



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2011

Ms. Kate Fite
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2011-03285A

Dear Ms. Fite:

This office issued Open Records Letter No. 2011-03285 (2011) on March 9, 2011. We have examined this ruling and determined that we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on March 9, 2011. Your request was assigned ID# 419099.

The Office of the Governor (the "governor") received a request for all applications for the Texas Moving Image Industry Incentive Program that have been submitted to the governor since October 1, 2008, as well as records showing staff review of the applications and the outcome for these applications since October 1, 2008. You state the governor has released some of the responsive information. Although you take no position on the public availability of the submitted applications, you state release of this information may implicate the proprietary interests of the third party applicants. Thus, you state the governor notified these third parties of the governor's receipt of the request for information and of the companies' 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) (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. We have also received and considered comments from the requestor. *See*

Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the governor's procedural obligations under the Act. Section 552.301 of the Government Code prescribes procedures that 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), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). You inform us that the governor received the present request for information on December 16, 2010. However, you did not request a ruling from this office until January 4, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the governor failed to comply with the 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 a compelling reason exists 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). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Accordingly, we will consider whether third-party interests provide a compelling reason to withhold any portion of 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 Beyond the Farthest Star, LLP ("BTFS"); Bobby Goldstein Productions, Inc. ("BGP"); Bonanza Productions Inc. ("Bonanza"); Cheaters II, Inc. ("Cheaters"); Directorz, Inc. ("Directorz"); Deep Freeze Productions, Inc. ("Deep Freeze"); Gearbox; H.E. Butt Grocery Company ("HEB"); Home Box Office, Inc. ("HBO"); ITB Productions, LLC ("ITB"); LMNO Cable Group, Inc. ("LMNO"); Motion Picture Association of America ("MPAA"); Noonday Pictures, Inc. ("Noonday"); Reel FX ("Reel"); Retro Studios, Inc. ("Retro"); SDB, LLC ("SDB"); Seamless Entertainment ("Seamless"); Black Lantern Studios, Inc. ("BLS"); Synthetic Pictures, LLC ("Synthetic"); Terminal Reality, Inc. ("Terminal Reality"); Total Immersion Software, Inc. ("TIS"); Troublemaker Studios ("Troublemaker"); and Warner Brothers Animation, Inc. ("Warner Brothers"). However, as of the date of this letter we have not received comments from any of the remaining third parties whose applications are at issue, 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 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Consequently, the governor 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 companies may have in the information. We will address the arguments submitted by BTFS, BGP, Cheaters, Directorz, Deep Freeze, Gearbox, HEB, HBO, LMNO, Noonday, Retro, SDB, Seamless, BLS, Synthetic, Terminal Reality, TIS, and Troublemaker.¹

We note Black Lantern, BGP, BTFS, Cheaters, Gearbox, Retro, Seamless, and TIS seek to withhold information the governor 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. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we note Noonday is concerned with the requestor's identity and intended use of the requested information. We note, however, the identity of the requestor is generally not a factor to be considered when a governmental body receives a request for information. *See id.* § 552.223 (requiring uniform treatment of all requests for information). Further, the requestor states she is making the request for information pursuant to the Act. This office has determined the Act does not permit the consideration by a governmental body or this office of a requestor's intended use of information when responding to open records requests. *See id.* § 552.222(a) (stating governmental body may not inquire into purpose for which information will be used); *see also* Open Records Decision Nos. 508 at 2 (1988) (motives of a person seeking information under the Act are irrelevant), 51 (1974). Therefore, the governor may only withhold the submitted information if it is excepted from disclosure under the Act.

We note Troublemaker's one-page application was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-02958 (2011). In that ruling, we determined, in part, the governor must release Troublemaker's one-page application. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude the governor

¹We note that in their correspondence to our office, Warner Brothers and Bonanza state they do not object to release of their submitted one-page application. We further note that in their correspondence to this office, MPAA, ITB, and Reel did not submit arguments stating why the submitted information should be excepted from disclosure under the Act. *See* Gov't Code § 552.305(d)(2)(B).

must continue to rely on Open Records Letter No. 2011-02958 as a previous determination and release Troublemaker's submitted information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). As our ruling is dispositive, we need not address Troublemaker's arguments against disclosure.

Next, TIS, BGP, and Cheaters claim portions of their submitted applications are confidential under the federal Freedom of Information Act ("FOIA"), section 552 of title 5 of the United States Code. In addition, BGP and Cheaters assert portions of their submitted information are confidential under section 552a of title 5 of the United States Code, also known as the federal Privacy Act. FOIA and the Privacy Act apply to an "agency," which is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]" *See* 5 U.S.C. §§ 552(f)(1)², 552a(a)(1) (referring to 5 U.S.C. § 552(e) for definition of "agency"). In this instance, the submitted information is maintained by the governor, who is subject to the state laws of Texas. Our office and the courts have stated FOIA and the Privacy Act only apply to federal agencies and not to state or local agencies. *See St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F.Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). Therefore, the governor may not withhold any of the information in the applications of TIS, BGP, or Cheaters on the basis of the federal Privacy Act or FOIA.

Gearbox, HEB, LMNO, and Terminal argue portions of their submitted applications contain information each company considers confidential. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110).

²Formerly 5 U.S.C. § 552(e).

Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

BGP, Cheaters, and HEB raise 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. This exception encompasses information that other constitutional, statutory, or case law makes confidential. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). BGP, Cheaters, and HEB have not directed our attention to any law under which any of the information in their applications is considered to be confidential for the purposes of section 552.101. We therefore conclude the governor may not withhold any of the information pertaining to BGP, Cheaters, or HEB under section 552.101 of the Government Code.

Next, BGP, Cheaters, Deep Freeze, Seamless, Synthetic, Terminal Reality, and TIS claim portions of their applications are excepted under section 552.104 of the Government Code. However, this section only protects the interests of a governmental body. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). Because section 552.104 does not protect the interests of third parties, and the governor does not claim this section applies to the submitted information, the governor may not withhold any portion of the submitted information under section 552.104 of the Government Code.

BGP, Cheaters, Deep Freeze, Directorz, Gearbox, HEB, HBO, LMNO, Noonday, Retro, SDB, Synthetic, Terminal Reality, and Troublemaker raise section 552.110 of the Government Code. 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. *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 trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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 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 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 Huffines*, 314 S.W.2d at 776. 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 RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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. *See* 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.*; *see also* ORD 661 at 5-6.

Additionally, Directorz argues that the release of its commercial or financial information, which is generally unavailable to the public, would impair the government’s ability to obtain necessary information in the future. In advancing this argument, Directorz relies on the test pertaining to the applicability of the section 552(b)(4) exemption in FOIA to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a

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

kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Directorz's interests in withholding its application.

Upon review, we find Synthetic has established some of its customer information constitutes trade secrets; therefore, the governor must withhold this information, which we have marked, under section 552.110(a). However, Synthetic has made some of its customer information publicly available on its website. Because Synthetic has published this information, we are unable to conclude such information is proprietary. We also find that Synthetic has failed to establish a *prima facie* case that any of the remaining information in its application constitutes a trade secret. *See* Gov't Code § 552.110(a); ORD 402. Additionally, we find BGP, BLS, Cheaters, Gearbox, HEB, HBO, LMNO, Retro, SDB, Seamless, and Terminal Reality have failed to demonstrate that any of the information each company seeks to withhold meets the definition of a trade secret, nor have any of these third parties demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD No. 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, none of the remaining information in the applications of BGP, BLS, Cheaters, Gearbox, HEB, HBO, LMNO, Retro, SDB, Seamless, Synthetic, or Terminal may be withheld under section 552.110(a) of the Government Code.

Upon review, we find Directorz has established that release of the customer information we have marked would cause the companies substantial competitive harm. We note, however, that Directorz has made some of its customer information publicly available on its website. Because Directorz has published this information, they have failed to demonstrate how release of this information would cause substantial competitive harm under section 552.110(b). Thus, the governor may not withhold any of Directorz's remaining customer information under section 552.110(b). Furthermore, upon review of BGP, Cheaters, Deep Freeze, Directorz, HBO, HEB, LMNO, Retro, SDB, Synthetic, Terminal Reality, and Troublemaker's arguments and the information at issue, we find each company has made only conclusory allegations that the release of the remaining information each seeks to withhold would result in substantial damage to their competitive position. Thus, BGP, Cheaters, Deep Freeze, Directorz, HBO, HEB, LMNO, Retro, SDB, Synthetic,

Terminal Reality, and Troublemaker have not demonstrated that substantial competitive injury would result from the release of any of their remaining information. *See generally* Open Records Decision Nos. 661, 509 at 5 (1988), 319 at 3. Accordingly, none of the remaining information in the applications of BGP, Cheaters, Deep Freeze, Directorz, HBO, HEB, LMNO, Retro, SDB, Synthetic, Terminal Reality, or Troublemaker may be withheld under section 552.110(b).

BLS, Directorz, SDB, Seamless, and Terminal Reality also raise section 552.131 of the Government Code, which provides:

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). As previously stated, BLS, SDB, Seamless, and Terminal Reality have failed to demonstrate any portion of their information meets the definition of a trade secret and have provided no specific factual or evidentiary showing release of their information would cause the companies substantial competitive injury. Furthermore, we note Directorz has failed to demonstrate any of the remaining information in its application meets the definition of a trade secret or that release of this information would cause it substantial competitive harm. Consequently, we conclude that the governor may not withhold any of the remaining information in the applications of BLS, Directorz, SDB, Seamless, or Terminal Reality pursuant to section 552.131(a) of the Government Code.

We note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the governor does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of BLS, Directorz, SDB, or Seamless' information is excepted under section 552.131(b) of the Government Code.

BTFS also raises section 552.137 of the Government Code, which provides in part:

(a) Except as otherwise provided by this section, 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 this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract[.]

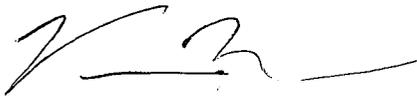
Gov't Code § 552.137(a), (c). BTFS argues the e-mail addresses contained in its application are excepted under section 552.137 because they were provided for the purpose of communicating electronically with a governmental body. We conclude that the e-mail addresses at issue are subject to section 552.137(c) because they were submitted as part of BTFS's application to obtain financial assistance from the Texas Moving Image Industry Incentive Program. We therefore find that the e-mail addresses in BTFS's application are not excepted from disclosure under section 552.137(a) and may not be withheld on that basis.

In summary, the governor must continue to rely on Open Records Letter No. 2011-02958 as a previous determination and release Troublemaker's submitted information in accordance with that ruling. The governor must withhold Synthetic's client information, which we have marked, under section 552.110(a) of the Government Code. The governor must withhold Directorz's customer information, which we have marked, under section 552.110(b) 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VEBjb

Ref: ID#419099

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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