



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2013

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

OR2013-02134

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# 479148.

The Office of the Governor (the "governor's office") received a request for all executed Texas Moving Image Industry Program agreements, contracts, amendments, and supporting exhibits entered into during a specified time period. You state the governor's office will release most of the responsive information. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of certain third parties. You state you have notified the third parties of this request and of the companies' rights to submit arguments to this office stating why their information should not be released.¹ 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

¹The notified third parties are: Armature Studio; Aspyr Media, Inc.; Bluepoint Games, Inc.; Certain Affinity, Inc.; Digital Harmony Games; Edge of Reality; Electronic Arts, Inc.; Famigo, Inc.; Kabam, Inc.; Merge Healthcare Solutions; Midnight Studios; On the Level Games Studios, LLC; Playdom, Inc.; Read and Succeed LLC; Red Fly Studios, Inc.; Retired Astronaut Collective; Ricochet Labs; Seamless Entertainment, Inc.; Sneaky Games, Inc.; SpiderMonk Entertainment; Stoic LLC; Terminal Reality; Thruster (a division of Bottle Rocket Apps); TimeGate Studios, Inc.; and Twisted Pixel Games.

comments submitted by representatives of Certain Affinity, Inc. ("CA"), Electronic Arts, Inc. ("EA"), On the Level Game Studios, LLC ("OTL"), Playdom, Inc. ("Playdom") and Sneaky Games, Inc. ("SGI"). We have considered the submitted arguments and reviewed the submitted information.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from CA, EA, OTL, Playdom, and SGI. Thus, the remaining third parties have not demonstrated the companies have protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)–(b); 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 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the governor's office may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Next, we note CA, OTL, and Playdom seek to withhold information the governor's office has not submitted for our review. This ruling does not address information beyond what the governor's office has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the governor's office submitted as responsive to the request for information.² *See id.*

EA and Playdom claim section 552.110 of the Government Code for some of their 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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See 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. 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 [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a

²As our determination is dispositive, we need not address CA's or OTL's arguments against disclosure.

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. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). 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.³ This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 2. 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.*; ORD 661.

³The 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).

EA and Playdom argue portions of the companies' information constitute trade secrets. Upon review, we find EA and Playdom have failed to demonstrate any of the information for which the companies assert section 552.110(a) meets the definition of a trade secret, nor have EA or Playdom demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Accordingly, the governor's office may not withhold any of the information at issue on the basis of section 552.110(a) of the Government Code.

EA and Playdom contend portions of the companies' information are commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we find Playdom has established release of the information we have marked constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, the governor's office must withhold this information under section 552.110(b) of the Government Code. However, we find EA and Playdom have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the companies substantial competitive harm. We, therefore, conclude the governor's office may not withhold any of the remaining information under section 552.110(b) of the Government Code.

EA raises section 552.131 of the Government Code, which relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) 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 § 552.131(a). We note the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because we have already disposed of EA's claims under section 552.110, the governor's office may not withhold any of the information at issue under section 552.131(a) of the Government Code.

In summary, the governor's office must withhold the information we have marked under section 552.110(b) of the Government Code. The governor's office 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.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 479148

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Mr. David Godwin
CEO
Sneaky Games, Inc.
13376 Research Boulevard, #605
Austin, Texas 78750
(w/o enclosures)

Ms. Betsy Contro
Legal Counsel - Litigation
Electronic Arts, Inc.
209 Redwood Shores Parkway
Redwood City, California 94065
(w/o enclosures)

Mr. Craig Carpenter
Counsel for On the Level Game
Studios, L.L.C.
Thompson & Knight, L.L.P.
1722 Routh Street, Suite 1500
Dallas, Texas 75201-2533
(w/o enclosures)

Mr. Edward Goines
Assistant Chief Counsel
Playdom, Inc.
395 Page Mill Road, Suite 200
Palo Alto, California 94306
(w/o enclosures)

Ms. Katie Repka
Armature Studio
5000 Plaza on the Lake, #110
Austin, Texas 78746
(w/o enclosures)

Ms. Rebekah Chapman
Digital Harmony Games
Suite 3 405
3925 West Braker Lane
Austin, Texas 78759
(w/o enclosures)

Mr. Philip Smolek
Kabam, Inc.
959 Skyway Road, Suite 100
San Carlos, California 94070
(w/o enclosures)

Mr. Charles Normann
Midnight Studios
200 Northwest Drive
Round Rock, Texas 78664
(w/o enclosures)

Mr. David S. Henry
Counsel for Certain Affinity, Inc.
Hiersche, Hayward,
Drakeley & Urbach, P.C.
15303 Tarrant Parkway, Suite 700
Addison, Texas 75001
(w/o enclosures)

Ms. Sydney Atkinson
Aspyr Media, Inc.
Suite 50
1221 South Mopac Expressway
Austin, Texas 78746
(w/o enclosures)

Ms. Susan Benedict
Bluepoint Games, Inc.
5000 Plaza on the Lake, Suite 120
Austin, Texas 78746
(w/o enclosures)

Mr. Mike Panoff
Edge of Reality
B5-300
6500 River Place Boulevard
Austin, Texas 78730
(w/o enclosures)

Mr. Matt McDonnell
Famigo
3925 West Braker Lane, Third Floor
Austin, Texas 78759
(w/o enclosures)

Mr. Mark Stephen Pierce
Merge Healthcare Solutions
8300 North Mopac Expressway, Suite 250
Austin, Texas 78759
(w/o enclosures)

Mr. Phil Murray
Read and Succeed, L.L.C.
701 Brazos Street, Suite 500
Austin, Texas 78701
(w/o enclosures)

Mr. Chris Chuter
Retired Astronaut Collective
2708 Bonnie Road
Austin, Texas 78703
(w/o enclosures)

Mr. Scott March
SpiderMonk Entertainment
2350 Airport Freeway
Bedford, Texas 76051
(w/o enclosures)

Mr. John Watson
Stoic, L.L.C.
6701 Burnet Road, H1
Austin, Texas 78757
(w/o enclosures)

Mr. Jeff Johnston
Thruster (a division of Bottle
Rocket Apps)
14643 Dallas Parkway, Suite 900
Dallas, Texas 75254
(w/o enclosures)

Ms. Amanda Henry
Twisted Pixel Games
4009 Bannister Lane, Suite 100
Austin, Texas 78704
(w/o enclosures)

Mr. Ron Kerwin
Red Fly Studio
206 East 9th Street, Suite 1502
Austin, Texas 78701
(w/o enclosures)

Mr. Rodney Gibbs
Ricochet Labs
1708 Guadalupe Street
Austin, Texas 78701
(w/o enclosures)

Mr. Dan Magaha
Seamless Entertainment, Inc.
3721 Executive Center Drive, Suite 201
Austin, Texas 78717
(w/o enclosures)

Mr. John O'Keefe
Terminal Reality
8650 Freeport Parkway, Suite 200
Irving, Texas 75063
(w/o enclosures)

Mr. Robert Siwiak
TimeGate Studios, Inc.
Suite 200
14140 Southwest Freeway
Sugar Land, Texas 77478
(w/o enclosures)