



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 11, 2011

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

OR2011-00549

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# 405548 (OOG# Copelin 397-10).

The Office of the Governor (the "governor") received a request for the summary report on Convergen LifeSciences, Inc. ("Convergen") prepared by the governor's staff for review by the governor, lieutenant governor, or speaker. You state that some of the requested information has been provided to the requestor. Although you take no position with respect to the public availability of the remaining information, you state it may contain proprietary information subject to exception under the Act. Accordingly, the governor notified Convergen of the request for information and of its right to submit arguments to this office as to why the information at issue 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 circumstances). Convergen has responded to this notice. We have considered Convergen's arguments and reviewed the submitted information.

Initially, we note Convergen asserts the information is confidential because its documents were marked as such when they were submitted to the governor. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it 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 through an 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 does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Convergen claims its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 490.057 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses section 490.057 of the Government Code, which addresses the confidentiality of certain information pertaining to the Texas 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. Convergen indicates it has not given consent to the governor to disclose the information at issue and argues the information it has marked in the submitted documents concerns the identity, background, finance, marketing plans, trade secrets, and other commercially or academically sensitive information of an entity being considered for an award from the fund. We note, however, that section 490.057 applies only to an entity "being considered for an award from the fund." *Id.* Because Convergen received an award of funds and is no longer being considered for an award from the fund, section 490.057 no longer applies to the submitted information. Therefore, none of the information Convergen marked is confidential under section 490.057 of the Government Code, and the governor may not withhold it from public disclosure on that basis.

Convergen also claims section 552.110(b) of the Government Code, which 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).

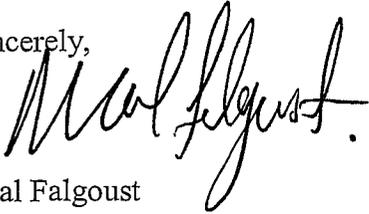
Upon review, we find Convergen has established release of the information we have marked would cause it substantial competitive injury. However, we find Convergen has made only conclusory allegations that release of the remaining information would result in substantial harm to its competitive position and has provided no specific factual or evidentiary showing to support such allegations. See ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual

evidence that substantial competitive injury would result from release of particular information at issue); *see also* 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). Accordingly, the governor must withhold the information we have marked under section 552.110(b) 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](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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/dls

Ref: ID# 405548

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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