



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 13, 2012

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

OR2012-00734

Dear Ms. Chatterjee:

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# 442381 (OGC# 140274).

The University of Texas Health Science Center at Houston (the "university") received a request for copies of (1) the agenda and meeting minutes for a specified committee from a specified time period and (2) specified contracts between the university and Abbott Laboratories ("Abbott"), AstraZeneca, Bristol-Myers Squibb ("Bristol"), Eli-Lilly & Company ("Eli"), GlaxoSmithKline ("Glaxo"), Johnson & Johnson ("Johnson"), Merck, Novartis Pharmaceuticals ("Novartis"), Roche, Teva Branded Pharmaceutical Products R&D ("Teva"), and Wyeth Pharmaceuticals ("Wyeth") from a specified time period. You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. You also inform us release of the submitted information may implicate the proprietary interests of Abbott, Bristol, Eli, Glaxo, Johnson, Merck, Novartis, Roche, Teva, and Wyeth. Accordingly, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *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 all of the third parties you notified except for Teva and Wyeth. We have considered the submitted

arguments and reviewed the submitted representative samples of information.<sup>1</sup> We have also 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, you inform us that a portion of the information submitted as responsive to item two of the request is not responsive because it is not from the specified time period. This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released in response to the present request.

Next, we note 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. *Id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Teva or Wyeth explaining why their information should not be released. Therefore, we have no basis to conclude these third parties have a protected proprietary interest in any of 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 university may not withhold any portion of the submitted information based upon the proprietary interests of Teva or Wyeth.

We also note that Merck seeks to withhold information that the university has not submitted for our review. This ruling does not address information beyond what the university has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the university submitted as responsive to the request for information. *See id.*

We first address Abbott's, Eli's, and Novartis's claims that their information should not be disclosed because of confidentiality agreements. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203

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<sup>1</sup>We assume the "representative sample" of records 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 that submitted to this office.

at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

We next address the university's claim under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.<sup>2</sup> Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Section 161.032 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*

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<sup>2</sup>We note Bristol joins in the university's arguments against disclosure under section 552.101.

*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 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 university’s Institutional Review Board (the “IRB”) is a medical committee established pursuant to federal law.<sup>3</sup> You also state the IRB was established in order “to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects.” 21 C.F.R. § 56.102(g). Based on your representations, we agree the IRB is a medical committee as defined by section 161.031. You state that the IRB agendas and meeting minutes submitted as Exhibit 6, and the research protocols and other documents you have indicated in Exhibit 7, were prepared for or at the direction of the IRB for the purpose of assessing research involving human subjects performed by university employees. You indicate the documents at issue are not made or maintained in the regular course of business. *Cf. Texarkana Mem’l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). Based on your representations and our review, we conclude Exhibit 6 and the information you indicated in Exhibit 7, which we have marked, consist of medical committee records that must be withheld under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code.<sup>4</sup>

Next, we address Merck’s claims under section 51.914 of the Education Code. Section 552.101 of the Government Code also encompasses section 51.914, which provides, in pertinent part:

(a) In order to protect the actual or potential value, the following information is confidential and is not 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

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<sup>3</sup>*See* 42 U.S.C. § 289(a) (providing Secretary of Health and Human Services shall by regulation require each entity that applies for grant, contract, or cooperative agreement for any project or program that involves conduct of biomedical or behavioral research involving human subjects [to] submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to [s]ecretary that it has established “Institutional Review Board” to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

<sup>4</sup>As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

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[.]

...

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to [the Act], unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003 [of the Education Code].

Educ. Code § 51.914(a)(1)-(2), (b). 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." Open Records Decision No. 651 at 9 (1997). 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 governmental body's assertion that the information has this potential. *See id. But see id.* at 10 (stating that university's determination that information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note that section 51.914 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).

Merck states that portions of its remaining information reveal technical details about how to achieve the goals of the research conducted under certain agreements between Merck and the

university. Merck also states that disclosure of this information would directly reveal the substance of the research conducted pursuant to the agreements at issue and permit third parties to appropriate such research. However, upon review of the information at issue, we find Merck has failed to explain, nor can we discern, how this information, which consists of pricing information and a general description of research, reveals details about the research at issue. Accordingly, the university may not withhold any of Merck's remaining information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.

Abbott also raises section 552.104 of the Government Code for its remaining information. This section excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the university does not seek to withhold any information pursuant to this exception, no portion of the remaining information may be withheld under section 552.104 of the Government Code.

Abbott, Eli, Glaxo, Johnson, Merck, Novartis, and Roche also raise section 552.110 of the Government Code for portions of the remaining information. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. 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.<sup>5</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 that the information meets the definition of a trade secret and the necessary factors have been demonstrated 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.*; *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).

Abbott, Eli, Johnson, and Novartis assert that portions of the remaining information consist of trade secrets that are excepted from disclosure under section 552.110(a). Upon review, we find that Abbott and Johnson have not demonstrated how any of their information meets the definition of a trade secret, nor have these companies 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). Furthermore, having considered all of Eli’s and Novartis’s arguments and reviewed the information at issue, we conclude that Eli and Novartis have not demonstrated how any of their remaining

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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 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).

information meets the definition of a trade secret. *See* ORD 402, 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note that 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 (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3 (1982). Therefore, the university may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Abbott, Eli, Glaxo, Johnson, Merck, Novartis, and Roche claim portions of the remaining information consist of pricing or commercial information that is excepted from disclosure under section 552.110(b). Upon review, we find these third parties have made only conclusory allegations that the release of any of the remaining information would cause the companies substantial competitive injury. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3. We note the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). We also note that the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (public has interest in knowing terms of contract with state agency). Accordingly, the university may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, Exhibit 6 and the information we have marked in Exhibit 7 must be withheld under section 552.101 of the Government Code in conjunction with section 161.032 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](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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/agn

Ref: ID# 442381

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Laura Levitan  
Associate General Counsel  
for Pharmaceutical  
Department 323, Building Ap6a-2  
Abbott Laboratories  
100 Abbott Park Road  
Abbott Park, Illinois 60064-3500  
(w/o enclosures)

Ms. Sandra Leung  
General Counsel  
Bristol-Myers Squibb  
Corporate Headquarters  
345 Park Avenue  
New York, New York 10154  
(w/o enclosures)

Mr. Dan Troy  
Senior Vice President  
GlaxoSmithKline  
One Franklin Plaza  
P.O Box 7929  
Philadelphia, Pennsylvania 19101  
(w/o enclosures)

Mr. Russell C. Deyo  
Vice President  
Johnson & Johnson  
One Johnson & Johnson Plaza  
New Brunswick, New Jersey 08933  
(w/o enclosures)

Dr. Gottlieb Keller  
General Counsel  
Head of Corporate Services  
Hoffman-La Roche, Incorporated  
9115 Hague Road  
Indianapolis, Indiana 46250  
(w/o enclosures)

Mr. Robert a Armitage  
Senior Vice President  
Eli Lilly & Company  
Eli Lilly Corporate Center  
893 S Delaware St  
Indianapolis, Indiana 46225  
(w/o enclosures)

Mr. Bruce N. Kuhlik  
Executive Vice President  
Merck & Company  
One Merck Drive  
Whitehouse Station, New Jersey 08889  
(w/o enclosures)

Mr. Robert E Pelzer  
President  
Novartis Corporation  
608 Fifth Avenue  
New York, New York 10020  
(w/o enclosures)

Mr. Richard S. Egosi  
Corporate Vice President  
Teva Neuroscience, Incorporated  
425 Privet Road  
Horsham, Pennsylvania 19044  
(w/o enclosures)

Ms. Amy Schulman  
Executive Vice President  
Pfizer, Incorporated  
235 East 42<sup>nd</sup> Street  
New York, New York 10017  
(w/o enclosures)