



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2010

Mr. Mark Adams
Office of the General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2010-01610

Dear Mr. Adams:

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# 369049.

The Office of the Governor (the "governor") received a request for information sent to or received from the Texas Emerging Technology Fund (the "ETF") by Qcue, Incorporated ("Qcue"), regarding funding provided to Qcue by the ETF. You state the governor has released some information in response to this request. You claim the submitted information is excepted from disclosure under sections 552.111 and 552.136 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of Qcue. Thus, pursuant to section 552.305 of the Government Code, you notified Qcue of the request and of its right to submit arguments to this office as to why its information should not be released. 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 to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the governor's obligations under the Act. Pursuant to section 552.301(e)(1)(D) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request for information a copy of the specific information requested or representative samples thereof. *See* Gov't Code § 552.301(e)(1)(D). Although you submitted most of the responsive information by the appropriate deadline, you did not submit Exhibit G until after the fifteen-business-day

deadline. Thus, we find the governor failed to comply with the requirements of section 552.301 with respect to the information in Exhibit G.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third party interests are at stake or when information is confidential by law. Open Records Decision No. 177 (1977). Because you indicate release of Exhibit G may implicate the proprietary interests of Qcue, we will consider the arguments submitted by Qcue for its information.

Initially, however, we address the arguments submitted by the governor for Exhibits B, E, and F. You claim these exhibits are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

This office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and

proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Exhibit B contains several drafts of the agreements by which Qcue was awarded ETF funds. Exhibit E contains e-mails between attorneys with the governor and employees and attorneys representing Qcue negotiating the terms of the agreement. Exhibit F contains an e-mail chain between an attorney representing the governor and another individual, and also relates to the terms of the agreement. We understand the ETF is administered by the governor as a means of strategic investment in private sector businesses, as part of the governor's policy to encourage job creation and economic growth in Texas. We therefore find these documents generally relate to the policymaking functions of the governor. However, the e-mails submitted in Exhibit E reflect they were communicated with representatives of Qcue, and you do not identify one of the parties to the e-mail chain in Exhibit F. Additionally, the draft agreements in Exhibit B are listed as attachments to the e-mails in Exhibits E and F. For section 552.111 to apply, the parties between whom these documents were passed must share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* ORD 561 at 9. Because you do not provide any arguments demonstrating the governor shared any privity of interest or common deliberative process with Qcue or with the unidentified party, you have not demonstrated these documents may be withheld under section 552.111 of the Government Code. However, you state the handwritten notes in Exhibit F were written by an attorney with the governor regarding the terms of the agreement. Based on your representations and our review, we find the handwritten notes contain the advice, opinion, or recommendation of a governor representative with respect to the policymaking functions of the governor. You also represent the notes are "internal" and were not shared with parties outside the governor. Accordingly, the governor may withhold the handwritten notes from the e-mail chain in Exhibit F under section 552.111 of the Government Code.

You also claim Exhibit D contains access device numbers excepted under section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to ... obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we conclude the bank account number and routing number we

marked in Exhibit D are access device numbers that must be withheld under section 552.136.¹

Qcuc claims the information it filed with the ETF should be withheld under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (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.” *See* Gov’t Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court 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 a single or ephemeral event 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 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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors

¹We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a bank account number and bank routing number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

have been demonstrated to establish a trade secret claim.² 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 it substantial competitive harm).

Upon review, we find Qcue has established some of its customer information constitutes a trade secret. The governor must withhold this information, which we have marked, under section 552.110(a) of the Government Code. We note, however, that Qcue has made the remainder of the customer information it seeks to withhold publicly available on its website. Because Qcue published this customer information, we conclude the company has failed to demonstrate it considers this information to be a trade secret. Although Qcue generally asserts its remaining filed information contains trade secrets, the company has not provided arguments establishing a *prima facie* case showing this information meets the definition of trade secret, and none of the remaining information may be withheld as such. *See* ORD 552 at 5. Additionally, Qcue has made only conclusory allegations that release of its information would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* ORD 661 at 5-6. We therefore conclude the governor may not withhold any of Qcue's information under section 552.110(b).

Qcue also raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 490.057 of the Government Code, which addresses the confidentiality of certain information pertaining to the ETF. Section 490.057 provides as follows:

²The 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 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Information collected by the governor's office, the [ETF Advisory C]ommittee, 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 an award from the fund is confidential unless the individual or entity consents to disclosure of the information.

Id. § 490.057. Qcue asserts certain documents are subject to section 490.057 because they provide information about Qcue's existing and planned business and financial relationships with the company's current and future customers, vendors, and partners. However, Qcue does not provide any arguments demonstrating how the remaining information in these documents concerns the company's identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information. Additionally, although Qcue makes a general assertion that its remaining information is confidential under section 490.057, Qcue failed to provide any arguments explaining the statute's applicability to this information. *See* Gov't Code § 552.305(b). Therefore, none of the information in Exhibits C and G is confidential under section 490.057 of the Government Code, and it may not be withheld from public disclosure under section 552.101 of the Government Code.

In summary, the governor may withhold the handwritten notes in Exhibit F under section 552.111 of the Government Code, and must withhold the account number and routing number we marked in Exhibit D under section 552.136 of the Government Code. The governor must also withhold the marked customer information under section 552.110(a) of the Government Code. The remaining 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, 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 369049

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Mr. Stephen R. Fogle
Jackson Walker, L.L.P.
112 East Pecan Street, Suite 2400
San Antonio, Texas 78205
(w/o enclosures)

SC OCT 27 2015
At 8:48 A.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-10-000695

QCUE, INC.,	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	98th JUDICIAL DISTRICT
GREG ABBOTT, in his official capacity	§	
as THE ATTORNEY GENERAL OF	§	
TEXAS, ¹	§	
<i>Defendant.</i>	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Qcue, Inc. (Qcue), and Defendant Ken Paxton, Attorney General of Texas (Attorney General), appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Qcue challenging Attorney General Open Records Letter Ruling OR2010-01610 (the Ruling). The Office of the Governor of Texas (the Governor) received a request from Ms. Rabeh Soofi (the Requestor) pursuant to the Public Information Act (the PIA), Tex. Gov't Code ch. 552, for certain documents related to Qcue. These documents contain information Qcue contends is confidential and proprietary information excepted from disclosure under the PIA. The Governor requested an open records ruling from the Open Records Division of the Office of the Attorney General (ORD). ORD subsequently issued the Ruling, ordering the release of portions of the requested information, including information Qcue contends is protected from disclosure (the Qcue Contested Information). The Governor holds the information that has been ordered to be disclosed.

¹ Greg Abbott was named defendant in his official capacity as Texas Attorney General. Ken Paxton became Texas Attorney General on January 5, 2015, and is now the appropriate defendant in this cause.

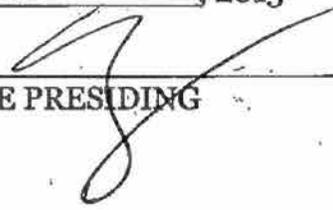


The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has abandoned the request for information, (2) in light of this abandonment the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

IT IS THEREFORE ORDERED that:

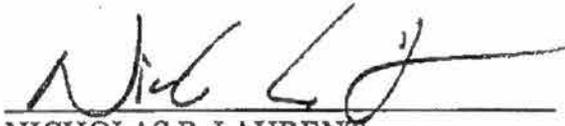
1. Because the request was abandoned, no part of the Qcue Contested Information should be released in reliance on Letter Ruling OR2010-01610. Insofar as it pertains to the Qcue Contested Information, Letter Ruling OR2010-01610 should not be cited for any purpose or relied upon as a previous determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the signing of this Final Judgment, the Office of the Attorney General shall notify the Governor in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall instruct the Governor that pursuant to Tex. Gov't Code § 552.301(g), it shall not rely upon Letter Ruling OR2010-01610 as a prior determination under Tex. Gov't Code § 552.301(f), insofar as it pertains to the Qcue Contested Information, nor shall it release any of the Qcue Contested Information in reliance on said Ruling, and if the Governor receives any future requests for the same Qcue Contested Information it must request a new decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2010-01610.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

Signed this 27 day of OCTOBER, 2015



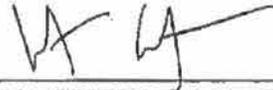
JUDGE PRESIDING

AGREED:



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