



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 15, 2013

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

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

OR2013-02677

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# 478959 (UT OGC# 147398).

The University of Texas Medical Branch at Galveston (the "university") received a request for information for a specified time period pertaining to specified types of prescriptions, HIV-positive inmates, and vendor contracts regarding the procurement of specified types of medications.<sup>1</sup> You state the university is releasing some of the requested information. You also state that, although the university takes no position with respect to the remaining requested information, its release may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the university notified Genentech USA, Inc. ("Genentech") and Gilead Sciences, Inc. ("Gilead") of the request for information and

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<sup>1</sup>You state the university sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

of their right to submit arguments stating why their 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); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by Genentech and Gilead.

Genentech and Gilead each submit arguments against disclosure of their information 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *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>2</sup> See 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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. 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.* § 552.110(b); 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).

Genentech and Gilead argue their pricing information within the information at issue, which consists of executed agreements, amendments, and agreement renewals, constitutes trade secrets. We note 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.” RESTATEMENT OF TORTS § 757 cmt. b (citation omitted); *see also Huffines*, 314 S.W.2d at 776. Upon review, we find Genentech and Gilead have failed to demonstrate their pricing information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the university may not withhold any of the information at issue on the basis of section 552.110(a) of the Government Code.

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<sup>2</sup>There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

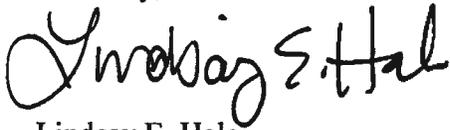
Genentech also claims its pricing information is excepted from disclosure under section 552.110(b) of the Government Code. In advancing its arguments, Genentech relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, in making a determination under section 552.110(b), we will only consider Genentech's interest in withholding its information.

Genentech and Gilead each contend their pricing information is commercial or financial information, release of which would cause the companies substantial competitive harm. We note the pricing information of winning bidders of a government contract, such as Genentech and Gilead, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. Upon review, we find Genentech and Gilead have made only conclusory allegations that release of their pricing information would cause the companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110(b). As such, the university may not withhold any of the information at issue under section 552.110(b) of the Government Code. As no further exceptions to disclosure have been raised, the university must release the submitted 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, 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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/tch

Ref: ID# 478959

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Sarina Rivera  
Counsel for Genentech, Inc.  
Senior Counsel  
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Nutley, New Jersey 07110  
(w/o enclosures)

Ms. Keeley Cain Wettan  
Corporate Counsel  
Gilead Sciences, Inc.  
333 Lakeside Drive  
Foster City, California 94404  
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Hernandez, on June 21, 2016, informing him of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that UTMB will withhold the designated portions of the information at issue. The requestor was also informed of his right to intervene in the suit to contest the withholding of this information. A copy of the certified mail receipt is attached to this motion.

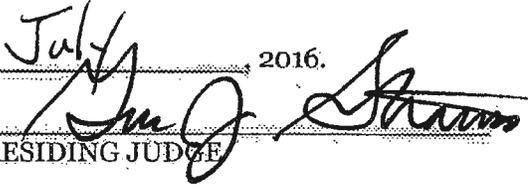
The requestor has not filed a motion to intervene. Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period to intervene after notice is attempted by the Attorney General.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. Gilead, the Attorney General, and UTMB have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue, specifically Gilead's pricing information, are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, UTMB will redact: 1) the prices charged by Gilead; and 2) information concerning its pricing method in Gilead's pricing agreements in accordance with the markings agreed to by Attorney General. The Attorney General will provide UTMB with a copy of the information with the agreed redactions highlighted;
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and

SIGNED the 11<sup>th</sup> day of July, 2016.

  
PRESIDING JUDGE

AGREED:



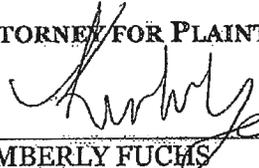
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Agreed Final Judgment  
Cause No. D-1-GN-13-001310

Austin, Texas 78711-2548  
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**ATTORNEY FOR DEFENDANT, UNIVERSITY OF TEXAS MEDICAL BRANCH**

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In Letter Ruling OR2013-12677, the Open Records Division of the Attorney General (ORD) required UTMB to release the information Gilead claims is proprietary. Gilead disputed the ruling and filed the above styled and captioned lawsuit to preserve its rights under the PIA.

Gilead submitted information and briefing to the Attorney General establishing that some of the information at issue is excepted from disclosure under Texas Government Code section 552.104. UTMB and the Attorney General have reviewed Gilead's request and agree to the settlement.

Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

#### **Terms**

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Gilead, the Attorney General, and UTMB have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue, specifically Gilead's pricing information, are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, UTMB will redact: 1) the prices charged by Gilead; and 2) information concerning its pricing method in Gilead's pricing agreements in accordance with the markings agreed to by Attorney General. The Attorney General will provide UTMB with a copy of the information with the agreed redactions highlighted.

2. Gilead, UTMB, and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The agreed

final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor.

3. The Attorney General agrees that he will also notify the requestor, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of his right to intervene to contest Gilead's right to have UTMB withhold the information.

4. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

5. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

6. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

7. Gilead warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that Gilead has against the Attorney General and/or UTMB arising out of the matters described in this Agreement.

8. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against Gilead and/or UTMB arising out of the matters described in this Agreement.

Agreement and fully understands it to be a compromise and settlement and release of all claims that the UTMB has against Gilead and/or the Attorney General arising out of the matters described in this Agreement.

10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

GILEAD SCIENCES, INC.

KEN PAXTON, ATTORNEY GENERAL  
OF TEXAS

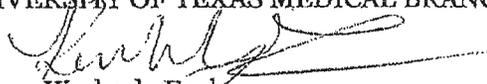
By:   
name: Afton Sarkis-Putyear  
firm: Husch Blackwell L.L.P.

By:   
name: Kimberly Fuchs  
title: Assistant Attorney General,  
Administrative Law Division

Date:

Date: 6/21/16

UNIVERSITY OF TEXAS MEDICAL BRANCH

By:   
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Date: 6/21/16