



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 3, 2011

Ms. Zeena Angadicheril  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2011-01789

Dear Ms. Angadicheril:

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# 408402 (OGC # 134315).

The University of Texas M. D. Anderson Cancer Center (the "university") received a request for communications pertaining to named individuals, Convergen LifeSciences, Inc. ("Convergen"), the Dallas Morning News, and the Emerging Technology Fund (the "fund"). You state the university has released some information to the requestor. You also state the university will redact information in the submitted information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, 552.136, and 552.137 of the Government Code. You also inform us the requested information may implicate the proprietary interests of third parties.

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<sup>1</sup>Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Gov't Code §§ 552.117, .024(c).

Accordingly, pursuant to section 552.305 of the Government Code, you notified Convergen, Vivante GMP Solutions, Inc. ("Vivante"), the Office of the Governor (the "governor"), and the Texas Life Science Center for Innovation and Commercialization (the "center") 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 § 552.304 (interested party may submit comments stating why information should or should not be released); *see also id.* § 552.305(d); Open Records Decision No. 542 (1990). We have received comments from Vivante, Convergen, and the center. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note Convergen and Vivante seek to withhold information the university has not submitted for our review. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the university, this ruling does not address Convergen's and Vivante's arguments against its disclosure.

Next, we address the center's contention its information is not subject to the Act. The Act is applicable to "public information." *See id.* § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). The center contends its information consists of documents that a university employee received only in his capacity as a director of the center. Furthermore, the center states its information was sent to the university employee in connection with the business of the center, including center board meetings and deliberations, and does not relate to the official business of the university. Therefore, the center asserts its information does not constitute public information because it was not collected, assembled, or maintained by or for the university and it was not collected, assembled, or maintained under a law or ordinance or in connection with the university's official business. Based on the center's representations and our review, we agree the center's information was not "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. *Id.*; *see* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, the center's

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<sup>2</sup>We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

information is not subject to the Act, and the university need not release this information in response to this request.<sup>3</sup>

Section 552.101 of the Government Code exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. Section 51.914 of the Education Code provides in relevant 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[.]

Educ. Code § 51.914(1). The legislature is silent as to how this office or a court is to determine whether particular information has "a potential for being sold, traded, or licensed for a fee." *See* Open Records Decision No. 651 (1997). Furthermore, whether particular 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(1) 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(1) is applicable only to information "developed in whole or in part at a state institution of higher education." Educ. Code § 51.914(1).

You inform us a portion of the submitted information describes novel cancer therapies and research related to products, devices, and processes developed by the university that have potential for being sold, traded, or licensed for a fee. Based on your representations and our review, we find the portions of the remaining information we have marked, are confidential under section 51.914 of the Education Code and must be withheld under section 552.101 of

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<sup>3</sup>As we are able to make this determination, we need not address the university's or the center's other arguments against disclosure of this information.

the Government Code.<sup>4</sup> However, the remaining information you have marked consists of working titles of experiments or other information that does not reveal the details of the cancer therapies and research at issue; thus, none of the remaining information you have marked is confidential under section 51.914 of the Education Code.

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code, which provides in relevant part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code § 161.032(a), (c), (f) (footnote omitted). Section 161.031(a) defines a “medical committee” as “any committee . . . of . . . (3) a university medical school or health science center[.]” *Id.* § 161.031(a)(3). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital [or] university medical school or health science center . . . may form . . . a medical committee, as defined by Section 161.031, to evaluate medical and health care services[.]” *Id.* § 161.0315(a).

The precise scope of the “medical committee” provision has been the subject of a number of judicial decisions. *See, e.g., Memorial Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Jordan*, 701 S.W.2d at 647-48. Protection does not

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<sup>4</sup>As we are able to make this determination, we need not address the university’s, Vivante’s, or Convergen’s other arguments against disclosure of this information.

extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other statutes, statutory predecessor to section 161.032).

You state the Institutional Review Board (the “IRB”) is a medical committee established pursuant to federal law in order “to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects.” *See* 21 C.F.R. § 56.102(g). You state the Institutional Biosafety Committee (the “IBC”) is a medical committee tasked with reviewing and initiating scientific research projects that involve the use of hazardous biological agents and recombinant DNA. You state the Conflict of Interest Committee (the “COIC”) is a medical committee that seeks to protect patient safety and welfare by requiring disclosure of all potential conflicts of interest during the pursuit of relationships with for-profit entities that further the mission of the university. Based on these representations, we agree the IRB, the IBC, and the COIC constitute medical committees as defined by section 161.031. You state the e-mails you have marked are records, information, or reports of or provided by the IRB, the IBC, and the COIC. Upon review, we agree the e-mails you have marked under the IBC and the COIC are records of these medical committees that have been prepared by or at the direction of the IBC and the COIC for committee purposes. However, we find you have failed to demonstrate any of the e-mails you have marked under the IRB either pertain to the proceedings of or consist of the records, information, or reports of or provided by the IRB to the governing body of the university. Accordingly, the university must withhold the IBC’s and the COIC’s records under section 552.101 in conjunction with section 161.032 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses section 490.057 of the Government Code, which addresses the confidentiality of certain information pertaining to the fund. Section 490.057 provides:

Information collected by the governor’s office, the [Texas Emerging Technology Advisory C]ommittee, or the committee’s advisory panels concerning the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an individual or entity being considered for an award from the fund is confidential unless the individual or entity consents to disclosure of the information.

Gov’t Code § 490.057. The university states the remaining information it has marked and Convergen states its remaining information was collected by the governor, the Texas Emerging Technology Fund Advisory Committee (the “committee”), or an advisory panel of the committee and concerns the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an entity being considered for an award from the fund. However, we note this provision applies only to an entity “being considered for an award from the fund.” *Id.* Because Convergen and the entities referred to in the remaining information the university has marked all received grants

from the fund, they are no longer being considered for an award from the fund. Thus, section 490.057 no longer applies to their information. Accordingly, the university may neither withhold the remaining information it has marked nor any of Convergen's remaining information under section 552.101 of the Government Code in conjunction with section 490.057 of the Government Code.

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. Upon review, we conclude you have failed to demonstrate how the cellular telephone number you have marked is highly intimate or embarrassing. Therefore, the university may not withhold the cellular telephone number you have marked under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. You assert the cellular phone number you have marked is protected under constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not demonstrated how constitutional privacy applies to the cellular telephone number you have marked. Accordingly, the university may not withhold the cellular telephone number you have marked under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive

advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See Open Records Decision No. 514 at 2 (1988)*. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See Open Records Decision No. 541 (1990)*.

You state the university is a competitor in the marketplace with regard to the development of the biotechnology referenced in the responsive information. You further state the university is acting as an investor and if competitive information regarding this technological and scientific information were made public this would undermine the ability of the university to optimize the financial benefit of its investment. However, you also state the bidding and contract negotiations pertaining to the technological and scientific information at issue have not begun and that all such competitive situations will be conducted in the future. Thus, we find you have not explained how the university was engaged in a particular competitive bidding situation at the time the university received the present request for information, nor have you demonstrated that public release of the information at issue would cause specific harm to the university’s interests in a particular competitive bidding situation. Accordingly, the university may not withhold any of the remaining information you have marked under section 552.104 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Open Records Decision No. 676 at 6-7*. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons

other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked consists of communications between individuals identified as university faculty and legal staff. You state the communications you have marked were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Accordingly, based on your representations and our review, we find the information you have marked consists of attorney-client privileged communications and may be withheld under section 552.107 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and (2) “commercial 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(a)-(b).

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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>5</sup> Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude section 552.110(a) is applicable unless the party claiming this exception has shown the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* 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. *Id.*; Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Although the university argues the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the university’s argument under section 552.110. Convergen argues its remaining information consists of trade secrets and commercial or financial information, release of which would cause substantial competitive harm. However, upon review, we find Convergen has not demonstrated how any of its remaining information meets the definition of a trade secret and has not provided anything more than conclusory allegations that release of its remaining information would cause substantial competitive harm. Accordingly, the university may not withhold any of Convergen’s remaining information under section 552.110 of the Government Code.

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<sup>5</sup>The 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 others 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).

Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we find you have failed to demonstrate how the password you have marked can be used to obtain money, goods, services, or another thing of value. Thus, the password you have marked may not be withheld under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). You state the e-mail addresses you have marked are confidential under section 552.137(a) of the Government Code. We note section 552.137(a) does not apply to one of these e-mail addresses, which we have marked for release, because it was provided by a person who had a contractual relationship with the university at the time of the e-mail. *Id.* § 552.137(c)(1). Therefore, with the exception of the e-mail address we have marked for release, the university must withhold the e-mail addresses you have marked under section 552.137, unless the university receives consent for their release.

In summary, the center’s information is not subject to the Act, and the university need not release this information in response to this request. The university must withhold the portions of the submitted information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The university must withhold the IBC’s and the COIC’s records under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. The university may withhold the information you have marked under section 552.107 of the Government Code. With the exception of the e-mail address we have marked for release, the university must withhold the e-mail addresses it has marked under section 552.137, unless the university receives consent for their release. As you raise no further exceptions to disclosure, the remaining information must be released to the requestor.

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, 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,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/eeg

Ref: ID# 408402

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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