



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 11, 2012

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

OR2011-18322A

Dear Mr. Davis:

This office issued Open Records Letter No. 2011-18322 (2011) on December 13, 2011. We have examined this ruling and determined Open Records Letter No. 2011-18322 is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2011-18322. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

The Office of the Governor (the "governor") received a request for the following information on the companies in Bexar County that have received funding from the Texas Emerging Technology Fund ("ETF"): (1) the ETF application and any attachments for each company, (2) the governor's Executive Summary on each company, and (3) the governor's synopsis on each company. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you believe release of the requested information may implicate the interests of third parties. Accordingly, you state the governor notified the third parties of the request for information and of their right to submit arguments stating why their information should not be released.<sup>1</sup> *See id.* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining

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<sup>1</sup>The third parties notified pursuant to section 552.305 are: AdviTech, Inc. ("AdviTech"); Azaya Therapeutics, Inc. ("Azaya"); Bauhause Software, Inc. ("Bauhause"); Bi02 Medical, Inc. ("Bi02"); CardioSpectra, Inc. ("CardioSpectra"); Corhythm, Inc. ("Corhythm"); Diabetica Solutions, Inc. ("Diabetica") (formerly Xilas Medical); Enthuze, Inc. ("Enthuze"); Fe3 Medical, Inc. ("Fe3") (formerly Fe2, Inc.); Neurolink, Inc. ("Neurolink"); Pronucleotein Biotechnologies, LLC ("Pronucleotein"); Seno Medical Instruments, Inc. ("Seno"); Speer Medical Devices, Inc. ("Speer"); and ViroXis Corporation ("ViroXis").

statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the exception you claim and reviewed the submitted information. We have also received and considered arguments submitted by attorneys for Bi02, Corhythm, Fe3, Neurolink, Seno, Speer, and ViroXis.

Initially, you state a majority of the information was the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-04769 (2008) and 2011-04665A (2011). In Open Records Letter No. 2008-04769 we determined, among other things, the governor must withhold Bauhause's information we marked under section 552.110(b) of the Government Code. In Open Records Letter No. 2011-04665A we determined, among other things: (1) the governor must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the governor may withhold Speer's information the governor marked under section 552.104 of the Government Code; (3) the governor must withhold the information we marked under section 552.110(b) of the Government Code; and (4) the governor could not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 490.057 of the Government Code. As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed as to the information subject to section 552.101 in conjunction with common-law privacy, or section 552.110 of the Government Code, the governor must continue to rely on Open Records Letter Nos. 2008-04769 and 2011-04665A with respect to the information subject to section 552.101 in conjunction with common-law privacy and section 552.110 as previous determinations and withhold the information at issue in accordance with 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). However, you state section 552.104 no longer applies to Speer's information because the negotiations at issue have ended and Speer has received an ETF award. As such, you no longer object to disclosure of Speer's information on the basis of section 552.104. Therefore, the circumstances have changed and the governor may not rely on Open Records Letter No. 2011-04665A as a previous determination as to Speer's information. *See id.* Accordingly, we will consider Speer's submitted arguments against disclosure of its information. Additionally, you inform us section 490.057 of the Government Code has been amended since the issuance of the previous ruling. As such, because the law affecting the submitted information has changed, we agree the governor may not rely upon our previous ruling as a previous determination with regard to our analysis under section 490.057, and we will therefore address the submitted arguments under section 490.057 for the remaining 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." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 490.057 of the Government Code addresses the confidentiality of certain information

pertaining to the ETF. *Id.* § 490.057. See generally *id.* §§ 490.101, .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.

*Id.* § 490.057. You explain the submitted information was collected by the governor or the committee. Additionally, you state each of the third parties has received an ETF award and has not consented to release of their information. You contend the submitted information concerns the identity, background, finance, marketing plans, trade secrets, and other commercially or academically sensitive information of each of the third parties and,

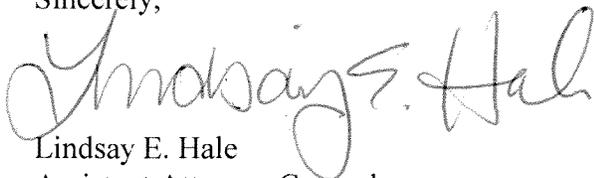
therefore, is confidential under section 490.057 and must be withheld from release pursuant to section 552.101 of the Government Code. Based upon the governor's representations and our review, we find the submitted information is subject to section 490.057 of the Government Code. However, we note that any information listed in section 490.057(b) is public information and must be released. Therefore, with the exception of information that is subject to public release under section 490.057(b), we conclude the governor must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 490.057(a).<sup>2</sup>

In summary, with respect to the information subject to section 552.101 of the Government Code in conjunction with common-law privacy and the information subject to section 552.110(b) of the Government Code, the governor must continue to rely on Open Records Letter Nos. 2008-04769 and 2011-04665A as previous determinations and withhold that information in accordance with the prior rulings. With the exception of information subject to public release under section 490.057(b) of the Government Code, the governor must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 490.057(a) of the Government Code. The governor must release the information subject to section 490.057(b) of the Government Code.

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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining submitted arguments against disclosure of this information, except to note that general exceptions to disclosure under the Act, such as section 552.110 of the Government Code, do not apply to information made public by other statutes. *See, e.g.*, Open Records Decision No. 623 at 3 (1994) (exceptions in Act inapplicable to information statutes expressly made public).

Ref: ID# 438702

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Enthuze, Inc.  
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(w/o enclosures)

Diabetica Solutions, Inc.  
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AdviTech, Inc.  
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Pronucleotein Biotechnologies, L.L.C.  
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Azaya Therapeutics, Inc.  
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