



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 3, 2012

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

OR2012-04808

Dear Mr. Gordon:

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# 450115 (PIR# 018-12).

The Office of the Governor (the “governor’s office”) received a request for 1) all e-mails generated or received by certain divisions of the governor’s office from August 10, 2011; 2) all e-mails generated or received by certain divisions of the governor’s office from September 3, 2011 through September 7, 2011; and 3) all information pertaining to the Texas Forensic Science Commission, including the replacement of its Commissioner, from September 18, 2009 through October 2, 2009.¹ You state the governor’s office has released some of the responsive information. Although you take no position on the public availability of the submitted information, you state release of this information may implicate third party proprietary interests. Thus, you state the governor’s office notified these third parties of the request for information and of the third parties’ right to submit arguments to this office as

¹You note that the governor’s office sought and received clarification of the information requested. See Gov’t Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

to why the information at issue should not be released.² *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). We have received correspondence from Capitol Area Council, Boy Scouts of America ("CAC") and Vapogenix, Inc. ("Vapogenix"). However, as of the date of this letter we have not received comments from any of the remaining third parties, explaining why any portion of the submitted information should not be released. Therefore, we have no basis to conclude these remaining third parties have any protected proprietary interest in the submitted information. *See* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (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), 552

²You state the interested third parties are: Booz Allen Hamilton; Boy Scouts of America; Fort Worth Chamber of Commerce; Federated Securities Corporation; Frisco Economic Development Corporation; Fulbright & Jaworski; Global Experience Specialists; Miles Media and Travel 2.0 Consulting Group; OneStar; Orix; Pedernales Electric Cooperative; Regionnovate; Texas Treasury Safekeeping Trust Company; Tierra Verde Solar Incorporated; Austin Convention & Visitors Bureau; United States Army; Vast.com; Washington State Workforce Training & Education Coordinating Board; World Lottery; E-Safe Woods; Farmers Insurance; Community Affairs; Texas Forest Service; Mercom Capital Group Mobile; Mobile Sciences Consortium, LLC; TAS Energy; iBridge; S&S Industries; Samsung Austin Semiconductor; SVTC Technologies; Cityimmune; Intertech Bio; Norwell; Bryan College Station Convention Visitors Bureau; City of Arlington; City of Dallas; City of Eden; City of Houston; City of Ingelside; City of Leander; City of New Braunfels; El Paso Regional Economic Development Corporation; Irving Economic Development Partnership; Kilgore Economic Development Corporation; Longview Economic Development Corporation; Lower Rio Grande Valley Development Corporation; Lubbock Economic Development Corporation; Greater San Marcos Partnership; K-W Construction; Steeltech Corporation; Fort Worth Chamber of Commerce; Freeport LNG; Irving Chamber of Commerce; GPTX; Meru Networks; Livingston; Research Valley; Rock Wallace Economic Development Corporation; Sedco; Snyder Texas; Roanoke Texas; Victoria Economic Development Corporation; Waco Chamber of Commerce; Waller County; Wharton Economic Development Corporation; Project Skyguard; CCS Medical; Commerce Texas; Midland Economic Development Corporation; Choose Temple; Rockdale Chamber of Commerce; Lakeside Pipe; Ibridge, LLC; Safety-Kleen Systems, Inc.; Novartis Corporation; Angus Davis Industries; Continental Automotive, Incorporated; I Wrena, LLC; Schlumberger Technology; Ryan LLC; Hilton; Ramada Inn New Braunfels; Holiday Inn Express San Marcos; Econolodge San Marcos; Hampton Inn Austin NW; Hilton Austin; Clarion Inn & Suites; Embassy Suites San Marcos; Four Seasons Hotel Austin; Howard Johnson Inn; Texas Hotel & Lodging Association; Omni Hotel Austin; Aloft Austin at the Domain; Doubletree Hotel Austin; Doubletree Suites Austin; Driskill Hotel; Hampton Inn Downtown Austin; Holiday Inn Express Austin North Central; Homewood Suites Arboretum; Hotel Allandale; Hyatt Regency Austin; InterContinental Stephen F. Austin Hotel; La Quinta Inn & Suites at the Domain; Quality Inn & Suites; Austin Airport; Ramada Austin Central; Renaissance Hotel Austin; Super 8 Airport South Austin; Towne Place Suites Austin NW; Wyndham Garden Hotel Austin; Comfort Suites San Marcos; and La Quinta Inn San Marcos.

at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Consequently, the governor's office may not withhold any portion of the information pertaining to the third parties that have not submitted comments to this office on the basis of any proprietary interest those third parties may have in the information. We will address the arguments submitted by CAC and Vapogenix.

Next, we note some of the submitted information is not subject to the Act. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). We note one of the e-mails at issue consists of a personal e-mail that does not relate to the transaction of official governor's office business. See Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Thus, we find the e-mail at issue and its attachments, which we have marked, do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the governor's office. See Gov't Code § 552.021. Accordingly, we conclude the e-mail at issue and its attachments, which we have marked, are not subject to the Act and need not be released in response to this request.³

We note Vapogenix seeks to withhold information the governor's office has not submitted to this office for our review. This ruling does not address that information and is limited to the information submitted as responsive by the governor's office. See *id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).⁴

Section 552.117(a)(1) of the Government Code exempts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.⁵ *Id.* § 552.117(a). We further note section 552.117 also applies to the personal cellular telephone number of a current or former

³As our ruling is dispositive, we need not address CAC's arguments against disclosure of this information.

⁴As our ruling is dispositive, we need not address Vapogenix's arguments against disclosure of this information.

⁵The 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).

official or employee of a governmental body, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The governor's office may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the governor's office must withhold the information we have marked under section 552.117(a)(1); however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the marked cellular telephone service, the governor's office may not withhold the marked information under section 552.117(a)(1) of the Government Code.

We also note the submitted information contains e-mail addresses that may be excepted under section 552.137 of the Government Code. This section excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137(c)(1) states an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" is not excepted from public disclosure. *Id.* § 552.137(c)(1). We note section 552.137 does not apply to a public employee's governmental e-mail address. We are unable to determine whether the e-mail addresses we have indicated on the submitted disk are excluded by subsection (c). Therefore, we must rule conditionally. To the extent the e-mail addresses at issue belong to members of the public who have not affirmatively consented to their release and are not subject to subsection (c), the governor's office must withhold these e-mail addresses under section 552.137 of the Government Code. However, to the extent these e-mail addresses are subject to subsection (c), they may not be withheld under section 552.137 of the Government Code.

We note portions of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the e-mail and its attachments we have marked are not subject to the Act and need not be released in response to this request. If the individual whose information is at issue timely requested confidentiality, the governor's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, if the individual at issue did not timely request confidentiality or a governmental body pays for the marked cellular telephone service, the governor's office may not withhold the marked information under section 552.117(a)(1) of the Government Code. To the extent the e-mail addresses at issue belong to members of the public who have not affirmatively consented to their release and are not subject to subsection (c), the governor's office must withhold these e-mail addresses under section 552.137 of the Government Code. However, to the extent these e-mail addresses are subject to subsection (c), they may not be withheld under section 552.137 of the Government Code. The remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 450115

Enc. Submitted documents

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(w/o enclosures)

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Capitol Area Council, Boy Scouts of America
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