



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2010

Ms. Katherine R. Fite
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2010-05999

Dear Ms. Fite:

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# 377315.

The Office of the Governor (the "governor") received a request for all e-mails of a named individual for the seven days preceding the request. You state that the governor will release some of the requested information. You claim that some of the submitted information is exempted from disclosure under sections 552.101, 552.104, 552.110, 552.111, and 552.131 of the Government Code.¹ You state that pursuant to section 552.305 of the Government Code, you have notified the Office of the Lieutenant Governor (the "lieutenant governor") and the Office of State and Federal Relations (the "OSFR") 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*

¹You inform us that you are withdrawing your request for a ruling with respect to the information submitted as Exhibits B, C, D, and E. We understand the governor is releasing this information to the requestor. Thus, our ruling does not address Exhibits B, C, D, or E. Accordingly, we need not address your arguments under sections 552.103 and 552.107 of the Government Code and the privileges under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence.

circumstances). We have considered the exceptions you claim and reviewed the submitted information.

You inform us that the requestor agreed to the redaction of personal e-mail addresses and "passcodes." Thus, any such information in the submitted documents is not responsive to the present request, and it need not be released.

Next, we must address the governor's procedural obligations under the Act. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You inform us that the governor received the present request for information on February 3, 2010. Thus, the governor's ten-business-day deadline under section 552.301(b) was February 18, 2010.² However, you did not request a ruling from this office until February 19, 2010. Thus, the governor has failed to comply with the requirements of section 552.301.

A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You claim the information submitted as Exhibits F and G is excepted from disclosure under sections 552.104, 552.111, and 552.131(b) of the Government Code. These sections are discretionary exceptions to disclosure that a governmental body may waive. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the governor may not withhold any of the responsive information under sections 552.104, 552.111, or 552.131(b) of the Government Code. However sections 552.101 and 552.110 of the Government Code can provide compelling reasons for non-disclosure; therefore, we will consider the governor's arguments under these exceptions.

²You inform us that February 15, 2010 was a skeleton crew day for the governor. This office does not count holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadlines under the Act.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the lieutenant governor and the OSFR have not submitted comments to this office explaining why any portion of the submitted information relating to them should not be released to the requestor. Therefore, the lieutenant governor and the OSFR have failed to provide us with any basis to conclude that they have an interest in the submitted information. Therefore, none of the information at issue may be withheld on their behalf.

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 exception encompasses information that other statutes make confidential. Section 490.057 of the Government Code addresses the confidentiality of certain information pertaining to the Emerging Technology Fund (the "fund"). Section 490.057 provides as follows:

Information collected by the governor's office, the [Texas Emerging Technology Advisory C]ommittee, or the committee's advisory panels concerning the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an individual or entity being considered for an award from the fund is confidential unless the individual or entity consents to disclosure of the information.

Id. § 490.057. You indicate that Exhibits F and G concern the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of entities being considered for an award. You state that the governor has not received consent to disclose the information at issue. Based upon these representations and our review, we agree that Exhibit G and the information we have marked in Exhibit F concerns the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an entity considered for an award from the fund. Therefore, that information is confidential under section 490.057 of the Government Code and must be withheld from public disclosure under section 552.101 of the Government Code. However, we find you have failed to demonstrate that the remaining information in Exhibit F concerns the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an entity considered for an award from the fund. Therefore, the governor may not withhold any of the remaining information in Exhibit F under section 552.101 in conjunction with section 490.057.

Next, you raise section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and (2) "commercial or financial information for which it is demonstrated based on specific

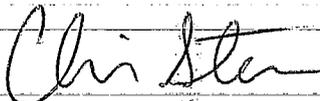
factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” *Id.* § 552.110(a)-(b). We note, however, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the governor’s argument under section 552.110 for the submitted information. Therefore, the governor may not withhold any of the submitted information under section 552.110 of the Government Code.

In summary, the governor must withhold Exhibit G and the information we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with section 490.057 of the Government Code. The governor must release the remaining information at issue to the requestor.

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 377315

Enc. Submitted documents

c: Requestor
(w/o enclosures)