



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 7, 2016

Ms. Jennifer Burnett  
Attorney & Public Information Coordinator  
Office of General Counsel  
The University of Texas System  
201 West 7<sup>th</sup> Street, Suite 600  
Austin, Texas 78701-2901

OR2016-27077

Dear Ms. Burnett:

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# 636940 (UT OGC# 169658).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for all communications between the university and a specified individual and specified foundation.<sup>1</sup> You state you have released some information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>2</sup> Additionally, you state release of the submitted information may

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<sup>1</sup>You state the university sought and received clarification and a narrowing of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Further, you inform us the university sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the university received the required deposit on June 22, 2016. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

<sup>2</sup>We note the university did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because section 552.101 and third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

implicate the proprietary interests of Berkeley Lights (“Berkeley”); Fluidigm Canada, Inc.; Immune Tolerance Network; Memorial Sloan Kettering Cancer Center (“MSK”); Parker Institute for Cancer Immunotherapy (“Parker”); Penn Center for Innovation; PsiOxus Therapeutics Limited (“PsiOxus”); Stanford University; The University of California, San Francisco; and The University of California, Los Angeles. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the submitted 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), .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 Berkeley, MSK, Parker, and PsiOxus. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note you have marked some information as not responsive. This ruling does not address the public availability of the non-responsive information and the university need not release it to the requestor.

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. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in 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 the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we must address Parker’s and MSK’s assertions the request was not a valid request under the Act. Section 552.301(c) of the Government Code provides “a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail for facsimile transmission.” Gov’t Code § 552.301(c). Parker and MSK argue, because the e-mail request was not sent to the university’s officer for public information, or a person designated by that officer, the e-mail

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<sup>3</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.

request was not a proper written request, and therefore did not require the university to respond. *See generally id.* § 552.301 (governmental body's duty to request a ruling from the attorney general arises only after it receives a written request). We note, however, the university did treat the request for information as a proper written request and requested a decision from our office under the Act. Accordingly, we will consider the submitted arguments against disclosure of the submitted information.

Parker and MSK also assert the present request for information is legally defective, unclear, and requires interpretation of a legal question. This office has held a written communication that reasonably can be judged to be a request for public information constitutes a request for information under the Act. *See Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974).* In addition, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989).* Because the university has submitted information for our review, we find the university has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

We also understand MSK claims some of its information may not be disclosed because it was marked "confidential" and, per MSK's agreement with the university, the information is precluded from disclosure. Similarly, Berkeley claims, and provides documentation showing, its information may not be disclosed because it is subject to a non-disclosure agreement. However, we note the information at issue is not confidential under the Act simply because the party that submits the information anticipates or requests it will 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 by 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 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the university must release it, notwithstanding any expectations or agreement specifying otherwise.

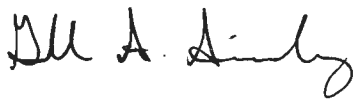
Section 552.104(a) of the Government Code exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at 841. Berkeley, MSK, Parker, and PsiOxus indicate they have competitors. In addition, Berkeley, MSK, Parker, and PsiOxus represent release of their information at issue would give their competitors an advantage. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); *Open Records Decision Nos. 541 at 8*

(1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 841. After review of the information at issue and consideration of the arguments, we find Berkeley, MSK, Parker, and PsiOxus have established release of their information at issue, which we have indicated, would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we indicated under section 552.104(a) of the Government Code.<sup>4</sup> As no other exceptions to disclosure have been raised, 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

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

Ref: ID# 636940

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

10 Third Parties  
(w/o enclosures)