



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 24, 2011

Ms. Kate Fite  
Office of the General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2011-01142

Dear Ms. Fite:

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# 406684.

The Office of the Governor (the "governor") received a request for contracts of all Emerging Technology Fund recipients since August 16, 2010. You take no position on the public availability of the requested information. You state release of this information may implicate the proprietary interests of Corhythm, Inc. ("Corhythm"); Fe3 Medical, Inc. ("Fe3 Medical"); Fiberio Technology Corporation ("Fiberio"); J.C. Lads Corporation ("J.C. Lads"); Ideal Power Converters, Inc. ("Ideal Power"); Inview Technology Corporation ("Inview"); Neurolink, Inc. ("Neurolink"); Oncolix, Inc. ("Oncolix"); Texas Tech University ("Texas Tech"); The University of Texas at El Paso ("UT at El Paso"); and Viroxis Corporation ("Viroxis"). Accordingly, you inform us that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have reviewed the submitted arguments and information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor asserts that he was not timely notified of the governor's request for a ruling from this office as required by section 552.301(d)(2) of the Government Code. *See id.* § 552.301(d) (governmental body must provide requestor with copy of governmental body's written communication to attorney general asking for decision). Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with a copy of its written communication to this office results in the presumption that the information is public. We note the governor's request for a decision to this office was timely submitted and shows it was copied to the requestor. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Based on the submitted information, we find that the governor complied with the procedural requirements of section 552.301 in requesting this ruling.

Next, we note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the third party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Corhythm, Fe3 Medical, Fiberio, J.C. Lads, Ideal Power, Inview, Neurolink, Oncolix, and UT at El Paso have not submitted comments to this office explaining why any portion of their submitted information should not be released to the requestor. Therefore, we have no basis to conclude that the release of any portion of the submitted information relating to these third parties would implicate their proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the governor may not withhold any portion of the submitted information on the basis of any proprietary interests that these third parties may have in the information.

Texas Tech contends that a portion of its submitted information is confidential under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Section 51.914 provides in part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], or otherwise:

- (1) all information 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 at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1)-(2). As noted in Open Records Decision No. 651 (1997), 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.” 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 id.* Thus, this office has stated that in considering whether requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a university’s assertion that the information has this potential. *See id.*; *but see id.* at 10 (university’s determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.194 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988). Moreover, section 51.914 is applicable only to information “developed in whole or in part at a state institution of higher education.” Educ. Code § 51.914(1).

Texas Tech informs us that the information at issue outlines the details of a turbulence analysis service. Texas Tech states that the information was developed by its researchers and has the potential for being sold, traded, or licensed for a fee. Texas Tech contends that disclosure of the information would reveal the substance of the research. Based on Texas Tech’s representations, we conclude that the information at issue, which we have marked, is confidential under section 51.914(1) of the Education Code.

We note that Texas Tech transferred the marked information to the governor. This office has long held that information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies, so as to effectively carry out the business of the state. *See* Attorney General Opinions GA-0055 (2003), H-836 (1976), H-242 (1974), M-713 (1970); *see also* Open Records Decision Nos. 674 (2001), 667 (2000).

*But see* Attorney General Opinion DM-353 at 4 n.6 (1995) (interagency transfer prohibited where confidentiality statute enumerates specific entities to which release of confidential information is authorized and where receiving agency is not among statute's enumerated entities); *see also* Open Records Decision No. 655 (1997); *cf.* Attorney General Opinion GA-0019 (2003) (information could not be transferred where statute absolutely prohibited disclosure). Therefore, the information at issue remains confidential in the governor's possession under section 51.914 of the Education Code and must be withheld from disclosure on that basis under section 552.101 of the Government Code.

Viroxis claims portions of its information are excepted under section 552.110(b) of the Government Code. 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. *Id.*; *see also* ORD 661 at 5-6 (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).

Upon review of Viroxis's arguments and the information at issue, we find Viroxis has established that the information at issue, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the governor must withhold the information we have marked under section 552.110(b) of the Government Code.<sup>1</sup>

In summary, the governor must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The governor must also withhold the information we have marked under section 552.110 of the Government Code. The governor 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.

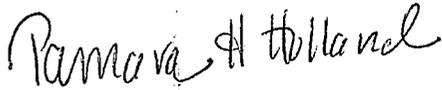
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free,

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<sup>1</sup>As our ruling is dispositive, we need not address Viroxis's remaining arguments against disclosure of this information.

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,



Tamara H. Holland  
Assistant Attorney General  
Open Records Division

THH/tf

Ref: ID# 406684

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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Fe3 Medical, Inc  
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Fiberio Technology Corporation  
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J.C. Lads Corporation  
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