



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 11, 2011

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

OR2011-00560

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# 405549 (OOG # Copelin 400-10).

The Office of the Governor (the "governor") received a request for all written communications between two named individuals from January 1, 2010 through August 31, 2010. Although you take no position on whether the submitted information is excepted from disclosure, you state that release of this information may implicate the proprietary interests of Convergen LifeSciences, Inc. ("Convergen"). Accordingly, you inform us that you notified Convergen of the request and of the company's right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Convergen. We have considered the submitted arguments and reviewed the submitted information.

Convergen claims portions of the submitted information are 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 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 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 raises section 552.110 of the Government Code for some of the submitted information. Section 552.110 protects: (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *Id.* § 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

The following are the six factors that the Restatement gives 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.

Id.; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) 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.*; Open Records Decision No. 661 (1999).

Upon review, we find Convergen has established release of the information we have marked would cause it substantial competitive injury. Therefore, the governor must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Convergen has made only conclusory allegations that release of the remaining information at issue 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). Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code. Furthermore, we conclude Convergen has not demonstrated any of the remaining information it has marked consists of trade secrets. Consequently, the governor may not withhold any of the remaining information under section 552.110(a) of the Government Code. As no further exceptions to disclosure have been raised, the remaining information must be released 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/tf

Ref: ID# 405549

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Rodney Varner
Wilson & Varner, LLP
7004 Bee Cave Road
Building 1, Suite 100
Austin, Texas 78746
(w/o enclosures)