



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2011

Ms. Chelsea T. Buchholtz
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2011-02529

Dear Ms. Buchholtz:

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# 409567.

The Office of the Governor (the "governor") received a request for communications between (1) a named individual, members of the Texas Emerging Technology Advisory Committee (the "committee"), and the governor's staff regarding Convergen LifeSciences, Inc. ("Convergen") during a specified time period; (2) the committee and the governor's staff regarding the proposed ethics policy governing the committee during a specified time period; and (3) a named individual, the committee, and the governor's staff regarding a specified proposal. Although you take no position with respect to the public availability of the submitted information, you state it may contain proprietary information subject to exception under the Act. Accordingly, the governor notified Convergen of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *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 comments from Convergen. We have considered Convergen's arguments and reviewed the submitted information.

Initially, we note you did not submit information responsive to items two and three of the request. You do not inform us whether you released this information, to the extent it exists.

We assume, to the extent any additional information responsive to the instant request existed when the governor received the request for information, you have released it to the requestor. If not, then you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the governor's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). In this instance, you state the governor received the request for information on November 19, 2010. Accordingly, the ten-business-day deadline was December 7, 2010. However, you did not seek an attorney general's decision until December 14, 2010. Thus, we find the governor failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because third party interests can provide compelling reasons to overcome this presumption, we will consider whether the submitted information is excepted from disclosure under the Act.

Convergen claims most of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 490.057 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. This exception encompasses section 490.057 of the Government Code, which addresses the confidentiality of certain information pertaining to the Texas Emerging Technology Fund (the "fund"). Section 490.057 provides as follows:

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

Id. § 490.057. Convergen indicates it has not given consent to the governor to disclose the information at issue and argues the information it has marked in the submitted documents concerns the identity, background, finance, marketing plans, trade secrets, and other commercially or academically sensitive information of an entity being considered for an award from the fund. We note, however, section 490.057 applies only to an entity “being considered for an award from the fund[.]” *Id.* Because Convergen received an award of funds and is no longer being considered for an award from the fund, section 490.057 no longer applies to the submitted information. Therefore, none of the submitted information is confidential under section 490.057, and the governor may not withhold it under section 552.101 on that basis.

Convergen also claims section 552.110(b) of the Government Code for portions of the submitted information. 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[.]” *Id.* § 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.*; *see also* Open Records Decision No. 661 at 5 (1999).

Upon review, we find Convergen has established release of the information we marked would cause it substantial competitive injury. Accordingly, the governor must withhold the information we marked under section 552.110(b).¹ However, we find Convergen has made only conclusory allegations that release of the remaining information at issue would result in substantial harm to its competitive position and has provided no specific factual or evidentiary showing to support such allegations. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Consequently, the governor may not withhold any of the remaining information at issue under section 552.110(b).

Convergen also asserts the remaining portions of its consulting agreement are excepted under common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to

¹As our ruling is dispositive for this information, we need not address Convergen’s remaining argument against its release.

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) (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)) (corporation has no right to privacy). Accordingly, the governor may not withhold any of the remaining information in the consulting agreement based on the privacy interests of Convergen. Further, although Convergen also asserts the remaining portions of its consulting agreement are excepted based on the privacy interests of its consultant, we find none of this information is highly intimate or embarrassing. Consequently, the governor may not withhold any of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

We note portions of the remaining information are subject to section 552.136 of the Government Code.² Section 552.136 provides “[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); *see also id.* § 552.136(a) (defining “access device”). Thus, the governor must withhold the bank account and routing numbers and wire transfer number we marked under section 552.136.

Lastly, we note the remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 provides “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We marked e-mail addresses that are not of the types specifically excluded by section 552.137(c). Accordingly, the governor must withhold the marked e-mail addresses under section 552.137, unless the owners of the e-mail addresses consent to their disclosure.

In summary, the governor must withhold (1) the information we marked under section 552.110(b) of the Government Code; (2) the bank account and routing numbers and wire transfer number we marked under section 552.136 of the Government Code; and (3) the e-mail addresses we marked under section 552.137 of the Government Code, unless the

²The 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).

owners of the marked e-mail addresses consent to their release.³ The governor 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 409567

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.