



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 28, 1994

Ms. Martha T. Williams
Associate General Counsel
Port of Houston Authority
P.O. Box 2562
Houston, Texas 77252-2562

OR94-749

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29194.

The Port of Houston Authority ("Port Authority") received a request for numerous items of information. The Port Authority seeks to withhold from required public disclosure portions of three documents based on section 552.110 of the Government Code and submitted to this office for our review copies of one cargo declaration (United States Customs Form 1302) and two vessel manifests. The Port Authority marked as confidential portions of these documents that disclose the shipper, the consignee and the notified party. In addition, on the manifests, the Port Authority has marked as confidential the information in the "Marks" portion of the manifests and two words that have apparently been stamped on the manifest.

This request implicates the property rights of a third party, Cargo Terminal Venture ("Venture"). Consequently, this office notified Venture of this request. See Gov't Code § 552.305. Venture asserts that three categories of information are excepted from required public disclosure under sections 552.104 and 552.110 of the Government Code. Venture describes these categories as follows:

1. Financial information, including past and present financial statements of Venture, its partners, or the guarantors under the lease (including balance sheets and operating statements), and projections in respect to the financial prospects for Venture;
2. Report/ship manifests of the number of ships handled at the facility, the type of cargo and tonnage handled on each such occasion, as well as the

rates charged those customers; and 3. Customer lists and correspondence related thereto, including lists of liner services, shipping companies, freight forwarders, milling companies, and export cargo companies.¹

We consider first the availability of Venture's financial information. Section 552.110 of the Government Code reads as follows:

A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.

This exception refers to two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person. Venture does not assert that the financial information is a trade secret. Rather, Venture asserts that the release of the information will cause substantial harm to its competitive position. *See* Letter from Clark K. Ervin, Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P., to Beverly McGaffey, Office of Texas Attorney General (Oct. 10, 1994); Letter from Douglas W. Schnitzer, President, Cargo Terminal Venture, to Honorable Dan Morales, Office of Attorney General of Texas (Sept. 14, 1994).

In order to be excepted from disclosure under the commercial or financial information branch of section 552.110, the information must be confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991). Therefore, the fact that such disclosure may cause substantial harm to the Venture's competitive position is not sufficient to protect the information from disclosure. *See id.*

Venture has not cited, nor are we aware, of any common or statutory law of Texas that would make the financial information confidential. We, therefore, conclude that the Port Authority may not withhold such information under section 552.110 of the Government Code.

Section 552.104 states that:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592. Section 552.104 is not designed to protect the interests of private parties that submit information to a

¹Except for the cargo declaration and the two manifests, the Port Authority has not submitted to this office information that Venture asserts is excepted from required public disclosure.

governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Consequently, a governmental body may waive section 552.104. *See* Open Records Decision No. 592 at 8.

In this instance, the Port Authority did not raise section 552.104; only Venture did so. Section 552.104 is inapplicable to protect the interests of Venture. Accordingly, the Port Authority may not withhold the financial information based on section 552.104 of the Government Code.

We turn to the information on the cargo declaration and the two manifests. The Port Authority asserts that the names and addresses of the shipper, the consignee and the notified party, as well as the marks and numbers which can be used to identify the shipper, consignee and/or notified party are a trade secret of the shipper. By letter to this office, dated September 22, 1994, the requestor stated that it "has no objection to the information being released by the Port . . . Authority in redacted form so as to protect the names and addresses of the consignee or notified party . . ." Thus, we will not address whether the information about the consignee or notified party is a trade secret, since the requestor has agreed to the redaction of this information.² We consider whether the information about the shipper as well as the stamped information are trade secrets.

Section 552.110 of the Government Code excepts a trade secret from required public disclosure. 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.

²Such redaction would, of course, include the marks of the consignee and the notified party.

RESTATEMENT OF TORTS § 757, cmt. b (1939). The Restatement also lists the following six factors to be considered in determining whether particular information constitutes a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 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 to [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.

Id. In determining whether information is a trade secret, this office relies on information from the company about these six factors. See Open Records Decision Nos. 554; 552 (1990). We will consider the trade secret arguments of Venture and the Port Authority.

Counsel for Venture does not contend that any of the information on the manifests is a trade secret. The President of Venture argues in a general way that disclosure of all of the information in its three categories "will result in a disadvantage to the Venture in negotiations with shippers who desire to utilize our services and provide an advantage to our competitors of knowing virtually all aspects of our business." Letter from Douglas W. Schnitzer, President, Cargo Terminal Venture, to Honorable Dan Morales, Office of Attorney General of Texas (Sept. 14, 1994).

The Port Authority's arguments for trade secret protection are directed to the manifests as a whole, rather than to particular portions of it. The Port Authority informs us that the availability of a vessel manifest is limited; only the steamship line and/or its agent at origin and destination, the captain of the vessel carrying the cargo, U.S. Customs, USDA-PPQ (Plant Protection and Quarantine), the stevedore/freight handler, and the Port Authority have access to the manifest. See Affidavit of Walter V. Kleczkowski, Operations Division of the Port Authority (Sept. 14, 1994). Mr. Kleczkowski states that the information can only be acquired through company permission or through industrial espionage. *Id.* Mr. Kleczkowski also states that each company has its own security measures to safeguard the information on a vessel manifest. He states that obtaining

confidential information on a vessel manifest would allow competitors to call on a shipper's or consignee's customers in order to undercut the shipper's or consignor's prices and/or service. He also states that releasing the manifest would cause severe harm to the company and that the information is developed by the entire sales efforts of each shipper and consignee. *See id.*

Ordinarily, a company must show what efforts have been made to keep information confidential in order for it to qualify as a trade secret under section 552.110. *See Open Records Decision No. 255 (1980)*. Venture has provided no information about its efforts to keep the cargo declaration and the manifests or the information about the shipper confidential. As mentioned above, the Port Authority has addressed some of these factors while contending that a manifest as a whole is a trade secret. However, the Port Authority does not address the issue of whether the information about the shipper standing alone, without the inclusion of the information about the consignee and the notify address, constitutes a trade secret. Nor does the Port Authority explain why the information that is stamped on the manifest is excepted from required public disclosure.

Counsel for Venture also asserts that information about the rates Venture charges its customers as well as its customer lists are trade secrets. Counsel states that the disclosure of the rates would permit its competitors to determine its methodology and pricing structure and use that knowledge to its detriment in future competition. As support for the contention that Venture's customer lists and related correspondence constitutes a trade secret, counsel cites the definition of a trade secret that the Texas Supreme Court adopted in *Hyde Corporation*.

We believe that neither Venture nor the Port Authority has provided sufficient information about the six trade factors to establish that the shipper information or the stamped information are trade secrets. We, therefore, conclude that the Port Authority may not withhold this information pursuant to section 552.110 of the Government Code.

Nor do we believe that Venture has established that the rates charged or the customer list information are trade secrets. Customer lists may be withheld only if they meet the six criteria of the Restatement of Torts. *See Open Records Decision No. 494 (1988)* at 5. Venture has provided no information about the six trade secret criteria in regard to the rates charged or the customer list information. Thus, the Port Authority may not withhold information about the rates charge or about Venture customers based on section 552.110 of the Government Code. (b) (5) - (D)

Finally, the Port Authority raises federal regulations concerning the disclosure of information on vessel manifests. *See 19 C.F.R. § 103.14*. These regulations provide procedures by which the public and the press may obtain access to records maintained by the United States Customs Service. *See id.* § 103.0. Thus, the regulations do not control the release of information on vessel manifests that are in the possession of the Port Authority.

In conclusion, because the requestor has so agreed, the Port Authority may release the cargo declaration and the manifest with redactions of the information about the consignee and the notified party. The remaining information on these documents must be released.

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 our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 29194

Enclosures: Submitted documents

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