



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2011

Mr. Christopher Sterner
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2011-16564

Dear Mr. Sterner:

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# 435723 (ORR# 338-11).

The Office of the Governor (the "governor") received a request for the annual report of Convergen LifeSciences, Inc. ("Convergen") that was due on August 15, 2011 as part of Convergen's obligations to the Texas Emergency Technology Fund (the "fund"). You do not take a position as to whether the submitted information is excepted from disclosure under the Act. However, in correspondence to this office, Convergen asserts some of the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 reviewed the submitted arguments and 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." This section encompasses information protected by other statutes. Section 490.057 of the Government Code addresses the confidentiality of certain information pertaining to the fund. *See* Act of May 30, 2011, 82nd Leg., R.S., H.B. 2457, § 9 (to be codified as an amendment to Gov't Code § 490.057). *See generally* Act of May 30, 2011, 82nd Leg., R.S., H.B. 2457,

§ 10 (to be codified as an amendment to Gov't Code § 490.101); Gov't Code §§ 490.102-.103. Section 490.057 provides:

(a) Except as provided by Subsection (b), information collected by the governor's office, the [Texas Emerging Technology Advisory Committee (the "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, receiving, or having received an award from the fund is confidential unless the individual or entity consents to disclosure of the information.

(b) The following information collected by the governor's office, the committee, or the committee's advisory panels under this chapter is public information and may be disclosed under [the Act]:

(1) the name and address of an individual or entity receiving or having received an award from the fund;

(2) the amount of funding received by an award recipient;

(3) a brief description of the project that is funded under this chapter;

(4) if applicable, a brief description of the equity position that the governor, on behalf of the state, has taken in an entity that has received an award from the fund; and

(5) any other information designated by the committee with the consent of:

(A) the individual or entity receiving or having received an award from the fund, as applicable;

(B) the governor;

(C) the lieutenant governor; and

(D) the speaker of the house of representatives.

Act of May 30, 2011, 82nd Leg., R.S., H.B. 2457, § 9 (to be codified as an amendment to Gov't Code § 490.057). As noted above, the governor does not assert any of the submitted information is excepted from disclosure under the Act. Nevertheless, Convergen argues the

submitted information was collected by the governor or the committee. Convergen also claims some of the submitted information concerns its identity, background, finance, marketing plans, trade secrets, and other commercially or academically sensitive information and, therefore, is confidential under section 490.057 and must be withheld from release pursuant to section 552.101 of the Government Code.

Some of the information Convergen seeks to withhold consists of the amount of funding Convergen received from the fund. This information is public under section 490.057(b)(2); therefore, the governor may not withhold it under section 490.057(a). *See id.* § 490.057(b). The governor must release this information to the requestor. In addition, Convergen has made some of the information it seeks to withhold publicly available on its website. Because Convergen itself published this information, we find Convergen has consented to its disclosure and, thus, this information is also not confidential under section 490.057(a). *See id.* Upon review, we find Convergen has established the remaining information it seeks to withhold consists of Convergen's financial or commercially sensitive information. Convergen indicates it has not consented to disclosure of this information. Therefore, the governor must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 490.057(a). Convergen also asserts the information noted above that it published on its website is excepted from disclosure under section 552.110 of the Government Code. Thus, we will address Convergen's arguments for this information under section 552.110.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 1958); *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.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See Open Records Decision No. 402 (1983)*.

Section 552.110(b) excepts from disclosure “[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). 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 requested information. *See Open Records Decision No. 661 at 5-6 (1999)* (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

As noted, Convergen seeks to withhold under section 552.110 information that Convergen itself made publicly available on its website. However, because Convergen itself published this information, we are unable to conclude such information is proprietary. Thus, Convergen has not established this information is excepted from disclosure under section 552.110 and the governor may not withhold it from release on that ground. Accordingly, as Convergen makes no further arguments to withhold this information under the Act, the governor must release this information to the requestor.

To conclude, the governor must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 490.057(a) of the Government Code. The governor must release the remaining 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.

¹The 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. RESTATEMENT OF TORTS § 757 cmt. b; *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 435723

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Rodney Varner
For Convergen LifeSciences, Inc
Wilson & Varner, L.L.P.
7004 Bee Caves Road
Austin, Texas 78746
(w/o enclosures)