



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 31, 1994

Mr. G. Mike Davis  
Interim State Fire Marshal  
Texas Commission on Fire Protection  
P.O. Box 2286  
Austin, Texas 78768-2286

OR94-232

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 25825.

The Texas Commission on Fire Protection (the "commission") has received a request for a copy "of the mailing list of all licensed retailers for the calendar year 1993." You have submitted the requested information to us for review. You claim that sections 552.104 and 552.110 of the Government Code except the requested information from required public disclosure.

We first address your claim that section 552.104 excepts the requested information from required public disclosure. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 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. Open Records Decision No. 541 (1990). In the past, this office held that section 552.104 could not be asserted to protect a governmental body's "competitive advantage" because a governmental body cannot be regarded as being in competition with private enterprise. See Open Records Decision No. 463 (1987) at 2. In Open Records Decision No. 593 (1991), however, this office held that a governmental body might be deemed, under certain circumstances, to be a "competitor" in the marketplace.

You do not claim, nor are we otherwise aware, that the requested information relates to a pending competitive bidding process. In addition, we do not understand the commission to be a "competitor" in the marketplace. Accordingly, we conclude that the

commission may not withhold the requested information under section 552.104 of the Government Code.<sup>1</sup>

You also claim that section 552.110 excepts the requested information from required public disclosure. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. You claim that the requested information constitutes "trade secrets" and "commercial or financial" information. We address first the "trade secrets" branch of section 552.110.

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, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) 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, . . . [but] 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. [Emphasis added.]

RESTATEMENT OF TORTS § 757, cmt. b (1939). With regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a claim for exception as valid under that branch if a *prima facie* case for exception is established and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>2</sup> This office has on numerous occasions

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<sup>1</sup>Section 552.104 is designed to protect only a governmental body's interests. *See* Open Records Decision No. 541 (1990) at 4-5. Thus, you may not assert it to protect the interests of the firework permit holders.

<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (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

held customer lists to be "trade secrets" under section 552.110. *See, e.g.*, Open Records Decision Nos. 552 (1990) at 3; 437 (1986) at 4; 255 (1980) at 3.

You advise us that the requested mailing list was generated by the commission in connection with its responsibilities in granting firework permits. *See* Ins. Code art. 5.43-4, § 8. You contend that the mailing list constitutes the customer lists of firework manufacturers, distributors, and jobbers, who are permitted to sell permits to fireworks retailers. We note, however, that the requestor does not seek information specific to any one of the entities permitted to sell permits to retailers, but rather seeks a mailing list of all licensed retailers. We conclude, therefore, that you have not made a *prima facie* case that the requested information constitutes trade secrets. Accordingly, we conclude that the commission may not withhold the requested information under the trade secrets branch of section 552.110 of the Government Code.

Finally, we address the "commercial or financial" information aspect of section 552.110. Citing Open Records Decision No. 238 (1980), you assert that the requested information is excepted because its release would impair the commission's ability to obtain the information in the future. Past open records decisions issued by this office have relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act ("FOIA") in applying section 552.110 to commercial information. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, in Open Records Decision No. 592 (1991), reliance on federal interpretations of exemption 4 of FOIA was reexamined. As a consequence of this reexamination, open records decisions exempting commercial and financial information pursuant to federal interpretations of exemption 4 were overruled. Unless the information requested constitutes trade secrets or is "privileged or confidential" under the common or statutory law of Texas, it cannot be withheld under section 552.110. You have not demonstrated, nor is it otherwise apparent, that the requested information is "privileged or confidential" under the common or statutory law of Texas. Accordingly, we conclude that the commission may not withhold the requested information under section 552.110 of the Government Code. The commission must release the requested information in its entirety.

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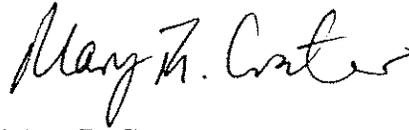
(Footnote continued)

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 (1982) at 2; 306 (1982) at 2; 255 (1980) at 2.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Open Government Section

MRC/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 25825

cc: Mr. H. H. Girdley  
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P.O. Box 18264  
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(w/o enclosures)