Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 31, 1994

Ms. Sharon M. Schweitzer
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR94-234

Dear Ms. Schweitzer:

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# 24571.

The Texas Department of Transportation (the "department"), which you represent, has received a request for "any and all non-confidential information submitted with the DBE [Disadvantaged Business Enterprise] applications of" Manufactured Concrete Products Company ("MANCO") and San Antonio Pre-Stress Company, Inc. ("SAPSCO"). You have submitted the requested information to us for review and claim that the city may withhold it from required public disclosure under the Open Records Act.

Section 552.301(a) of the Government Code provides:

> A governmental body that receives a written request for information that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.

Section 552.302 provides:

> If a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information.

The department received the request December 29, 1993. You requested a determination of this office February 11, 1994. On the basis of these facts, we conclude that the department failed to request a decision within the ten day period section 552.301(a) of the Government Code mandates.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982) at 1-2. The governmental body must show a compelling reason to withhold the information to overcome this presumption. *See Hancock, supra.* Normally, a governmental body can overcome the presumption of openness by a compelling demonstration that the governmental body should not release the requested information to the public, *i.e.*, that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. You seek to withhold the requested information under sections 552.101, 552.102, and 552.104 of the Government Code.

Pursuant to section 552.305 of the Government Code, we have notified the parties whose proprietary interests are implicated by this request. We have received responses from MANCO and SAPSCO. MANCO claims that sections 552.101, 552.104, 552.105, and 552.110 of the Government Code except information about MANCO from required public disclosure. SAPSCO claims that sections 552.101, 552.104, and 552.110 of the Government Code except some of the information about SAPSCO from required public disclosure.[1] 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. Collectively, the respondents claim that the information submitted to us for review constitutes "trade secrets" and "commercial or financial information." We first address 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

[1]Sections 552.104 and 552.105 are designed to protect only a governmental body's interests. *See generally* Open Records Decision No. 541 (1990). Thus, the respondents have no standing to assert these exceptions. In addition, your failure to assert section 552.104 within the ten days required by section 552.301 constitutes a waiver of the exception.

> 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. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.[2]

We have examined the arguments submitted to us for review. We conclude that neither of the respondents has made a prima facie case that the requested information constitutes trade secrets. Accordingly, we conclude that the requested information may not be withheld from required public disclosure under the trade secrets branch of section 552.110 of the act.

Next, we address the "commercial or financial information" branch of section 552.110. "Commercial or financial information" may be withheld from required public disclosure under section 552.110 if it is privileged or confidential by statute or judicial decision. We note that some of the requested information must be withheld from

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[2]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

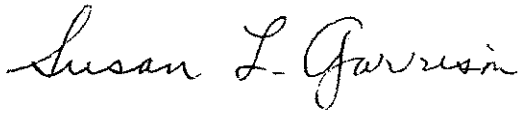
> (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information;(4) the value of the information to [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, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

required public disclosure under section 552.110 in conjunction with federal law. Title 26, section 6103(a) 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). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Accordingly, the requested information must be withheld from required public disclosure under section 552.110 of the Government Code to the extent that it contains tax return information made confidential by federal statute. Except for tax return information, however, the requested information must be released in its entirety.[3]

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,



Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 24571
ID# 25456
ID# 25549
ID# 25549
ID# 25571

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[3]You also seek to withhold the requested information under section 552.102 of the Government Code, which excepts "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test the Texas Supreme Court articulated for section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The submitted information does not appear to be "information in personnel files." In addition, the submitted information does not include intimate or embarrassing information. Accordingly, section 552.102 is inapplicable here.

cc: Mr. Paul Guthrie
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