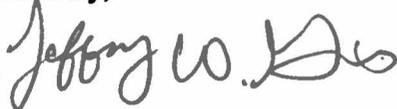
Xenex further argues some of the remaining information consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Xenex has made only conclusory allegations that the release of this information would result in substantial harm to its competitive position. *See* ORD 661. Consequently, the institute may not withhold any of the remaining information under section 552.110(b) of the Government Code.

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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Open Records Division

JWG/dls

Ref: ID# 472368

Enc. Submitted documents

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