



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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

April 27, 2011

Mr. Justin D. Gordon
Assistant General Counsel
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.

OR2011-04665A

Dear Mr. Gordon:

This office issued Open Records Letter No. 2011-04665 (2011) on April 5, 2011. We have examined this ruling and determined Open Records Letter No. 2011-04665 is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2011-04665. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

The Office of the Governor (the "governor") received a request for eight categories of information relating to the Emerging Technology Fund (the "fund"), including (1) records relating to potential appointees to the fund's advisory committee (the "committee"); (2) memos provided by the governor about fund applicants recommended by the committee; (3) notes or other records of the governor's staff from meetings of the committee or its subcommittees; (4) notes from meetings or other communications with the lieutenant governor, speaker of the House, or their staff members; (5) records of recusals by members of the committee, its subcommittees, and members of any of the regional or state centers for innovation and commercialization; (6) complaints about the fund from applicants, legislators, or citizens of Texas; (7) applications submitted to the regional or state centers for innovation and commercialization, the committee, and the governor; and (8) legal opinions in response to the funding application of Convergen Lifesciences.¹ You state the governor does not

¹You provide documentation showing the governor sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

maintain information responsive to category 8.² You state you will release information responsive to categories 1 and 6 and some information responsive to categories 3 and 5. You state you will withhold or release certain information pursuant to previous determinations issued to the governor in Open Records Letter Nos. 2011-00549 (2011), 2011-00565 (2011), 2010-00693 (2010), 2010-08748 (2010), and 2008-04769 (2008).³ See Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (previous determinations). You claim Exhibits B and C are excepted from disclosure under sections 552.104, 552.111, and 552.131 of the Government Code. Although you take no position on the public availability of the information in Exhibit D, you state this information may implicate the proprietary interests of numerous third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released.⁴ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from some of the third parties.⁵ We have

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³Open Records Letter Nos. 2011-00549 (2011) and 2011-00565 (2011) pertain to Convergen LifeSciences, Inc. ("Convergen"); Open Records Letter No. 2010-00693 pertains to Xitronix Corp.; Open Records Letter No. 2010-08748 pertains to ScanTech Sciences, L.L.C.; and Open Records Letter No. 2008-04769 pertains to Bauhaus Software, Inc.

⁴You inform us you are withdrawing your request for a ruling on information pertaining to Agile Planet, Inc; Hyperion Biotechnology, Inc.; Molecular LogiX, Inc; Monebo Technologies, Inc.; Savara, Inc.; University of Texas at Dallas; and University of Texas Health Science Center—San Antonio. You state these third parties have notified the governor they do not object to the release of their information. Additionally, Salient Pharmaceuticals Inc. ("Salient") informs us it has reached an agreement with the requestor regarding a portion of the information Salient wishes to withhold. Accordingly, this ruling does not address the information relating to these third parties.

⁵We have received comments from AdviTech, Inc. (AdvITech); BetaBatt, Inc. ("Betabatt"); Bi02 Medical, Inc., formerly known as Artificial Airways, Inc. ("Bi02"); Calxeda, Inc., formerly known as SmoothStone, Inc. ("Calxeda"); Convergen; Corythm, Inc. ("Corhythm"); CryoPen, Inc. ("CryoPen"); DataInfoCom USA, Inc. ("DataInfoCom"); DeviceFidelity, Inc. ("DeviceFidelity"); Digital Proctor, Inc. ("Digital"); Fe2 Medical, Inc. ("Fe2"); Firefly LED Lighting, Inc. ("Firefly"); Gradalis, Inc. ("Gradalis"); Green Revolution Cooling ("Green"); Inview Technology Corp. ("Inview"); MicroTransponder, Inc. ("MicroTransponder"); MicroZap, Inc. ("MicroZap"); Mirna Therapeutics, Inc. ("Mirna"); Mystic Pharmaceuticals, Inc. ("Mystic"); Net.Orange, Inc. ("Net.Orange"); Net Watch Solutions, Inc. ("Net Watch"); Neuro Resource Group, Inc. ("NRG"); Neurolink, Inc. ("Neurolink"); OrthoAccel Technologies, Inc. ("OrthoAccel"); Palmaz Scientific, Inc. ("Palmaz"); Patton Surgical, Inc. ("Patton"); Photon8, Inc. ("Photon8"); PLx Pharma, Inc. ("PLx"); Resonant Optics, Inc. and Resonant Sensors, Inc. ("Resonant"); Seno Medical Instruments, Inc. ("Seno"); SmartField, Inc. ("SmartField"); SolarBridge Technologies, Inc., formerly known as SmartSpark Energy Systems, Inc. ("SolarBridge"); Stellarray, Inc. also known as Stellar Micro Devices, Inc. ("Stellarray"); Syndiant, Inc. ("Syndiant"); RLIP L.L.C. doing business as Terapio Corp. ("Terapio"); Texas Tech University ("Texas Tech"); UT Health Science Center-Houston ("UTHSC-Houston"); Veros Systems, Inc. ("Veros"); ViroXis Corp. ("ViroXis"); VuComp, Inc. ("VuComp"); and ZS Pharma, Inc. ("ZS Pharma").

considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from an individual claiming a privacy interest in a portion of the submitted information. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note you have marked some of the information in Exhibit C as not responsive to the present request. We further note portions of Exhibits B and D, which we have marked, are not responsive to the present request because they do not fall within one of the categories of requested information or were created after the governor received the present request. This decision does not address the public availability of the non-responsive information, and the governor need not release that information in response to this request.

Next, we note the information in Exhibit D pertaining to Convergen is currently at issue in a lawsuit pending against the Office of the Attorney General, *Convergen LifeSciences, Inc. v. Hon. Greg Abbott, Attorney Gen. of Tex., & Hon. Rick Perry, Gov. of Tex.*, No. D-1-GN-11-000246 (419th Dist. Ct., Travis County, Tex.).⁶ Therefore, we will not address whether Convergen's information at issue in the lawsuit is excepted under the Act, but will instead allow the trial court to determine whether this information must be released to the public.

The governor raises section 552.104 of the Government Code for the fund applications and notes in Exhibit B. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The protections afforded by section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2, 463 at 1 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

You explain the applications in Exhibit B were submitted to the governor by twelve companies and two universities seeking financial incentives from the fund. You state the notes pertain to these entities, negotiations with these entities concerning fund incentives are pending, and no contracts have been executed. You explain release of the applications and notes would give advantage to other entities competing for the incentives by revealing details that would permit applicants to demand changes that would prevent the governor from

⁶As noted above, Convergen's information at issue in this lawsuit was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2011-00549 (2011) and 2011-00565 (2011).

negotiating or receiving the most favorable terms for the fund. You also state release of this information would harm the economic interests of the state by revealing economic incentives the state offers and the state's negotiating strategies to other states competing for applicants. You explain release of such information would permit competing states to offer more favorable incentives to applicants, undermining the state's ability to compete with other states in attracting these businesses. Based on these representations and our review, we agree release of the applications and notes in Exhibit B at this time would harm the governor's interest in particular competitive situations, both by giving an unfair competitive advantage to the companies competing for fund incentives and by interfering with the governor's competitive recruitment of such applicants to Texas. Therefore, the governor may withhold the information you have marked in Exhibit B under section 552.104 of the Government Code.⁷

The governor claims the remaining information in Exhibit B and the information it marked in Exhibit C is 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

⁷As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

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.

You state the remaining information in Exhibit B and the information you have marked in Exhibit C consist of notes created by the governor's staff during review of fund applications, notes recording the committee's opinions and recommendations regarding fund applications, and score sheets relating to applicants created by the governor's staff. You assert this information constitutes advice, opinions, or recommendations pertaining to the governor's policy deliberations regarding the fund. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to the information at issue. Therefore, the governor may withhold the remaining information in Exhibit B and the information you have marked in Exhibit C under section 552.111 of the Government Code.

Next, we address the third-party information in Exhibit D.⁸ We note 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 requested information relating to that party should be withheld from disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, certain third parties have not submitted any comments to this office explaining how release of the information at issue would affect their proprietary interests.⁹ Accordingly, none of the information belonging to these third parties

⁸Texas Tech informs us it takes no position on the public availability of a portion of its information, but states the information it marked may implicate the proprietary interest of another third party, III-N Technology, Inc. ("III-N"). Pursuant to section 552.305 of the Government Code, Texas Tech notified III-N of the request and its right to submit arguments to this office as to why its information should not be released. *See Gov't Code* § 552.305(d); *see also* ORD 542.

⁹We have not received comments from III-N, 1st Detect Corp.; 21 Century Silicon, Inc.; 2Cimple, Inc.; AADI, Inc.; Accelerator Technology Corp.; ActaCell, Inc.; Advanced Receiver Technologies L.L.C.; Aeon Clad Coatings L.L.C.; Agile Planet, Inc.; AgileMesh, Inc.; America Stem Cell, Inc.; Analogix Dev. Corp. dba Axelo Inc.; Animal Innovations; Anzode Inc.; Alliance for Higher Education; Armida Technologies Corp.; Atonometrics, Inc.; AuricX (ThermaLabs); Azaya Therapeutics, Inc.; Bellicum Pharmaceuticals, Inc.; Blue Box Health, Inc.; Bynari, Inc.; Capstone Composites, Inc.; Capstone IntelliH2O, Inc.; Carbon Nanotechnologies, Inc.; CardioSpectra, Inc.; Castle Biosciences, Inc.; Center for the Commercialization of Electric Technologies; Chipotle Business Group, Inc.; ClassOne Orthodontics, Inc.; ClearVet, Inc.; CMNA Power, L.L.C.; Codekko Software L.L.C.; CorInnova, Inc.; Cormedics Corp.; Crystal Water Alliance; CrystaTech, Inc.; CytImmune Sciences, Inc.; Dental Implant Technologies, Inc.; DentLight, Inc.; DEP Shape Memory Therapeutics; DNATriX, Inc.; Dogberry Solutions, Inc.; Dolphin Tech; DRC Technologies, Inc.; DRM Labs, Inc.; Electronic Polymers Newco, Inc.; Emerald Touch; Emission Solutions Inc.; Encore Vision; Endothelix, Inc.; Ensysce Biosciences, Inc.; Enthuze, Inc.; Environmental Quality Management Associates; EONSIL, Inc.; Evestra, Inc.; Falcon International, Inc.; Faradox Energy Storage, Inc.; FibeRio Technology Corp.; Frio Pharmaceuticals, Inc.; FrogPad Inc.; Global Contour Ltd.; Go Green Fuel, Inc.; Greenfield Compression, Inc.; Halsa Pharmaceuticals, Inc.; Hanson Robotics, Inc.; Holguin Group L.L.C.; Hydro Green Energy L.L.C.; HyEnergy Systems, Inc.; Hyperion Biotechnology, Inc.; Ideal Power Converters, Inc.; iLearning Gateway, Inc.; Image Trends, Inc.; Infintium Fuel Cell Systems Inc.; Informa Systems; inQuate Corp.; Interoperate.biz, Inc.; Introgen Technical Services, Inc.; Iridescent Networks, Inc.; Ironbridge Technologies, Inc.; itRobotics, Inc.; J.C. Lads Corp. dba Biometric Signature ID; Kewl Innovations, Inc.; KLD Energy Technologies, Inc.; Laser Tissue Welding, Inc.; LaserGen, Inc.; Leonardo BioSystems, Inc.; Livingston Products L.L.C.; Lynntech, Inc.; MacuCLEAR, Inc.; Mayan Pigments, Inc.; MC Nano Tissues L.L.C.; Medical Safety Technologies, Inc.; Merkatum Corp.; Metal

may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating business enterprise claiming exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

Some third parties argue the confidentiality notice in the fund application or the confidential and proprietary nature of their responsive information prohibits the release of the information at issue. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (“[T]he obligations of a governmental body under [the predecessor to 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 Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Next, we note BetaBatt, InView, Veros, and ZS Pharma have submitted arguments regarding information beyond that which the governor submitted to this office for our review. This ruling does not address such information, and is limited to the information submitted as

Oxide Technologies, Inc.; Modria, Inc.; Molecular Imprints, Inc.; Molecular LogiX, Inc.; Monebo Technologies, Inc.; MyMail Technology L.L.C.; MyToons f/k/a Bauhaus; Nano3D Biosciences, Inc.; NanoComposites, Inc.; NanoCoolers, Inc.; Nanoelectronics Research Institute; NanoMedical Systems, Inc.; Nanospectra Biosciences, Inc.; Nanotailor, Inc.; Nanotechnologies, Inc.; National Trauma Institute; Neptune Wave Power L.L.C.; Nextronics, Inc.; Nimbic Systems; NonInvasix; Novomedics L.L.C.; Oncolix, Inc.; OncoVista Inc.; Optisense Network, Inc.; Ortho Kinematics, Inc.; OxySure Systems, Inc.; Pass2Play, Inc.; Phoenix Renewable Energy, Inc.; Photodigm, Inc.; Pixel Engines, Inc.; PrincipleSoft, Inc.; Pronucleotein Biotechnologies L.L.C.; Pulmotect, L.L.C.; Pulsewave RF; Pungo, Inc.; Qcue, Inc.; Quantum Logic Devices, Inc.; RadioMedix, Inc.; Rampart-iD Systems, Inc.; Receptor Logic, Ltd.; Reflex Biosciences, Inc.; Repair Technologies, Inc.; RF SAW, Inc.; RFMicron, Inc.; Ringful L.L.C.; Rotating Sleeve Engine Technologies, Inc.; Rotec Design Ltd.; SafeTScribe Technologies; ScanTech Holdings L.L.C.; Secure Origins, Inc.; SEMATECH-Adv. Processing & Prototyping Center; SEMMT, Inc. (Apaxis Medical); Senda Micro Technologies, Inc.; SeprOx L.L.C.; Shape Memory Therapeutics, Inc.; SkyWay Aerospace Technology, Inc.; Smart Imaging Technologies Co.; SNRLabs Corp.; Solarno, Inc.; Space Services, Inc.; SPACEHAB, Inc.; Spinnaker Semiconductor, Inc.; StarVision Technologies, Inc.; Streamami L.L.C.; Sunrise Ridge Algae, Inc.; Tenaska, Inc.; Terrabon L.L.C.; Texas A&M University Health Science Center; Texas A&M University System; Texas Agricultural Experiment Station; Texas Piezoelectric, Inc.; Texas Railroad Commission; Texas Robotics; Texas State University; Theft-Proof Data L.L.C.; ThromboVision, Inc.; Trinity Thermal Systems L.P.; Turbo Thermal Corp.; Turbo Trac Limited L.P.; TXL Group; University of Houston; University of North Texas; University of Texas System Health Science Center; University of Texas System; University of Texas-Arlington; University of Texas-Austin; University of Texas-El Paso; University of Texas-San Antonio; University of Texas-Tyler; Varaha Systems, Inc.; Velatec; Veroscan, Inc.; Visualase; Vivante GMP Solutions, Inc.; Voxelox Corp.; Waldo Networks, Inc.; Wham! Inc.; World Wide Notary L.L.C.; Xilas Medical, Inc.; Xitronix Corp.; Xpower Solutions L.L.C. d/b/a Xtreme Power; Zehicle, Inc.; Zero Emission Energy Plants Ltd.; or Zyvex Corp.

responsive to the request 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). As ZS Pharma has not submitted arguments against disclosure of any of the submitted information, the governor may not withhold any information on the basis of ZS Pharma's arguments.

Next, Texas Tech and ViroXis inform us portions of the submitted information are subject to a prior ruling issued by this office. In Open Records Letter No. 2011-01142 (2011), we determined the governor must withhold a portion of Texas Tech's information under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code and a portion of ViroXis's information under section 552.110(b) of the Government Code. Therefore, to the extent the submitted information is encompassed by our previous ruling, and as we have no indication that the law, facts, and circumstances on which that decision was based have changed, the governor must continue to rely on our decision in Open Records Letter No. 2011-01142 and withhold Texas Tech's information at issue according to that ruling. *See* Gov't Code § 552.301(a); ORD 673 at 6-7 (listing elements of first type of previous determination under Gov't Code § 552.301(a)). We note, however, in Open Records Letter No. 2011-01142, ViroXis's information at issue concerned a contract for receipt of money from the fund. However, the present request is for fund applications, not contracts for the receipt of money from the fund. Accordingly, because the law, facts, and circumstances on which Open Records Letter No. 2011-01142 was based have changed with respect to ViroXis's information, the governor may not rely on Open Records Letter No. 2011-01142 as a previous determination for ViroXis's information. Thus, the governor may not withhold or release ViroXis's information in accordance with that ruling. To the extent the submitted information is not encompassed by this previous ruling, we will consider the submitted arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. While BetaBatt, Gradalis, and the individual claiming a privacy interest generally assert portions of their information are confidential by law, they have not directed our attention to any confidentiality provision, nor are we aware of any, that would make the information at issue confidential under section 552.101. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the governor may not withhold any portion of these third parties' responsive information under section 552.101 of the Government Code.

Section 552.101 encompasses information made confidential by other statutes. Resonant claims a portion of its submitted application is confidential under the federal Freedom of Information Act ("FOIA"), section 552 of title 5 of the United States Code. In addition, AdviTech claims a portion of its information is 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. § 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, which is a state, and not a federal, agency. This office and the courts have stated FOIA and the Privacy Act apply only 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 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 submitted information under section 552.101 of the Government Code on the basis of FOIA or the federal Privacy Act.

AdviTech also contends a portion of its information is confidential under the Federal Financial Modernization Act, also known as the Gramm-Leach-Bliley Act (the “GLB Act”). See 15 U.S.C. § 6801 *et seq.* Section 6802(c) of the GLB Act provides as follows:

. . . a nonaffiliated third party that receives from a financial institution nonpublic personal information [defined by the GLB Act as personally identifiable financial information as defined by federal regulations] under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6802(c). AdviTech contends a portion of its information is confidential under the GLB Act. However, AdviTech does not inform this office, nor does the information on its face reflect, that the information at issue is nonpersonal public information as defined by the GLB Act or personally identifiable financial information as defined by the federal regulations. See *id.* § 6809(4)(A) (defining “nonpersonal public information”); 16 C.F.R. § 313.3(o)(1) (defining “personally identifiable financial information”); *Individual Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) (“It is the context in which information is disclosed—rather than the intrinsic nature of the information itself—that determines whether information falls within the GLB Act.”). Thus, we are unable to conclude the GLB Act is applicable to this information.

Next, we note the submitted information includes a Form 1065 tax return. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty,

... or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), aff’d in part, 993 F.2d 1111 (4th Cir. 1993). Thus, we find the governor must withhold the Form 1065 tax return we have marked pursuant to federal law.

Texas Tech and UTHSC-Houston contend portions of their information are confidential under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. Section 51.914 provides in part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], or otherwise:

- (1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]
- (2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1)-(2). As noted in Open Records Decision No. 651 (1997), the legislature is silent as to how this office or a court is to determine whether particular scientific information has “a potential for being sold, traded, or licensed for a fee.” Furthermore, whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. See *id.* Thus, this office has stated that in considering whether requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a university’s assertion that the information has this potential. See *id.*; but see *id.* at 10 (university’s determination information has potential for being sold, traded, or licensed for fee is subject to judicial review). We note section 51.194 is not applicable to working titles of experiments or other information that does not reveal the details of the research. See Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988). Moreover, section 51.914 is applicable only to information “developed in whole or in part at a state institution of higher education.” Educ. Code § 51.914(1).

Texas Tech informs us its information at issue outlines the details of a turbulence analysis service. Texas Tech states the information was developed by its researchers and has the potential for being sold, traded, or licensed for a fee. Texas Tech contends disclosure of the information would reveal the substance of the research. UTHSC-Houston informs us its information at issue concerns proprietary information regarding unpublished research efforts, results, plans, and strategy. UTHSC-Houston states it can potentially sell or license this information for a fee, and disclosure of this information would reveal substance of the research. Based on these representations, we conclude Texas Tech's information at issue and a portion of UTHSC-Houston's information at issue, which we have marked, are confidential under section 51.914(1) of the Education Code. However, UTHSC-Houston also seeks to withhold the names, titles, qualifications, and other background information of individuals being considered as potential recruits to lead proposed research. Upon further review, we find this information does not reveal the specifics of any actual research. Consequently, we determine UTHSC-Houston failed to establish the applicability of section 51.914(1) to its remaining information, and the governor may not withhold this information under section 552.101 of the Government Code.

We note Texas Tech and UTHSC-Houston transferred the information at issue to the governor. This office has long held that information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies, so as to effectively carry out the business of the state. *See* Attorney General Opinions GA-0055 (2003), H-836 (1976), H-242 (1974), M-713 (1970); *see also* Open Records Decision Nos. 674 (2001), 667 (2000). *But see* Attorney General Opinion DM-353 at 4 n.6 (1995) (interagency transfer prohibited where confidentiality statute enumerates specific entities to which release of confidential information is authorized and where receiving agency is not among statute's enumerated entities); *see also* Open Records Decision No. 655 (1997); *cf.* Attorney General Opinion GA-0019 (2003) (information could not be transferred where statute absolutely prohibited disclosure). Therefore, the information at issue remains confidential in the governor's possession under section 51.914 of the Education Code and must be withheld from disclosure on that basis under section 552.101 of the Government Code.

AdviTech, Bi02, Corhythm, CryoPen, DataInfoCom, Digital Proctor, Fe2, Green, Mystic, Net Watch, Neurolink, NRG, Palmaz, PLx, Seno, Smartfield, Stellarray, Veros, ViroXis, and VuComp claim their information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 490.057 of the Government Code. Section 490.057 addresses the confidentiality of certain information pertaining to the fund and 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. We note section 490.057 applies only to an entity “being considered for an award from the fund[.]” *Id.* The governor does not indicate any of the information in Exhibit D relates to any entity “being considered” for an award. Although some third parties argue they are “still ‘being considered’ for an award from the fund” because they have not received their entire disbursements from the fund, we note an entity first must enter into a contract with the governor to receive an award from the fund. *Id.* § 490.101(g) (before making award from fund, governor shall enter into written agreement with entity receiving award). Such a contract may include terms relating to an award and “shall also specify other matters considered necessary by the governor, lieutenant governor, and speaker of the house of representatives.” *Id.* §§ 490.101(i), .103(b). Any fund disbursements therefore relate to terms of existing contracts between the governor and entities who have already received awards from the fund. Accordingly, we find these companies who have been approved for awards are no longer “being considered” for an award for purposes of section 490.057 of the Government Code. Other third parties argue their information is protected by section 490.057 because their applications for an award from the fund were denied. We likewise find these entities are no longer “being considered” for an award from the fund for section 490.057 purposes. Therefore, none of the information in Exhibit D is confidential under section 490.057, and the governor may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992) (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We note, however, common-law privacy protects the privacy interests of individuals, but not of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *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). We further note names, addresses, telephone numbers, educational history, and work background of individuals are not highly intimate or embarrassing. *See* ORD 455 at 7 (names and addresses not protected by privacy).

Bi02, Corhythm, Fe2, Mystic, Net Watch, Neurolink, NRG, Palmaz, Veros, ViroXis, and VuComp claim portions of their information are protected by common-law privacy. Upon

review, we find portions of the information belonging to these companies, as well as in the remaining third-party information, reflect individual owners' or investors' personal financial decisions and do not involve a financial transaction between the individuals and a governmental body. Therefore, the governor must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. We note, however, the remaining owners or investors at issue are business entities or the information at issue is not highly intimate or embarrassing and of no legitimate public interest. Consequently, the governor may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Mirna and Syndiant raise section 552.102 of the Government Code for portions of their information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See* Open Records Decision No. 345 (1982). In this instance, the information at issue relates to private entities. Therefore, the governor may not withhold any portion of these third parties' information under section 552.102(a) of the Government Code.

Resonant claims a portion of its information is excepted from disclosure by the litigation exception, section 552.103 of Government Code. Resonant states the information at issue is related to pending litigation involving a political subdivision of the state, *Resonant Sensors Inc., Resonant Optics, Inc, and Board of Regents, University Of Texas System v. SRU Biosystems, Inc.*, Civil Action No. 08-cv-01978, in the Dallas Division of the United States District Court for the Northern District of Texas. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties, we do not address Resonant's argument under section 552.103. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate rights of third party), 522 (1989) (discretionary exceptions in general). Furthermore, we note the governor is not a party to this lawsuit. The litigation exception only applies when the governmental body is a party to the pending or reasonably anticipated litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Accordingly, the governor may not withhold any of Resonant's information under section 552.103 of the Government Code.

Smartfield, Syndiant, and VuComp raise section 552.104 of the Government Code for portions of their responsive information. We note, however, the governor does not raise section 552.104 for any of the information in Exhibit D. Because section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties, we will not consider these third parties' claims under section 552.104. *See* Open Records Decision No. 592 at 8 (1991).

Many of the third parties raise section 552.110 of the Government Code for portions of their information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive

harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 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* ORD 552 at 2. 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.¹⁰ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person’s claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown 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) excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial

¹⁰The following are the six factors that the Restatement gives 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).

competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(b). 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 requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

In asserting his information should be excepted from disclosure, the individual claiming a privacy interest relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act 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). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 770. 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 *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 the enactment of section 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, in making our determinations under section 552.110, we will consider only the third parties’ interests in their responsive information.

AdviTech, BetaBatt, Bi02, Calxeda, Corhythm, Device Fidelity, Digital Proctor, Fe2, Firefly, Gradalis, Green, MicroZap, Net.Orange, Neurolink, NRG, OrthoAccel, Palmaz, Photon8, Resonant, Seno, Smartfield, SolarBridge, Stellarray, Veros, ViroXis, and VuComp contend portions of their responsive information constitute trade secrets. After reviewing these companies’ arguments and the information at issue, we find Digital Proctor, Green, NRG, and SolarBridge have made *prima facie* cases that portions of their information constitute a trade secret. Thus, the governor must withhold the information we have marked under section 552.110(a) of the Government Code. However, we conclude AdviTech, BetaBatt, Bi02, Calxeda, Corhythm, Device Fidelity, Fe2, Firefly, Gradalis, MicroZap, Net.Orange, Neurolink, OrthoAccel, Palmaz, Photon8, Resonant, Seno, Smartfield, Stellarray, Veros, ViroXis, and VuComp have failed to establish any of their information meets the definition of a trade secret. Thus, the governor may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Advitech, BetaBatt, Bi02, Calxeda, Corhythm, CryoPen, Device Fidelity, Fe2, Firefly, Gradalis, Green, InView, MicroTransponder, MicroZap, Mirna, Mystic, Net.Orange, Net Watch, Neurolink, NRG, OrthoAccel, Palmaz, Patton, Photon8, Resonant, Seno, Smartfield, SolarBridge, Stellarray, Syndiant, Terapio, Veros, ViroXis, VuComp, and the individual claiming a privacy interest seek to withhold portions of their information under

section 552.110(b) of the Government Code. Upon review, we determine AdviTech, Bi02, Calxeda, Corhythm, CryoPen, Fe2, Green, MicroTransponder, MicroZap, Mystic, Net Watch, Neurolink, NRG, Palmaz, Seno, Smartfield, SolarBridge, Terapio, ViroXis, and VuComp have established portions of their information, which we have marked, constitute commercial or financial information, the release of which would cause their companies substantial competitive injury. Therefore, the governor must withhold the information we have marked under section 552.110(b). However, we find AdviTech, Bi02, Calxeda, Corhythm, CryoPen, Fe2, Green, MicroZap, Mystic, Net Watch, Neurolink, NRG, Palmaz, Seno, Smartfield, Terapio, ViroXis, and VuComp have made only conclusory allegations that the release of their remaining information would result in substantial competitive injury. Furthermore, we find Betabatt, Device Fidelity, Firefly, Gradalis, InView, Mirna, Net.Orange, OrthoAccel, Patton, Photon8, Resonant, Stellarray, Syndiant, Veros, and the individual claiming a privacy interest have made only conclusory allegations that the release of any of their information would result in substantial competitive injury. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the governor may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Smartfield also raises section 552.113 of the Government Code, which protects certain geological, geophysical, and other information regarding the exploration or development of natural resources. *See* Gov't Code § 552.113; *see generally* Open Records Decision No. 627 (1994). Because Smartfield has not demonstrated this exception is applicable to any of its information, the governor may not withhold any of Smartfield's information under section 552.113 of the Government Code.

Gradalis, MicroZap, Resonant, Smartfield, Stellarray, and VuComp raise section 552.131 of the Government Code for portions of their information. Section 552.131 provides in relevant 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.

(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(a)–(b). 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.* Thus, the protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110 of the Government Code. *See id.* § 552.110(a)–(b); ORD 552, 661. Therefore, because we have already disposed of these third parties’ claims under section 552.110, the governor may not withhold the remaining information under section 552.131(a) of the Government Code. Furthermore, we note 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) for any third-party information, we conclude no portion of the remaining information is excepted under section 552.131(b) of the Government Code.

We note a portion of the remaining information is subject to Section 552.136 of the Government Code. Section 552.136 provides as follows:

(a) In this section, “access device” means 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:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. Accordingly, the governor must withhold the bank account number and bank routing number we have marked under section 552.136 of the Government Code.¹¹

¹¹We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Bi02, Corhythm, Device Fidelity, Fe2, Net.Orange, Neurolink, Palmaz, and ViroXis raise section 552.136 of the Government Code for portions of their remaining information. Upon review, we find these companies have failed to demonstrate how the federal tax identification numbers, Texas comptroller of public accounts numbers, or North American Industry Classification System numbers they seek to withhold under section 552.136 constitute access device numbers 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. Therefore, the governor may not withhold any of the remaining information under section 552.136 of the Government Code.

Fe2 and VuComp raise section 552.137 of the Government Code for portions of their remaining information. Section 552.137 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[.]

Id. § 552.137(a), (c). These third parties assert the e-mail addresses in their responsive information are excepted under section 552.137. However, we note the e-mail addresses at issue are subject to section 552.137(c)(3). We therefore find these e-mail addresses are not excepted from disclosure under section 552.137(a) and may not be withheld on that basis.

Net Watch asserts its submitted information is excepted under section 552.143 of the Government Code. Section 552.143 provides in part “[a]ll information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) [of the Government Code] is confidential and excepted from [required public disclosure].” *Id.* § 552.143(a). Section 552.143(d)(1) defines a private investment fund as “an entity, other than a governmental body, that issues restricted securities to a governmental body to evidence the investment of public funds for the purpose of reinvestment.” *Id.* § 552.143(d)(1). Net Watch states the information at issue “was prepared as a review and analysis of a government body, [the fund], for the direct purchase of securities in Net Watch Solutions, a private business venture.” Net Watch does not represent, and the submitted information does not indicate, Net Watch issues restricted

securities to a governmental body to evidence the investment of public funds for the purpose of reinvestment. Consequently, we find Net Watch has failed to demonstrate it is a private investment fund for purposes of section 552.143. We therefore conclude the governor may not withhold any of the remaining information under section 552.143 of the Government Code.

In summary, the governor may withhold the information you have marked in Exhibit B under section 552.104 of the Government Code. The governor may withhold the remaining information in Exhibit B and the information you have marked in Exhibit C under section 552.111 of the Government Code. To the extent the information at issue is encompassed by Open Records Letter No. 2011-01142, the governor must continue to rely on that ruling and withhold the information according to that ruling. The governor must withhold the Form 1065 tax return in Exhibit D we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The governor must withhold the information in Exhibit D we have marked under section 552.101 of the Government Code in conjunction with section 51.914(1) of the Education Code. The governor must withhold the information in Exhibit D we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The governor must withhold the information in Exhibit D we have marked under section 552.110(a) and section 552.110(b) of the Government Code. The governor must withhold the bank account number and bank routing number in Exhibit D we have marked under section 552.136 of the Government Code. 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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 411887

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c: Requestor
(w/o enclosures)

c: All Third Parties
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LM DEC 15 2011

At 1:56 M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-11-001118

CALXEDA, INC.,
Plaintiff,

v.

THE HONORABLE GREG ABBOTT,
IN HIS CAPACITY AS
TEXAS ATTORNEY GENERAL &
THE HONORABLE RICK PERRY,
IN HIS CAPACITY AS
GOVERNOR OF TEXAS,
Defendants.

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§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201st JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Calxeda, Inc. and Defendants Greg Abbott, Attorney General of Texas, and Rick Perry, Governor of Texas, 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 compromised and settled.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. In settlement of this dispute, Calxeda and the Attorney General have agreed that in accordance with the PIA and under the facts presented, some of the information currently at issue, specifically, highlighted information submitted pursuant to the proposed compromise agreement in Calxeda's Emerging Technology Fund Proposal, sections 1.4, 1.5, 2.4, 3.2, 3.3, 3.6, 4.5, 5.2, 6.2; and Synopsis of Portfolio Company, "Market Section" (hereinafter, the Excepted Information) are excepted from disclosure by PIA § 552.110(b).

2. In accordance with the PIA and the parties' agreement, the Governor shall withhold the Excepted Information.
3. The Governor has released or will release all other information at issue to the requestor, except the Excepted Information;
4. All costs of court are taxed against the parties incurring the same;
5. Each party will bear its own attorneys' fees;
6. All relief not expressly granted is denied; and
7. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

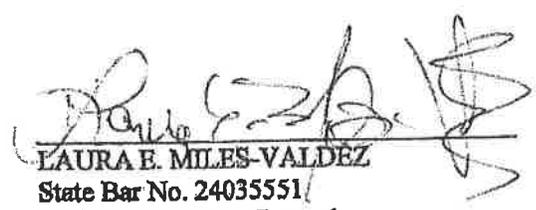
SIGNED this the 15th day of December, 2011.


PRESIDING JUDGE

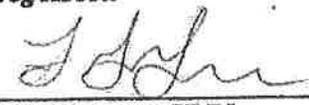
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