



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 11, 2015

Ms. Jordan Hale  
Public Information Coordinator  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2015-09109

Dear Ms. Hale:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 563000 (OOG ID# 15-044).

The Office of the Governor (the "governor's office") received a request for certain categories of information submitted by Certain Affinity, Inc. ("Certain Affinity") regarding the Texas Moving Image Industry Incentive Program (the "program").<sup>1</sup> Although you take no position as to whether the submitted information is excepted under the Act, you inform us its release may implicate the proprietary interests of Certain Affinity. Accordingly, you state the governor's office notified Certain Affinity of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in certain circumstances).

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<sup>1</sup>You state the requestor narrowed the scope of the information requested in response to a cost estimate. *See* Gov't Code § 552.222 (governmental body may communicate with requestor to clarify or narrow request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

We have received comments from Certain Affinity. We have considered the submitted arguments and reviewed the submitted information.

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. This section encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found personal financial information not related to a financial transaction between an individual and a governmental body is intimate or embarrassing and of no legitimate public interest. *See generally* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See generally* Open Records Decision No. 545(1990). Whether the public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. Certain Affinity argues portions of its information are subject to common-law privacy. Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the governor’s office must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>2</sup> However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

Certain Affinity claims portions of its information are excepted from disclosure under section 552.102(a) of the Government Code. 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). However, section 552.102 applies to information in the personnel file of a governmental employee. *See id.* None of Certain Affinity’s information consists of information in the personnel file of a governmental employee. Therefore, we find section 552.102 of the Government Code is not applicable, and the governor’s office may not withhold any of Certain Affinity’s information on that basis.

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<sup>2</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

Certain Affinity raises section 552.110 of the Government Code for portions of the remaining information. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 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, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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 Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *Open Records Decision No. 402 (1983)*.

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<sup>3</sup>The 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; *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

Certain Affinity argues portions of its remaining information consist of commercial and financial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Certain Affinity has established that some of its remaining information, which we have marked, generally constitutes commercial or financial information, the disclosure of which would cause Certain Affinity substantial competitive harm. However, we note the marked information consists of the titles of projects being developed by Certain Affinity, some of which, according to Certain Affinity, have not yet been released. Accordingly, to the extent the information we have marked relates to a project that has not yet been released, the governor’s office must withhold the information we have marked under section 552.110(b).<sup>4</sup> Furthermore, we note a portion of the remaining information consists of the dollar amount submitted by Certain Affinity to the governor’s office, for which Certain Affinity seeks a grant from the governor’s office under the program. Section 552.110 is generally not applicable to this type of information. *See generally* Open Records Decision Nos. 541 at 8 514 (1988), 319 at 3. Upon review, we find Certain Affinity has not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause Certain Affinity substantial competitive harm. *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 is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the governor’s office may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Certain Affinity argues portions of its remaining information consist trade secrets under section 552.110(a) of the Government Code. Upon review, we find Certain Affinity has failed to establish a *prima facie* case that any portion of the remaining information meets the

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<sup>4</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

definition of a trade secret. Moreover, we find Certain Affinity has not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, no portion of the remaining information may be withheld under section 552.110(a).

Certain Affinity also argues portions of its remaining information fit the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the Texas Uniform Trade Secrets Act (the "TUTSA") as added by the Eighty-third Texas Legislature. Section 134A.002(6) provides:

(6) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

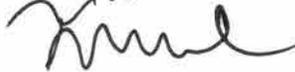
Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). The definition of trade secret found in section 134A.002(6) expressly applies to chapter 134A only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6); *see also id.* § 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act); Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the governor's office may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of the Texas Civil Practice and Remedies Code.

In summary, the governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we have marked relates to a project that has not yet been released, the governor's office must withhold the information we have marked under section 552.110(b). The governor's office must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/bhf

Ref: ID# 563000

Enc. Submitted documents

c: Requestor

Requestor  
(w/o enclosures)

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