



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 26, 2019

Ms. Jennifer Burnett
Senior Attorney and Public Information Coordinator
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2901

OR2019-11157

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# 762146 (OGC# 189014).

The University of Texas Medical Branch at Galveston (the "university") received a request for information regarding specified agreements with third parties during a specified date range. You claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.151 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of twenty-three third parties.¹ 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 § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits

¹ The third parties are: Altor BioScience Corporation; Applied Biotechnical Institute; Arisan Therapeutics, Inc.; Arno Therapeutics; Boston Children's Hospital ("Boston Children's"); Celdara Medical LLC; Emergent Product Development; Farmak International Holding GmbH; Flow Pharma, Inc.; Giliad Sciences, Inc.; Hokkaido University Research; ImmuneMed; KINETA, Inc.; ModernaTX, Inc. ("Moderna"); Texas Biomedical Research Institute; SNKT LLC ("SNKT"); University of Amsterdam; University of Arizona; University of Hawaii; University of Texas - San Antonio; Vanderbilt University ("Vanderbilt"); Wisconsin Alumni Research Foundation; and Yaso Therapeutics, Inc.

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 Boston Children's, Moderna, SNKT, and Vanderbilt. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 protected proprietary interests 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 interests the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The university, Boston Children's, Moderna, and Vanderbilt state they have specific marketplace interests in the information at issue. The university argues it competes with public and private entities for research funding. The university also states release of the information at issue would allow competing parties to have an unfair advantage over the university in the marketplace for research funding. Boston Children's states release of its information at issue could allow other organizations to gain a financial benefit to the detriment of Boston Children's. Moderna states release of its information at issue would allow competitors to take advantage of Moderna's substantial research investments and give competitors a substantial competitive advantage. Vanderbilt states release of its information at issue would compromise its competitive advantage in the marketplace for research funding by placing details about its licensing agreements in a public forum. After review of the information at issue and consideration of the arguments, we find the university, Boston Children's, Moderna, and Vanderbilt have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information you marked and we marked under section 552.104(a) of the Government Code.²

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Section 552.110 of the Government Code protects (1) trade secrets obtained from a person 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, 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.³ 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 the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to

³The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular 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; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) of the Government Code 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* Open Records Decision No. 661 at 5 (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).

SNKT asserts portions of its remaining information at issue constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude SNKT has failed to establish a *prima facie* case that any portion of its remaining information at issue meets the definition of a trade secret. We further find SNKT has not demonstrated the necessary factors to establish a trade secret claim for its remaining information at issue. *See* ORD 402. Therefore, the university may not withhold any of the remaining information under section 552.110(a) of the Government Code.

SNKT also asserts some of its remaining information at issue is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find SNKT has failed to demonstrate the release of any of its remaining information at issue would result in substantial harm to its competitive position. Accordingly, the university may not withhold any of the remaining information under 552.110(b) of the Government Code.

Section 552.151 of the Government Code provides the following:

(a) The following information that pertains to a biological agent or toxin identified or listed as a select agent under federal law, including under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. L. No. 107-188) and regulations adopted under that Act, is excepted from the requirements of Section 552.021:

(1) the specific location of a select agent within an approved facility;

(2) personal identifying information of an individual whose name appears in documentation relating to the chain of custody of select agents, including a materials transfer agreement; and

(3) the identity of an individual authorized to possess, use, or access a select agent.

...

(c) This section does not except from disclosure the identity of an individual faculty member or employee whose name appears or will appear on published research.

(d) This section does not except from disclosure otherwise public information relating to contracts of a governmental body.

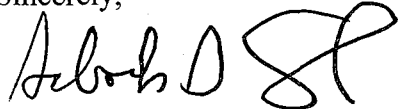
Gov't Code § 552.151(a), (c), (d). You state the biological agent at the locations at issue is identified as a select agent under federal law. *See id.* § 552.151(a). You state portions of the remaining information at issue reveal the specific locations of select agents within approved facilities, personal identifying information of individuals whose names appear in documentation relating to the chains of custody of select agents, and the identities of individuals authorized to possess, use, or access select agents. Upon review, we find you have established section 552.151(a) of the Government Code is applicable to the information at issue. Accordingly, the university must withhold information revealing specific locations of select agents within approved facilities, personal identifying information of individuals whose names appear in documentation relating to the chains of custody of select agents, and the identities of individuals authorized to possess, use, or access select agents under section 552.151(a) of the Government Code.

In summary, the university may withhold the information you marked and we marked under section 552.104(a) of the Government Code. The university must withhold information revealing specific locations of select agents within approved facilities, personal identifying information of individuals whose names appear in documentation relating to the chains of custody of select agents, and the identities of individuals authorized to possess, use, or access select agents under section 552.151(a) of the Government Code. The university must release the remaining 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.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,

A handwritten signature in black ink, appearing to read "Deborah Southerland". The signature is fluid and cursive, with the first name "Deborah" written in a larger, more prominent script than the last name "Southerland".

Deborah Southerland
Attorney
Open Records Division

DS/gw

Ref: ID# 762146

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 23 Third Parties
(w/o enclosures)