



October 16, 2000

The Honorable David Dewhurst
Commissioner
General Land Office
Stephen F. Austin Building
1700 North Congress Avenue
Austin, Texas 78701-1495

Open Records Decision No. 669

Re: Whether digital mapping data contained in Tobin International, Ltd.'s Original Texas Land Surveys and Texas Well Header databases are excepted from public disclosure under sections 552.110 and 552.113 of the Government Code. (ORQ-53)

Dear Commissioner Dewhurst:

On behalf of the General Land Office (the "GLO"), you ask whether digital mapping data contained in Tobin International, Ltd.'s Original Texas Land Surveys and Texas Well Header databases are excepted from public disclosure under sections 552.110 and 552.113 of the Government Code. We conclude that the information at issue is generally excepted from required public disclosure by section 552.110 of the Government Code, but that the information is not excepted from public disclosure to the extent Tobin International, Ltd. permits the information to be publicly disclosed under the terms of its licensing agreements or otherwise.

You inform us that the GLO currently holds a license from Tobin International, Ltd. ("Tobin") for access to a database titled "Original Texas Land Surveys," a component of a copyright-protected suite of databases owned by Tobin and known as "Superbase." GLO seeks to expand its Superbase access to include another component of Superbase titled the "Texas Well Header" database. We shall herein refer to the Original Texas Land Surveys and the Texas Well Header databases collectively as, "the digital mapping data." The GLO and Tobin have each provided comments and arguments to this office in support of the position that Tobin's digital mapping data is excepted from the public disclosure requirements of the Public Information Act (the "Act"), chapter 552 of the Government Code, by sections 552.110 and 552.113 of that code. No other interested party has submitted comments or arguments opposing or supporting the public disclosure of the information.

Section 552.110 of the Government Code provides:

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the [required public disclosure] requirements of Section 552.021.

(b) 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 [required public disclosure] requirements of Section 552.021.

Section 552.110 protects the property interests of those supplying information to governmental bodies. Among other arguments, the GLO and Tobin assert that the digital mapping data constitute trade secret information and are thereby excepted from disclosure under section 552.110(a). A "trade secret" may consist of 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 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) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

The determination of whether any particular information is a trade secret is a determination of fact. Open Records Decision No. 552 at 2 (1990). In the open records ruling process, the Attorney General is unable to resolve disputes of fact regarding the status of information as "trade secrets," and this office therefore must rely upon the facts alleged or that are discernible from the information at issue. Accordingly, the Attorney General will accept a claim for exception as a trade secret when a *prima facie* case is made that the information in question constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law. *Id.* at 5.

In this instance, the GLO and Tobin each make specific factual assertions in support of the conclusion that the digital mapping data constitute trade secret information, and this office has received no arguments to the contrary. Tobin explains that Superbase is a digitized comprehensive continuous high-resolution map organized into component databases, and the data contained in the component databases that comprise the digital mapping data is derived from multiple cross-referenced sources including original surveys, supplemental and private

surveys, well location calls, and visible evidence from orthophotography. Tobin licenses the use of these databases to third parties for a fee, such that the database information is continuously used in the operation of Tobin's business. The information is also continuously used by third parties, such as companies in the energy industry and governmental entities, licensed by Tobin to use the information. We find from Tobin's representations that the digital mapping data constitute a "compilation of information" for "continuous use in the operation of a business," as contemplated by the above-quoted definition of "trade secret." Although we understand that a portion of the source information from which the digital mapping data are derived is information that is in the public domain, we nevertheless believe that a conclusion that the digital mapping data meet the definition of "trade secret information" is consistent with the past opinions and analysis of this office and with the holdings of courts in other jurisdictions.

Other jurisdictions have held, for example, that a trade secret can exist in a combination of characteristics and components each of which, by itself, is in the public domain, where the unified process, design, and unique combination of the information affords a competitive advantage. *See, e.g., Integrated Cash Mgmt. Servs. v. Digital Transaction, Inc.*, 920 F.2d 171, 17 U.S.P.Q.2d 1054, 1056 (2d Cir. 1990); *Imperial Chem. Indus., Ltd. v. National Distillers & Chem. Corp.*, 342 F.2d 737, 742, 144 U.S.P.Q. 695, 699 (2d Cir. 1965); *FMC Corp. v. Peats*, 2 U.S.P.Q.2d 1178 (Me. Super. Ct. 1987); *FMC Corp. v. Spurlin*, 596 F.Supp. 609, 224 U.S.P.Q. 720, 722 (W.D. Pa. 1984). Thus, the fact that a portion of the source information that comprises the digital mapping data is from the public domain does not undermine Tobin's assertion of trade secret protection.

There are six factors to be assessed in determining whether particular information qualifies as 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 this information; and
- (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 No. 232 (1979).

Tobin represents to this office numerous pertinent facts that support the application of each of the above-quoted factors to the digital mapping data information at issue. We have summarized Tobin's allegations of fact by each of the above-stated Restatement factors, as follows:

(1) the extent to which the information is known outside of [the company's] business:

Due to the methods used in compiling the source data, only Tobin employees, its licensed customers, and its distributors know the information. Although one competitor has similar information, the competitor's information lacks vital coordinates, thus providing Tobin a competitive advantage.

(2) the extent to which it is known by employees and others involved in [the company's] business:

Only those Tobin employees who need the information in order to perform their job functions are provided access to the information.

(3) the extent of measures taken by [the company] to guard the secrecy of the information:

Specific access privileges, protected by usernames and passwords, are required to access the information. Computer network access is protected by firewalls, with event logs monitored to ensure against unauthorized access. Licensing agreements impose confidentiality obligations which are vigorously enforced by lawsuit. Tobin carefully reviews its licensed customers' compliance with the strict confidentiality terms of the licensing agreement, and Tobin does not license the information for use by its competitors.

(4) the value of the information to [the company] and to [its] competitors:

In 1999 Tobin generated approximately \$7.5 million in licensing fees attributable to the digital mapping data. If competitors had access to the information they would be able to expand and improve the accuracy of their databases and could thereby more effectively compete with Tobin.

(5) the amount of effort or money expended by [the company] in developing this information:

Tobin has expended approximately 400 man-years and \$20 million developing the digital mapping data.

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others:

Compiling all of the source information is no longer possible, as many historic wells are no longer visible and the gathering of other necessary information is prohibitively expensive. Competitors have failed in attempting to develop similar databases. Only individuals with specific skill sets can perform the necessary work in gathering the source data following six months to a year of specialized training.

We believe the specific facts summarized above establish a *prima facie* case that the digital mapping data constitutes trade secret information, and we have received no arguments or information to the contrary. We therefore conclude, except as otherwise specifically noted below, that the digital mapping data is protected from public disclosure by section 552.110(a) of the Government Code.

As stated above, section 552.110(b) of the Government Code excepts from required public disclosure “[c]ommercial 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[.]” In addition to the facts we have summarized above relating to our analysis of trade secret, Tobin explains that it has two competitors in the Texas mapping database market, that the accuracy of the digital mapping data gives Tobin an advantage over these competitors, and that the competitors, if provided access to the digital mapping data, could create or enhance their own database products and market that information to Tobin’s detriment. In addition to demonstrating the applicability of the trade secret prong of section 552.110, we find that Tobin has demonstrated by the assertion of specific facts that the digital mapping data constitutes commercial information the public disclosure of which would cause Tobin substantial competitive harm. Except as otherwise specifically noted below, we therefore also conclude that the digital mapping data is protected from public disclosure by section 552.110(b) of the Government Code.

As the above discussion of the six trade secret factors makes clear, the gravamen of trade secret protection is the degree to which the information is kept *secret*. The GLO represents to this office that the terms of its current licensing agreement with Tobin permit the GLO publicly to release certain printouts of maps that are generated from the Original Texas Land Surveys database. We understand from the comments provided that these printouts do not reveal all of the information in the database related to the mapped areas. For example, the printouts do not contain certain vital coordinates and other reference data that render the data, as a whole, commercially valuable. We believe that to the extent Tobin permits the information at issue to be publicly released under the terms of its licensing agreements, other contract provisions, or through the routine business practices of Tobin,

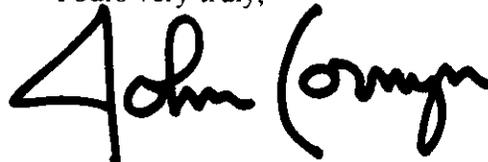
such information does not comprise trade secrets, nor has the information been demonstrated to consist of commercial information the public disclosure of which would cause substantial competitive harm to Tobin. Accordingly, to the extent Tobin permits the digital mapping data to be publicly disclosed under the terms of its licensing agreements or otherwise, we conclude such information is not excepted from public disclosure by section 552.110 of the Government Code.

We now address the application of section 552.113 of the Government Code to that portion of the responsive information which we have concluded is not excepted from disclosure by Government Code section 552.110. We note that the relevant language of section 552.113 excepts from required public disclosure “geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]” Gov’t Code § 552.113(a)(2). This office has stated that this exception protects from public disclosure only *commercially valuable* geological and geophysical information regarding the exploration or development of natural resources. Open Records Decision No. 627 at 4 (1994). We are of the opinion that permitting information to be publicly disclosed, under the terms of a licensing agreement or otherwise, defeats any claim that might otherwise be asserted that the information is commercially valuable. Therefore, digital mapping information made publicly available by Tobin may not be withheld from public disclosure under section 552.113 of the Government Code.

S U M M A R Y

Digital mapping information obtained from Tobin International, Ltd. that is in the possession of the General Land Office is excepted from public disclosure by section 552.110 of the Government Code, except for that portion of this information which has been made publicly available by Tobin International, Ltd. Digital mapping data information that has been made publicly available by Tobin International Ltd., under the terms of licensing agreements or otherwise, may not be withheld from public disclosure under section 552.110 or 552.113 of the Government Code.

Yours very truly,

A handwritten signature in black ink that reads "John Cornyn". The signature is written in a cursive, flowing style.

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