



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2013

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

OR2013-08310

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# 487934 (CPRIT No. 2013-96).

The Cancer Prevention and Research Institute of Texas (the "institute") received a request for the application and review records related to the submissions of Norwell, Inc. ("Norwell").¹ You state the institute has released some of the information. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. You also state the proprietary interests of Norwell might be implicated by the release of the requested information. Accordingly, you notified Norwell of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have received comments submitted by Norwell. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us some of the requested information was the subject of a similar request for information, in response to which this office issued Open Records Letter

¹We note the institute sought and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

No. 2012-19282 (2012). In that ruling we determined the institute may withhold certain information in the review records related to Norwell under section 552.111 of the Government Code and must release the remaining information. As to this information, you state there has been no change in the law, facts, or circumstances on which the previous ruling was based. Thus, with regard to the information previously ruled upon in Norwell's review records, we conclude the institute may continue to rely on Open Records Letter No. 2012-19282 as a previous determination and withhold or release the identical information in accordance with that ruling. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

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 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.

Heath & 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)(1). 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).

You assert portions of the submitted information are confidential under section 102.262(b)(1). This information consists of grant funding applications for cancer research and prevention services. These applications outline the proposed research, its cost, and its commercial and financial implications. You state each application concerns “the discovery and/or use of state-of-the-art technologies, tools, products, devices or processes for cancer research.” You argue potential commercialization pathways such as licensing and patent opportunities for the underlying research are destroyed if the research results are prematurely released in a public arena. Based upon these representations and our review, we find the information at issue relates to “a product, device, or process, the application or use of such a product, device, or process, and . . . technological and scientific information, including computer programs, . . . that has a potential for being sold, traded, or licensed for a fee” and is therefore generally subject to section 102.262. However, pursuant to section 102.262(a), any information listed in section 102.262(a) is public information and may be disclosed. Health & Safety Code § 102.262(a). Therefore, with the exception of information that is subject to section 102.262(a), which you have indicated, the institute must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 102.262(b)(1) of the Health and Safety Code.²

²As our ruling is dispositive for this information, we need not address Norwell’s arguments against its disclosure.

Norwell argues some of the remaining information contains trade secret information or information that, if released, could cause it substantial harm. Section 552.110 of the Government Code 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 (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.³ 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 that

³The 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).

section 552.110(a) is applicable unless it has been shown that 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, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See id.*; *see also* Open Records Decision No. 661 at 5 (1999).

Upon review, we find Norwell has not demonstrated any of the remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b, 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). Accordingly, the institute may not withhold any of Norwell’s remaining information under section 552.110(a) of the Government Code. Upon further review, we find Norwell has not demonstrated how any of the remaining information constitutes commercial or financial information, the disclosure of which would cause it substantial competitive harm. Accordingly, the institute may not withhold any of Norwell’s remaining information under section 552.110(b) of the Government Code.

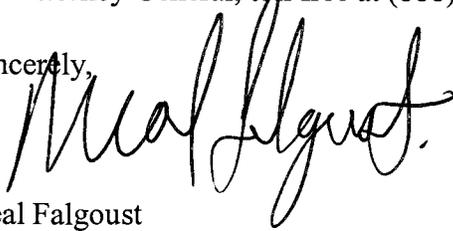
In summary, the institute may continue to rely on Open Records Letter No. 2012-19282 as a previous determination and withhold or release any identical information under section 552.111 of the Government Code in accordance with that ruling. With the exception of the information that is subject to section 102.262(a) of the Health and Safety Code, which you have indicated, the institute must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 102.262(b)(1) of the Health and Safety Code. The remaining information must be released.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 487934

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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