



June 10, 1999

Ms. Lavergne Schwender
Assistant County Attorney
County of Harris
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR99-1623

Dear Ms. Schwender:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124814.

Harris County (the "county") received a request for proposals submitted in response to the county's "Time and Attendance" request for proposals. You claim that release of the requested information may implicate the proprietary interests of third parties, but assert no position in this regard. You have supplied information responsive to this request to our office for review.

Pursuant to section 552.305 of the Government Code, this office informed the third parties, AcuStaf Development Corporation, Simplex Time Recorder Company and Automating Peripherals Inc. ("API"), of the request and provided each the opportunity to claim the exceptions to disclosure it may contend applies to its responsive information, together with argument in support of those exceptions. *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 Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions in certain circumstances). Neither AcuStaf Development Corporation, nor Simplex Time Recorder Company replied. Responsive information from these firms is therefore considered public and must be disclosed.

API replied, claiming that certain responsive information submitted by that firm was excepted from disclosure by section 552.110 of the Government Code. It contends that the following submitted information items constitute trade secrets:

- a. imported screens and report
- b. sample payroll information rules and parameters, specification survey and benefits accruals, sample rules specifications; company minutes 1/9/98

c. company minutes 1/9/98

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).

The following criteria determines if information constitutes a trade secret:

(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, *supra*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a *prima facie* case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure).

API asserts factual allegations in support of applying each of the six factors to items (a) and (b). We conclude that API has established a *prima facie* case that this information is

excepted as a trade secret under section 552.110 of the Government Code. API does not assert factual allegations sufficient to establish that item (c) is so excepted.

API also contends that the following submitted information constitutes financial information, excepted from public disclosure by section 552.110 of the Government Code:

1. API's financial statements
2. pricing information

Section 552.110 excepts from disclosure "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Our office previously held that information could be withheld under this exception if it is likely either (1) to impair the government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained, applying the test articulated in *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir 1974). However, this rationale was expressly rejected by the Third Court of Appeals, which recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.—Austin May 20, 1999, no pet. h.). As neither the county nor a third party has cited a statute or judicial decision that expressly holds the subject information to be privileged or confidential, and we are aware of none, the information may not be withheld under the commercial or financial information prong of section 552.110.

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.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 124814

Encl. Submitted documents

cc: Mr. Jeff Williams
KRONOS
400 Fifth Avenue
Waltham, Massachusetts 02451
(w/o enclosures)

Mr. John P. Davis
Simplex Time Recorder Company
15503 West Hardy Road
Houston, Texas 77060
(w/o enclosures)

Ms. ChrysMarie Suby
AcuStaf Development Corporation
5001 West 80th Street, Suite #900
Bloomington, Minnesota 55437
(w/o enclosures)

Mr. Luis Garcia
Automating Peripherals, Inc.
Woodridge Technology Park
310 North Wilson Avenue
Hartford, Wisconsin 53027
(w/o enclosures)