



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2011

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

OR2011-01569

Dear Ms. Buchholtz:

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# 407812.

The Office of the Governor (the "governor") received a request for (1) a list of recipients recommended by the Texas Life Science Center board of directors that received final approval for funding from the Emerging Technology Fund (the "ETF"); (2) information pertaining to by-laws and conflict of interest policies for the eight Centers of Innovation and Commercialization ("CICs"); (3) disclosures by and other information pertaining to members of CIC boards of directors; and (4) minutes of the boards of directors and review committee. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of a third party. Accordingly, you state you notified the third party of the request for information and of its 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 circumstances).* We have received comments from Innovate El Paso ("Innovate").¹ We have considered the submitted comments and reviewed the submitted information.

¹Innovate states it was formerly known as the TransPecos/El Paso Regional Center for Innovation and Commercialization.

Initially, we note you have not submitted information responsive to categories one through three of the request for information. To the extent any information responsive to these portions of the request existed on the date the governor received the request, we assume the governor has released it. If the governor has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the governor's obligations under section 552.301 of the Government Code, which prescribes the procedures 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). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). You state the governor received the request for information on September 17, 2010. Accordingly, you were required to request a decision from this office by October 1, 2010, and to submit the information required by section 552.301(e) by October 8, 2010. However, you did not request a ruling from this office or submit the required information until November 23, 2010. Accordingly, we conclude the governor failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural 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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision Nos. 630 (1994), 586 (1991), 319 (1982). This office has held a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). Because third-party interests are at stake, we will address the arguments provided to this office by Innovate for the submitted information.

Innovate argues portions of its information are excepted from disclosure under section 552.110 of the Government Code. 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.*; *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).

Innovate argues because it has not concluded any agreement with any of the business prospects it has indicated, release of information pertaining to the identities of the business prospects would cause harm to Innovate. Innovate explains if the information at issue were released, other governmental entities would make offers to the same business prospects, thus encouraging these companies to take their business elsewhere. Thus, Innovate argues release of the information would interfere with its ability to attract businesses to Texas locations. Based on these arguments and our review of the submitted information, we find Innovate has demonstrated portions of the information it has indicated, which we have marked, constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the governor must withhold the information we have marked under section 552.110(b) of the Government Code.² However, we find Innovate has not demonstrated the remaining information it has indicated, which pertains to an individual being considered for the selection committee, constitutes commercial or financial information, the release of which would cause Innovate substantial competitive injury. Thus, the governor may not withhold the remaining information Innovate has indicated under section 552.110(b).

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 ETF. Section 490.057 provides:

Information collected by the governor’s office, the ETF committee, 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. The governor informs us Innovate is contracted with the governor to act as the El Paso/Trans Pecos Regional CIC. The governor explains pursuant to this contract and

²As our ruling is dispositive with respect to this information, we need not address Innovate’s remaining arguments against its disclosure.

section 490.153(b) of the Government Code, Innovate receives support funding from the ETF. The governor further explains Innovate is responsible for working with potential applicants and recommending applications to the ETF's advisory committee. *See id.* 490.152(c). Thus, the governor explains Innovate's functions include identification, review, and counseling of companies leading up to a formal ETF application. Innovate states the remaining information it has indicated reveals the identity, background, finances, marketing plans, or trade secrets of an entity being considered for an award for the fund. Upon review, we find Innovate has failed to demonstrate how an individual being considered for a position on the selection committee consists of information of an individual or entity being considered for an award from the ETF. Accordingly, the governor may not withhold the remaining information under section 552.101 in conjunction with section 490.057 of the Government Code.

Next, we address Innovate's contention its remaining information is excepted from disclosure by section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Id. § 552.131. 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.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). We note Innovate does not argue any of the information constitutes a trade secret for these purposes. Because we have already disposed of Innovate's claims under section 552.110, the governor may not withhold the remaining information under section 552.131(a) of the Government Code. Furthermore, we note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the governor does not assert

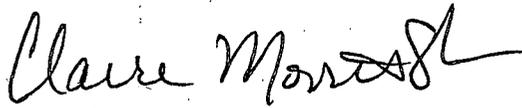
section 552.131(b) as an exception to disclosure, we conclude no portion of the remaining information is excepted under section 552.131(b) of the Government Code.

In summary, 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, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 407812

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Monica D. Cunningham
Kemp Smith LLP
816 Congress Avenue, Suite 1150
Austin, Texas 78701-2443
(w/o enclosures)