



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2013

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

OR2013-03521

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# 478798 (CPRIT 2013-20).

The Cancer Prevention & Research Institute of Texas (the "institute") received a request for all e-mails, including attachments, sent to or received by a named individual from September 1, 2012 to the date of the request. You state you will release some of the requested information to the requestor. We understand you have redacted personal information of employees subject to section 552.117 of the Government Code pursuant to section 552.024 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

²Although you raise rule 503 of the Texas Rules of Evidence for a portion of the submitted information, we note section 552.107(1) of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

Initially, you state some of the requested “management due diligence reports” were the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2012-17916 (2012). In that ruling, we held, with the exception of information the institute released under section 102.262(a) of the Health and Safety Code, the institute must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code. In addition, we note portions of the submitted information, which we have marked, were the subject of another previous request for a ruling, in response to which this office issued Open Records Letter No. 2013-02512 (2013). In that ruling, we held the institute may withhold the information at issue under section 552.108(a)(1) on behalf of the Travis County District Attorney’s Office. As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed as to this information, the institute must continue to rely on Open Records Letter Nos. 2012-17916 and 2013-02512 as previous determinations and withhold and release this information in accordance with these rulings. *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 that information is or is not excepted from disclosure). As to the remaining information at issue, we will consider the submitted arguments against disclosure.

Next, we note the institute has redacted e-mail addresses under section 552.137 of the Government Code, pursuant to Open Records Decision No. 684 (2009). This decision acts as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision. This decision, however, does not authorize governmental bodies to withhold e-mail addresses that are subject to section 552.137(c). *See* ORD 684 at 10. We note section 552.137 does not apply to an e-mail address maintained by a governmental entity for one of its officials or employees. Additionally, section 552.137 does not apply to an e-mail address “provided to a governmental body in the course of negotiating the terms of a contract or potential contract[.]” *See* Gov’t Code § 552.137(c)(3). To the extent the e-mail addresses you have redacted and the remaining e-mail addresses in the submitted information are subject to section 552.137(c), the institute may not withhold these e-mail addresses under section 552.137 of the Government Code. To the extent the redacted and remaining e-mail addresses in the submitted information are not subject to section 552.137(c), the institute must withhold this information under section 552.137 of the Government Code, unless the owners of these addresses have affirmatively consented to their release.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 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.

Health & 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). 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 the information you have indicated is confidential under section 102.262(b)(1). The information at issue consists of grant funding applications for cancer research and prevention services, as well as completed intellectual property due diligence and management reports for ApoCell, Inc.; Molecular Templates, Inc.; and Xenex Healthcare Services. You explain the intellectual property due diligence and management reports at issue are “sourced directly from the applicants’ underlying application and /or submitted by the applicant to the lawyer or business expert working on behalf of [the institute].” You state this information outlines the proposed research, its cost, and its commercial and financial implications. You further state the information at issue 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. *See* Health and Safety Code § 102.262(b)(2). However, we note, pursuant to section 102.262(a), any information listed in section 102.262(a) is public information and may be disclosed. *Id.* § 102.262(a). Therefore, with the exception of information that is subject to section 102.262(a), the institute must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety 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. ORD 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. Finally, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 indicated consists of communications between institute employees, institute attorneys, and outside legal counsel for the institute. You state the communications were made for the purpose of facilitating the rendition of legal services to the institute and were intended to be, and have remained, confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications that the institute may generally withhold under section 552.107(1) of the Government Code. We note, however, some of the e-mail strings at issue include e-mails received from or sent to individuals you have not demonstrated are privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, to the extent these non-privileged e-mails, which we have marked, are maintained by the institute separate and apart from the otherwise privileged e-mail strings in which they appear, then the institute may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*.

In *Open Records Decision No. 615*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See ORD 615 at 5*. A governmental body’s policymaking

functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You state some of the remaining submitted information relates to internal communications reflecting the deliberative and policymaking processes of the institute's appointed committee for cancer research. Based upon your representations and our review of the information at issue, we generally agree the remaining information you have marked consists of advice, opinions, and recommendations related to policymaking. Thus, we generally find the remaining information you have marked is excepted from disclosure under section 552.111 of the Government Code and the institute may withhold this information from disclosure on that basis. However, we find some of the information at issue is purely factual in nature. Therefore, you have failed to demonstrate how the deliberative process privilege applies to this information, which we have marked for release. Accordingly, except as we have marked for release, the institute may withhold the information you have marked under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure under the Act]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a

municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(a), (b)(1)–(2). Section 552.116 of the Government Code provides:

(a) An audit, working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Id. § 552.116(a), (b)(1)–(2). You state the information you have indicated consists of audit working papers prepared or maintained by the institute as part of an audit being conducted by the State Auditor’s Office (the “state auditor”). We note the state auditor is the independent auditor for Texas state government. *See generally id.* ch. 321. The state auditor has authority under section 321.013 to conduct audits of all state departments as specified in the audit plan. *Id.* § 321.013(a). We note, however, section 552.116 is intended to protect the auditor’s interests. The information at issue is maintained by the institute, who we understand is the auditee. As the auditee, the institute cannot assert section 552.116 in order to protect its own interest in withholding the information. Thus, section 552.116 is not applicable, and the institute may not withhold any of the information you have indicated under section 552.116 of the Government Code.

In summary, the institute must continue to rely on Open Records Letter Nos. 2012-17916 and 2013-02512 as previous determinations and withhold and release the information at issue in accordance with those rulings. To the extent the redacted e-mail addresses and remaining e-mail addresses in the submitted information are not subject to section 552.137(c), the institute must withhold this information under section 552.137 of the Government Code, unless the owners of these addresses have affirmatively consented to their release. With the exception of information that is subject to section 102.262(a), the institute must withhold the information at issue, which you have indicated, under section 552.101 of the Government Code in conjunction with section 102.262(b) of the Health and Safety Code. The institute may generally withhold the e-mails you have indicated under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mails are maintained by the institute separate and apart from the otherwise privileged e-mail strings in which they appear, then the institute may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Except as we have marked for release, the institute may withhold the remaining information you have marked under section 552.111 of the Government 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,

A handwritten signature in black ink, appearing to read 'Vanessa Burgess', with a long horizontal line extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 478798

Enc. Submitted documents

c: Requestor
(w/o enclosures)