



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 31, 1998

Mr. Brendan Hall
Attorney at Law
P.O. Box 2725
Harlingen, Texas 78550

OR98-0859

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112948.

The City of Harlingen (the "city"), which you represent, received a request for the 1996 and 1997 monthly water consumption of seven specified Watermill Express sites. You state that the city's waterworks system maintains the requested information. You state that the information may be confidential by law as proprietary information and protected from disclosure by section 552.101 or 552.110 of the Government Code. Gov't Code § 552.007; Gov't Code § 552.305. You raise no exception to disclosure on behalf of the city, and make no arguments regarding the proprietary nature of the requested information. You ask whether the requested information must be released. You have submitted the records at issue for our review.

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified Watermill Express, Inc. ("Watermill") about the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Watermill responded to our notification and argues that the requested information is protected from disclosure by section 552.110 of the Government Code.

Section 552.110 protects the property interests of private parties by excepting from 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. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 a single or ephemeral event 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 *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). 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 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 (1990) at 5.¹

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent

¹The 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 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 (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

Watermill argues that the requested information is protected both as a trade secret and as confidential commercial or financial information. The requested information consists of the city's log of the quantity of water consumed at seven specified addresses. It appears that the water at these sites is metered and the logs reflect these meter readings. It appears that the city both maintains and generates the information. Watermill is a retail water sales company. It contends that if the requested information is released, competitors can determine Watermill's water sales at each location. "A competitor could then use this information to place their own sites nearby Watermill's best producing sites and avoid the areas where the sites are not producing. The water consumption records would allow Watermill's competitors to avoid the expense of research and development markets placing Watermill at a competitive disadvantage."

First, even if we presume that Windmill has the authority to compel non-disclosure of information produced, created and generated by the city, we do not believe that it has established that the water consumption data fits the definition of trade secret. *See* Open Records Decision No. 401 (1983) (distinguishing government-generated computer programs and programs obtained from private sources); *see also* Open Records Decision No. 520 (1989). The water consumption information relates exclusively to discrete periods of time and in individual circumstances, that is, "single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." Accordingly, the city may not withhold the information from public disclosure as a trade secret. Second, we do not believe that the information is protected as confidential commercial or financial information. The requestor here does not seek commercial or financial information that the governmental body has obtained from a person. Open Records Decision No. 590 (1991) at 4 (list of donors and donation amounts to public university not protected by section 552.110), 568 (1990) at 3 (names and percentages of each member of the Cigarette Tax Recovery Trust Fund not "obtained" from distributors, but generated by distributor's participation in Trust Fund). The information here is generated and maintained by the city in documentation of particular transactions. You may not withhold the information under section 552.110.

Furthermore, after reviewing the submitted materials and arguments, we do not believe that the requested information must be withheld under section 552.101. *See* Open Records Decision No. 600 (1992) (corporation or business entity may not claim common-law privacy). We do not find nor does any party point to a statute that would deem the information confidential. Consequently, the city must release the water consumption information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 112948

Enclosures: Submitted documents

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