



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 23, 2011

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

OR2011-02709

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# 409898.

The Office of the Governor (the "governor") received a request for telephone logs for three named individuals for the past year and e-mails, notes, or memoranda concerning two other named individuals sent or received in the past year. You state the governor will provide some responsive information to the requestor and the remaining responsive information has been submitted to this office. You claim the information submitted in Exhibits B and C is excepted from disclosure under section 552.111 of the Government Code. Although you take no position with respect to the public availability of the information submitted in Exhibit D, you state its release may implicate the proprietary interests of Convergen LifeSciences, Inc. ("Convergen"). Accordingly, you state the governor notified Convergen of the request for information and of its right to submit arguments to this office as to why its 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 Convergen. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information consists of an e-mail and attachments that were sent on November 11, 2009. The requestor limits his request, however, to those e-mails sent or received "during the last year" from the date of the request. You state the request was received by the governor on December 3, 2010. Thus, because the e-mail at issue was sent and received before December 3, 2009, it is not responsive to the request.

This decision does not address the public availability of the non-responsive information, and the e-mail and attachments we marked need not be released.

Next, we note some of the submitted information, which we have marked, was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2011-00565 (2011), 2011-00560 (2011), and 2011-00549 (2011). In those rulings, this office determined the governor must withhold certain information under section 552.110(b) of the Government Code. As we have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based, the governor must rely on Open Records Letter Nos. 2011-00565, 2011-00560, and 2011-00549 as previous determinations and continue to withhold the information that was ordered withheld in those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). The remaining information at issue in Open Records Letter Nos. 2011-00565, 2011-00560, and 2011-00549 was ordered released. That information is now the subject of pending litigation styled *Convergen LifeSciences, Inc. v. Hon. Greg Abbott, Attorney General of Tex., & Hon. Rick Perry, Gov. of Tex.*, No. D-1-GN-11-000246 (419th Dist. Ct., Travis County, Tex.). We do not address the public availability of the information that is currently the subject of that litigation, and will allow the trial court to determine whether and to what extent such information must be released to the public. We consider your claims, however, for the information that was not at issue in Open Records Letter Nos. 2011-00565, 2011-00560, and 2011-00549.

You claim the information in Exhibits B and C is excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22

S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state Exhibit B consists of notes taken by governor employees in furtherance of the governor's evaluation of Convergen's application for the Texas Emerging Technology Fund (the "ETF"). We understand the ETF is administered by the governor as a means of strategic investment in private sector businesses, as part of the governor's policy to encourage job creation and economic growth in Texas. You represent these notes reflect the employees' deliberations with respect to policies and strategies used in evaluating Convergen's ETF application. Thus, based on your representations and our review, we agree Exhibit B consists of the advice, opinion, or recommendation of governor employees regarding its policymaking process. You state Exhibit C contains the preliminary draft of a policymaking document that has been released in its final form. You explain the document is a draft of a contract between Convergen and the governor that was drafted by a governor employee. You state this draft represents the advice, opinion, and recommendation of the governor with respect to the final contract with Convergen. Therefore, based on your representations and our review, we find the governor may withhold Exhibits B and C under section 552.111 of the Government Code.

Convergen claims information submitted in Exhibit D 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 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 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 all the information in Exhibit D was collected by the governor or the ETF advisory committee. Convergen also claims the information concerns the identity, background, finance, marketing plans, trade secrets, and other commercially or academically sensitive information. 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 in Exhibit D 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.

We note portions of the remaining information are subject to section 552.136 of the Government Code.<sup>1</sup> Section 552.136 provides “[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.” Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). Thus, the governor must withhold the bank account and routing numbers and wire transfer number we marked under section 552.136.

The remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 provides “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We marked e-mail addresses that are not of the types specifically excluded by section 552.137(c). Accordingly, the governor must withhold the marked e-mail addresses under section 552.137, unless the owners of the e-mail addresses consent to their disclosure.

In summary, the governor must rely on Open Records Letter Nos. 2011-00565, 2011-00560, and 2011-00549 as previous determinations and withhold the information that was determined to be confidential in accordance with those rulings. This ruling does not address the information that was ordered released in Open Records Letter Nos. 2011-00565, 2011-00560, and 2011-00549, pending the trial court’s determination of whether and to what extent such information must be released. The governor may withhold Exhibits B and C under section 552.111 of the Government Code. From Exhibit D, the governor must withhold (1) the information we marked under section 552.110(b) of the Government Code; (2) the bank account and routing numbers and wire transfer number we marked under section 552.136 of the Government Code; and (3) the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the marked e-

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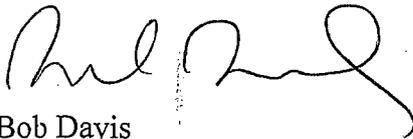
<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

mail addresses consent to their release.<sup>2</sup> The governor must release the remaining responsive information.

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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/tf

Ref: ID# 409898

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.