



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 16, 2010

Mr. Mark Adams  
Office of the General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2010-08748

Dear Mr. Adams:

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# 384294.

The Office of the Governor (the "governor") received a request for all grant applications and other documents pertaining to ScanTech Sciences, Inc., ScanTech Holdings, LLC, or related entities (collectively, "ScanTech") regarding the Texas Emerging Technology Fund Grant (the "fund"). You state the governor has provided some of the requested information to the requestor. You claim some of the submitted grant application information is excepted from disclosure under section 552.101 of the Government Code. You also state release of the remaining submitted information may implicate the proprietary interests of ScanTech. Thus, pursuant to section 552.305 of the Government Code, you notified ScanTech of the request and of its right to submit arguments to this office as to why its information should not be released. 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 to disclosure in certain circumstances). We have received comments from ScanTech. We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes, such as section 490.057 of the Government Code, which addresses the confidentiality of certain information pertaining to the fund. Section 490.057 provides:

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 state the information you have marked in Exhibit C and the information submitted as Exhibit D concerns the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of ScanTech, which was being considered for an award from the fund. You inform us ScanTech has not consented to disclosure of the information at issue in Exhibits C and D. Based upon your representations and our review, we find the marked information in Exhibit C and the entirety of Exhibit D concerns the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an entity being considered for an award from the fund. Therefore, this information is confidential under section 490.057 of the Government Code and must be withheld under section 552.101 of the Government Code. As you have not claimed any other exceptions to disclosure for the remaining information in Exhibit C, that information must be released.

You also state portions of Exhibit E, which consists of ScanTech's application information submitted to the governor, may be confidential under section 490.057. You have not, however, provided any arguments in support of this assertion because you contend ScanTech is in a better position to argue for the withholding of its information in Exhibit E. In this instance, ScanTech has not asserted a claim under section 490.057 or provided specific arguments to support any such claim. Thus, no part of Exhibit E may be withheld under section 552.101 of the Government Code in conjunction with section 490.057 of the Government Code.

ScanTech asserts the W-9 forms submitted in Exhibit E are confidential under section 6103(a) of title 26 of the United States Code, which is also encompassed by section 552.101 of the Government Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), dismissed in part, *aff'd* in part, vacated in part, and remanded, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). W-9 forms are requests for taxpayer identification numbers,

and do not fall within the definition of "tax return information." As such, the governor may not withhold the W-9 forms in Exhibit E under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision No. 545 (1990). ScanTech claims an apartment rental agreement in Exhibit E is protected by common-law privacy. The rental agreement is between an individual and the apartment leasing company. We find the financial aspects of the rental agreement, which we have marked, constitute personal financial information of an individual and are of no legitimate public concern. Accordingly, the governor must withhold the marked financial information under section 552.101 of the Government Code in conjunction with common-law privacy. ScanTech has failed to demonstrate the remaining information in the rental agreement is highly intimate or embarrassing. Consequently, none of this information may be withheld under common-law privacy. As no other exceptions to disclosure have been claimed for this information, it must be released.

ScanTech claims specified portions of the remaining grant application information in Exhibit E are excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure 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." 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 a "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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument 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 establish a trade secret claim.<sup>1</sup> Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); Open Records Decision No. 661 at 5-6 (1999).

ScanTech claims certain parts of its grant application information pertaining to the company's business plan, financial information, marketing presentation, investment information, project milestones, and potential customers constitute trade secrets under section 552.110(a). The list of potential customers ScanTech claims is a trade secret consists of fruit and vegetable distributors in a particular region ScanTech believes could benefit from the use of its product. ScanTech has not explained, or otherwise demonstrated, any of the companies on the list of potential customers are actual ScanTech customers. Thus, we find ScanTech has failed to demonstrate the list of potential customers it seeks to withhold meets

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<sup>1</sup>The 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 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 [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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the definition of a trade secret. ScanTech explains the remaining information it seeks to withhold details the company's proposed structure and strategic business plans for the project at issue. Based on ScanTech's explanation the information is specific to the project at issue, we find ScanTech has failed to demonstrate the remaining information it seeks to withhold, including organization and personnel information, market studies, and pricing, meets the definition of a trade secret. See RESTATEMENT OF TORTS § 757 cmt. b (1939) (trade secret "is not simply information as to a single or ephemeral event in the conduct of the business"); Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the governor may not withhold any of the information ScanTech seeks to withhold under section 552.110(a) of the Government Code.

ScanTech also indicates the release of its information could deter vendors such as ScanTech from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, ScanTech appears to rely 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*. See also *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). 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 to be applied and requires a specific factual demonstration the 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) of the Government Code by Seventy-sixth Legislature). 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, we will consider only ScanTech's interests in its information.

ScanTech also claims the information it seeks to withhold constitutes commercial information that, if released, would cause it substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find ScanTech has established release of some of its information in Exhibit E would cause it substantial competitive injury. Therefore, the governor must withhold this information, which we have marked, under section 552.110(b). We find, however, ScanTech has made only general conclusory assertions that release of the remaining information it seeks to withhold would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. See Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too

speculative), 319 at 3. Therefore, the governor may not withhold any of ScanTech's remaining information at issue under section 552.110(b) of the Government Code.

Section 552.131(a) of the Government Code is applicable to economic development information and provides:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

Gov't Code § 552.131(a). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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.* Thus, the protection provided by section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6, 552 at 5. As previously stated, ScanTech has failed to demonstrate any portion of its information at issue meets the definition of a trade secret, and ScanTech has provided no specific factual or evidentiary showing release of its remaining information at issue would cause the company substantial competitive injury. Consequently, the governor may not withhold any of the information at issue under section 552.131 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137(c)(2) states an e-mail address "provided to a governmental body by a vendor who seeks to contract with the governmental body" is not excepted from public disclosure. *Id.* § 552.137(c)(2). ScanTech claims the e-mail addresses in the remaining information in Exhibit E are excepted under section 552.137. In this instance, however, the e-mail addresses were provided to the governor by a company that sought to contract with the governor, and are, thus, specifically excluded by section 552.137(c)(2). As such, none of the e-mail addresses may be withheld under section 552.137 of the Government Code.

We note the remaining information in Exhibit E contains a copy of a temporary Texas driver's license. Section 552.130 of the Government Code provides information relating to

a motor vehicle operator's or driver's license or permit issued by a Texas agency is excepted from public release.<sup>2</sup> *Id.* § 552.130(a)(1). Accordingly, the governor must withhold the Texas driver's license information we have marked pursuant to section 552.130 of the Government Code.

The remaining information in Exhibit E contains bank account and routing numbers. Section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. We find the bank account and routing numbers at issue constitute access device numbers for purposes of section 552.136. Thus, the governor must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

Finally, we note some of the remaining information in Exhibit E appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the remaining information must be released in accordance with copyright law.

In summary, the governor must withhold the marked information in Exhibit C and the entirety of Exhibit D under section 552.101 of the Government Code in conjunction with section 490.057 of the Government Code; the marked financial information in Exhibit E under section 552.101 of the Government Code in conjunction with common-law privacy; the marked information in Exhibit E under section 552.110(b) of the Government Code; the marked Texas driver's license information in Exhibit E under section 552.130 of the Government Code; and the marked bank account and routing numbers in Exhibit E under section 552.136 of the Government Code.<sup>3</sup> The remaining information must be released in accordance with copyright law.

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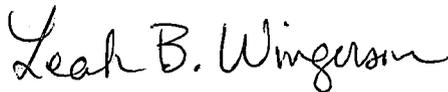
<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a copy of a Texas driver's license under section 552.130 of the Government Code and bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 384294

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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