



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 27, 2012

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

OR2012-02991

Dear Mr. Davis:

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# 446554 (OOG ID# 701-11).

The Office of the Governor (the "governor's office") received a request for information related to fees paid and loans awarded to seven specified entities.<sup>1</sup> You state most of the responsive information has been released. You claim some of the submitted information either is or may be excepted from disclosure under section 552.101 of the Government Code. You also believe this request for information may implicate the interests of the Edinburg Economic Development Corporation ("Edinburg"); the City of Fulshear 4A Development Corporation ("Fulshear"); the Kennedale Economic Development Corporation ("Kennedale"); S&S Industries, Inc. ("S&S"); SEMATECH, Inc. ("SEMATECH"); and Texas Biomedical Research Institute ("TBRI").<sup>2</sup> We received correspondence from S&S and

---

<sup>1</sup>You inform us, and have provided documentation confirming, the requestor narrowed and clarified the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

<sup>2</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

SEMATECH. We have considered all the submitted arguments and reviewed the submitted information.<sup>3</sup>

We first note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Edinburg, Fulshear, and Kennedale have not submitted arguments to this office. Moreover, you inform us TBRI has notified the governor's office that TBRI does not object to release of the submitted information pertaining to TBRI. Therefore, because Edinburg, Fulshear, Kennedale, and TBRI have not demonstrated any of the submitted information is proprietary for purposes of the Act, the governor's office may not withhold any of the information at issue on the basis of any interest Edinburg, Fulshear, Kennedale, or TBRI may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Both S&S and SEMATECH claim section 552.110 of the Government Code, which protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" 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." Gov't Code § 552.110(a)-(b).

The Supreme Court of Texas has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . 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.

---

<sup>3</sup>We note both S&S and SEMATECH have submitted information they contend the governor's office should withhold from the requestor. This decision is applicable only to the information the governor's office submitted to this office in connection with its request for the decision. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must submit specific information at issue or representative samples if information is voluminous).

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.<sup>4</sup> *See* ORD 552 at 5. We cannot conclude section 552.110(a) is applicable, however, 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) 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. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause substantial competitive harm).

S&S generally claims section 552.110(b) of the Government Code but has submitted no arguments explaining how or why section 552.110(b) is applicable to any of the information pertaining to S&S. Therefore, because S&S has not made the required factual or evidentiary showing that release of any of the information at issue would cause S&S substantial competitive harm, we conclude the governor's office may not withhold any of the submitted information pertaining to S&S under section 552.110(b) of the Government Code.

SEMATECH claims section 552.110(a) for all of the submitted information pertaining to SEMATECH. We note a trade secret "is not simply information as to single or ephemeral events in the conduct of [a] business[.]" RESTATEMENT OF TORTS § 757 cmt. b. Having considered SEMATECH's arguments, we find SEMATECH has not established any of the information at issue falls within the definition of a trade secret for purposes of section 552.110(a). SEMATECH also claims section 552.110(b) for some of the information pertaining to SEMATECH. We find SEMATECH has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information at issue would cause SEMATECH substantial competitive harm. We therefore conclude the governor's office may not withhold any of the submitted information pertaining to

---

<sup>4</sup>The Restatement of Torts lists the following six factors 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 other 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 (1939); *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

SEMATECH under section 552.110 of the Government Code. See Gov't Code § 552.110(a)-(b); ORD 552 at 5, 661 at 5-6.

Next, we address the claims of the governor's office, S&S, and SEMATECH under section 552.101 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, and encompasses information other statutes make confidential. Both the governor's office and S&S raise section 552.101 in conjunction with section 6103 of title 26 of the United States Code, which makes federal tax return information confidential. See Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. See 26 U.S.C. § 6103(b). We agree the governor's office must withhold the federal tax returns we have marked in the information pertaining to S&S under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

S&S also appears to claim section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code, which provides that "a member, employee, or agent of the [Texas Commission on Environmental Quality ("TCEQ")] may not disclose information submitted to [TCEQ] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). This office has concluded section 382.041 protects information submitted to TCEQ if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential in submitting it to TCEQ. See Open Records Decision No. 652 (1997). In this instance, the information pertaining to S&S was not submitted to TCEQ, and S&S does not contend any of the information at issue constitutes a trade secret. We therefore conclude the governor's office may not withhold any of the remaining information pertaining to S&S under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code.

The governor's office believes some of the submitted information may be confidential under section 552.101 of the Government Code in conjunction with section 489.215 of the Government Code, which provides in part:

- (a) Information described by Subsection (b) collected, assembled, or maintained by or for the [Texas Economic Development Bank (the "bank")] is confidential and may not be disclosed by the bank, the [Product Development and Small Business Incubator Board], the [Texas Economic Development and Tourism Office (the "office")], or the executive director of the office.

(b) This section applies to information in any form provided by or on behalf of an applicant for financing or a recipient of financing under [subchapter D of chapter 489 of the Government Code], including information contained in, accompanying, or derived from any application or report, that relates to a product, to the development, application, manufacture, or use of a product, or to the markets, market prospects, or marketing of a product and that is proprietary information of actual or potential commercial value to the applicant or recipient that has not been disclosed to the public. Confidential information includes scientific and technological information, including computer programs and software, and marketing and business operation information, regardless of whether the product to which the information relates is patentable or capable of being registered under copyright or trademark laws or has a potential for being sold, traded, or licensed for a fee. . . .

Gov't Code § 489.215(a)-(b); *see id.* § 489.201(4) (providing that “product” for purposes of Gov't Code § 489.215 “includes an invention, device, technique, or process, without regard to whether a patent has been or could be granted, that has advanced beyond the theoretical stage and has or is readily capable of having a commercial application,” but “does not include pure research”). We understand the bank is part of the Economic Development and Tourism Division of the governor's office. The governor's office informs us portions of the submitted information were collected, assembled, or maintained by or for the bank and provided by or on behalf of an applicant for a recipient of bank financing. The governor's office states, however, it is “unable to determine the extent to which any of the submitted information consists of product information that is ‘proprietary information of actual or potential commercial value to the applicant or recipient[.]’” The governor's office states the third parties to which the submitted information pertains were notified of their right to establish that section 489.215 of the Government Code is applicable to the information at issue. As previously noted, we have received no arguments from Edinburg, Fulshear, or Kennedale, and TBRI does not object to release of the submitted information pertaining to TBRI. Although S&S generally claims section 489.215, S&S provides no arguments explaining how or why section 489.215 is applicable to any of the remaining information pertaining to S&S. SEMATECH does not claim section 489.215, nor does SEMATECH otherwise establish that any of the submitted information pertaining to SEMATECH falls within the scope of section 489.215. Thus, we have no basis to find that any of the remaining information pertaining to S&S or any of the information pertaining to SEMATECH is related to a product, the development, application, manufacture, or use of a product, or the markets, market prospects, or marketing of a product that is proprietary information of actual or potential commercial value to any of the third parties concerned. *See id.* § 489.215(b); *see also id.* § 552.305(b) (person whose interests may be involved under Gov't Code § 552.305(a) may submit in writing to attorney general person's reasons why information at issue should be withheld). We therefore conclude the governor's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 489.215 of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We also have concluded common-law privacy encompasses certain types of personal financial information. Financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

We note common-law privacy protects the interests of individuals, not those of business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (corporation has no right to privacy) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)). We have marked personal financial information involving individuals in the information pertaining to Edinburg that is highly intimate or embarrassing and not a matter of legitimate public interest. The governor's office must withhold that information under section 552.101 of the Government Code in conjunction with common-law privacy. Although SEMATECH contends it has privacy interests in some of the submitted information pertaining to SEMATECH, SEMATECH has not demonstrated any of the information at issue involves an individual and is highly intimate or embarrassing and not a matter of legitimate public concern. We therefore conclude the governor's office may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

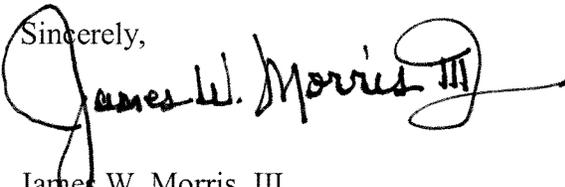
Lastly, we note the information pertaining to S&S includes motor vehicle information. Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration

issued by an agency of this state or another state or country.<sup>5</sup> See Gov't Code § 552.130(a)(2). We have marked the motor vehicle information the governor's office must withhold under section 552.130 of the Government Code.

In summary, the governor's office must withhold (1) the marked tax returns under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; (2) the marked personal financial information under section 552.101 in conjunction with common-law privacy; and (3) the marked motor vehicle information under section 552.130 of the Government Code. The rest of the submitted 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](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 W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/em

Ref: ID# 446554

Enc: Submitted information

c: Requestor  
(w/o enclosures)

---

<sup>5</sup>This office will raise section 552.130 on behalf of a governmental body, as this section is a mandatory exception to disclosure. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Mr. Porfirio Duron  
S&S Industries, Inc.  
2203 Century Center Boulevard  
Irving, Texas 75062  
(w/o enclosures)

Mr. Jamie McLeroy  
SEMATECH, Inc.  
2706 Montopolis Drive  
Austin, Texas 78741-6499  
(w/o enclosures)

Edinburg Economic Development Corporation  
c/o Mr. Bob Davis  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711  
(w/o enclosures)

City of Fulshear 4A Development Corporation  
c/o Mr. Bob Davis  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711  
(w/o enclosures)

Kennedale Economic Development Corporation  
c/o Mr. Bob Davis  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711  
(w/o enclosures)

Texas Biomedical Research Institute  
c/o Mr. Bob Davis  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711  
(w/o enclosures)