

February 16, 2021

300 Throckmorton Street
Suite 1700
Fort Worth, Texas 76102

817.420.8200 *OFFICE*
817.420.8201 *FAX*
winstead.com

CONFIDENTIAL

direct dial: 817.420.8225
jhoover@winstead.com

Office of the Attorney General
Open Records Division
Price Daniel Building
209 W. 14th Street, 6th Floor
Austin, Texas 78701

Re: Public Information Act Request (the "***PIA Request***") submitted by [REDACTED]
[REDACTED] (the "***Requestor***") to the Texas Governor's Office on January 11, 2021

Dear Sir/Madam:

Our client, Facebook, Inc. ("***FB***"), received written notice (the "***OOG Notice***") of the above-referenced PIA Request from the Office of the Governor ("***OOG***") on February 3, 2021 (see copy attached hereto as **Exhibit A**). The PIA Request relates to all "communications with all employees of" Alphabet Inc. and/or Google, Facebook Inc., Amazon.com, Inc., and Apple, Inc. "[f]or the time period of October 1, 2020 to present." The OOG Notice was delivered to FB in accordance with Section 552.305 of the Texas Public Information Act (the "***Act***") because the files requested in the PIA Request may include certain records that the OOG received from FB (the "***FB Records***"). As discussed in further detail below, FB respectfully requests that the Attorney General instruct the OOG to withhold certain portions of the FB Records from public disclosure.

I. Background

Headquartered in Menlo Park, California, FB is a social media conglomerate and technology company with 17 announced data center projects around the globe and offices in 70 cities worldwide. Within the State of Texas, FB currently has one data center facility near Fort Worth as well as offices in Austin and Dallas. FB is now looking to further expand its data center capabilities by adding a new data center within the United States (the "***Target Facility***"). The Target Facility will involve significant invested capital by FB, will result in the hiring of a significant number of full-time employees in the applicable state and local community, and will create significant revenues for state and local utility providers and other businesses.

Texas is one of several states being considered by FB for the Target Facility and, accordingly, FB has been engaged in preliminary discussions with the OOG's Economic Development & Tourism Office regarding possible site locations and related economic incentives. These discussions just commenced this past August and it will likely be at least a year or two before a final site selection decision is made by FB. As indicated in the OOG's Open Records Letter Ruling Request dated February 3, 2021 to the Office of the Attorney General, the FB Records further relate "to investigating,

coordinating, and gathering information regarding potential incentives under consideration to be offered to [FB]." The OOG's ability to maintain the confidentiality of the communications and other information embodied in the FB Records is paramount to the ability of the State of Texas to remain in consideration for the Target Facility. As evidence of the sensitivities of both the OOG and FB with respect to the FB Records, FB has designated a specific project codename for its discussions with the OOG, such that FB's identity can be protected through the vetting process of the possible location of the Target Facility in the State of Texas.

II. Confidential FB Information

The PIA Request specifically seeks copies, for the time period of October 1, 2020 to present, of "all communications with all employees of . . . [FB]" (all of the foregoing collectively referred to herein as the "**Requested FB Information**"). As we have confirmed with the OOG, the Requested FB Information consists of approximately 113 pages of documents. Within the Requested FB Information (also referred to herein as the "**FB Records**"), the following highly sensitive, proprietary, and confidential information of FB has not otherwise been made publicly available through any party, venue or media (collectively, the "**Confidential FB Information**"):

- The fact that FB is considering locations in the State of Texas for the Target Facility;
- The project codename for the Target Facility;
- The name of the FB subsidiary that will acquire the land for the Target Facility;
- FB project team members;
- The Nondisclosure Agreement entered into by FB and the OOG, the terms of which were heavily negotiated by the parties; and
- Email communications among FB project team members and executive officers of the OOG's Department of Economic Development & Tourism, as well as with representatives of the OOG's General Counsel (collectively, the "**Confidential Emails**").

It should be noted that the FB Records also include some email communications that are unrelated to the Target Facility (specifically, certain email communications involving FB, the OOG, and the Texas Lottery Commission and certain other email communications involving the OOG, FB, and other third parties regarding their participation in a panel discussion on social media marketing and ecommerce hosted by the OOG on October 28, 2020). However, we are not requesting that the Attorney General instruct the OOG to withhold these portions of the FB Records from public disclosure.

Clean and redacted copies of the FB Records are attached hereto as **Exhibit B** and **Exhibit C**, respectively. Also, it should be noted that the OOG has not otherwise previously disclosed any of the FB Records, and we understand that the OOG has fully redacted most if not all of the FB Records in connection with its Open Records Letter Ruling Request dated February 3, 2021 (which would be the preferred result for FB as well, as opposed to just a partial redaction of the FB Records).

We would also like to point out that (i) this same Requester submitted a similar request to the OOG last October (2020) which implicated similar FB records/information, and (ii) per a letter ruling issued on February 2, 2021, the Office of the Attorney General instructed the OOG to withhold from disclosure all such FB records/information. *See* OR2021-02715.

III. Third Party Request for Nondisclosure

As a third party whose privacy or property interests may be involved in the PIA Request, FB submits this letter, in accordance with Section 552.305 of the Act, to explain its reasons why the FB Records, or at least certain portions of the FB Records (namely the Confidential FB Information), should be withheld from disclosure to the Requestor. FB objects to the OOG's disclosure of the FB Records (or, at a minimum, the Confidential FB Information) and respectfully requests that the Attorney General instruct the OOG to withhold the FB Records (or, at a minimum, the Confidential FB Information) from public disclosure. FB cites the following alternative exceptions to public disclosure under the Act:

A. Section 552.131: Economic Development Information

The Confidential FB Information is exempt from disclosure pursuant to Section 552.131 of the Act. Specifically, this exemption applies to information that:

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. *See* TEX. GOV'T CODE ANN. § 552.131.

As an initial point, and without question, the FB Records relate to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate in its territory. As previously indicated, the FB Records involve economic development negotiations between FB and the OOG with respect to the potential location of the Target Facility in the State of Texas, and those negotiations are only at the very preliminary stages (as FB concurrently engages in similar negotiations with other states). Additionally (and as further discussed under Sections III.B and III.C below), the Confidential FB Information includes FB's trade secrets and relates to commercial and financial information, the disclosure of which would cause substantial competitive harm to FB if it were to be disclosed to Requestor (and in turn become publicly available to other third parties). As further discussed under Section III.C below, new data center projects are material undertakings that require a significant amount of investment capital. In this case, it should again be emphasized that FB is currently in the very preliminary stages of its site selection efforts across the United States (a process that will likely take at least another year or two to complete), so further negotiations remain pending and ongoing with various state and local governmental bodies (including the OOG, the State of Texas, and the local communities being considered in the State of Texas). In FB's experience, maintaining the confidentiality of a site selection effort is critical to the success of the underlying project. Frankly, if the FB Records become publicly available, then FB will likely withdraw from further discussions with the OOG regarding the possible location of the Target Facility in the State of Texas and focus its site selection efforts on

other states where the confidentiality of the underlying project can be maintained.

B. Section 552.110(b): Trade Secrets

Section 552.110(b) of the Act excepts from public disclosure information as to which "it is demonstrated based on specific factual evidence that the information is a trade secret." Section 552.110(a) of the Act further defines a "trade secret" as:

all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or however stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if: (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information. *See* TEX. GOV'T CODE ANN. § 552.110(a).

With respect to the first element of the trade secret definition above, FB has taken numerous measures to keep the FB Records secret. For example, only a select group of FB employees have been involved in FB's investigatory efforts for the Target Facility and an even smaller group of FB employees has knowledge of and/or full access to the specific details surrounding the Target Facility. To further illustrate this point, (i) FB has assigned a project codename to the Target Facility and FB requires that all states interested in discussing the Target Facility use such project codename in all communications, up and until a final site has been selected by FB, and (ii) FB and the OOG have entered into a Nondisclosure Agreement (the terms of which were heavily negotiated by the parties) as a precondition to FB's disclosure to the OOG of any confidential information regarding the Target Facility. Given the importance of maintaining confidentiality until final site selection, the Confidential FB Information is under no circumstances published or otherwise publicly disseminated by FB, internally or externally. Further, by implementing project codenames and project-specific email addresses, FB's identity and involvement in a new data center project would not otherwise be disclosed to applicable third parties (such as landowners or utility providers) until after definitive agreements have been executed with such parties.

With respect to the second element of the trade secret definition above, the FB Records contain invaluable information to FB, access to which would also be highly valuable to FB's competitors. For example, the Confidential Information includes details regarding the FB project team members, the project codename for the Target Facility, the name of the FB subsidiary entity that will acquire the land for the Target Facility, and the Nondisclosure Agreement entered into by FB and the OOG, the terms of which were heavily negotiated by the parties. FB has incurred significant time and cost in developing this information and its site location strategy and, given the magnitude of invested capital involved, the development of the Target Facility will be a significant investment decision for FB (as evidenced by the fact that FB has only announced 13 data center projects throughout the United States to date). Accordingly, disclosure of such Confidential Information could allow other companies (including other social media and technology companies) who compete with FB and its various business lines to

potentially replicate and implement FB's site location strategy. Disclosure of such information could allow FB's competitors to preemptively secure preferred site locations before FB has completed its processes for the Target Facility, thus impairing FB's ability to negotiate a market appropriate land valuation with the owners of land in the same location as it is possible the that land values might artificially increase if FB and its competitors are negotiating for land in the same location.

Finally, as further discussed in Section III.A above, discussions between FB and the OOG remain in the preliminary stages and have not yet proceeded to any contract negotiation stage. As a result, none of the FB Records constitute a contract or offer terms or their functional equivalent. We raise this point to preemptively address any concerns that Section 552.0222(b) of the Act may apply to any portion of the FB Records, on the basis of contracting information for which the Act's exception for trade secrets does not otherwise apply.

As set forth above, applying the applicable statutory definition to the FB Records indicates that the Confidential FB Information is a trade secret under Texas law.

C. Section 552.110(c): Confidential Commercial and Financial Information

The Confidential FB Information is also exempt from disclosure pursuant to Section 552.110(c) of the Act. Specifically, "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 is excepted from the requirements of 552.021." *See* TEX. GOV'T CODE ANN. § 552.110(c). As further described below, the Confidential FB Information represents commercial and financial information, the disclosure of which will cause substantial competitive harm to FB.

Given the magnitude of the time and cost that must be invested in the development of a data center of the scale of the Target Facility, new opportunities for similar data centers (not only within the United States but also globally) are quite rare. Accordingly, FB's final decision regarding where to locate the Target Facility will involve a myriad of considerations, both short-term and long-term, including site location, local labor markets, local economic environment, and economic/development incentives from state and local governments. Further, FB is considering multiple sites in multiple states for the Target Facility and it is critical that FB's communications with state and local governmental bodies (*i.e.*, the Confidential Emails) are kept confidential until a final decision on site selection has been made by FB. If those discussions are prematurely made public, then FB may withdraw its interest in a particular state and could suffer substantial competitive harm if such withdrawal results in FB having to locate the Target Facility at a less favorable site in another state (due to the applicable costs and local economic conditions associated with such alternative site/state).

As indicated above, the Confidential Information includes details regarding the FB project team members, the project codename for the Target Facility, the name of the FB subsidiary entity that will acquire the land for the Target Facility, and the Nondisclosure Agreement entered into by FB and the OOG, the terms of which were heavily negotiated by the parties. If this information were made publicly available before FB has contracted for its preferred site, then other owners and operators of data center facilities would accrue otherwise unavailable insight into FB's site location strategy, without having to devote similar cost and time in developing such information (as has been already incurred by FB). Substantial competitive harm would result to FB as other parties could pursue data center projects in the same or similar locations as being considered by FB (including in the State of Texas), but at a fraction of

the time and expense. Furthermore, if the Confidential FB Information were released, then those parties (who are competing for similar economic incentives from state and local governmental authorities) could use the Confidential FB Information to modify, update and reformat their own project proposals. The disclosure of the Confidential FB Information could also prejudice FB by impairing its ability to negotiate a market appropriate land valuation with the owner of the site ultimately selected for the Target Facility. For instance, it is possible that land values might artificially increase if it becomes public knowledge that the party searching for a large tract of land is a large technology company like FB.

Finally, as further discussed in Section III.A above, discussions between FB and the OOG remain in the preliminary stages and have not yet proceeded to any contract negotiation stage. As a result, none of the FB Records constitute a contract or offer terms or their functional equivalent. We raise this point to preemptively address any concerns that Section 552.0222(b) of the Act may apply to any portion of the FB Records, on the basis of contracting information for which the Act's exception for certain commercial or financial information does not otherwise apply.

For the foregoing reasons, the Confidential FB Information represents commercial or financial information of FB, the disclosure of which would cause substantial competitive harm to FB. Accordingly, the Confidential FB Information should be withheld from disclosure under Section 552.110(c) of the Act.

IV. Conclusion

Based on the foregoing, FB hereby requests a decision from the Attorney General that the FB Records sought in the PIA Request, or at least certain portions of such FB Records (specifically, the Confidential FB Information), be excepted from disclosure under the Act. We respectfully request that the Attorney General issue an opinion or order declaring that the OOG is not required to produce any of the FB Records (or, at a minimum, the Confidential FB Information) in response to the Requestor's PIA Request. Should you require any additional information to evaluate this matter, please advise, and we will be happy to respond promptly.

Best regards,



Justin A. Hoover

Enclosures

- Exhibit A – Copy of OOG Notice
- Exhibit B – Clean copy of FB Records
- Exhibit C – Redacted copy of FB Records

cc: Justin Glawe (*w/o enclosures*)