



November 3, 2000

Mr. Habib H. Erkan, Jr.
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2000-4301

Dear Mr. Erkan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140903.

The City of San Antonio (the "city") received a request for the competitive bids, including attachments and any submitted documents, regarding the city's formal invitation for bids, number 00-181. The responsive information consists of the bid proposal submitted to the city by Ward Diesel Filter Systems, Inc. ("Ward Diesel"). Although you raise no exception to disclosure on behalf of the city, you have notified Ward Diesel of the request pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). Ward Diesel has responded by claiming that a particular pictorial schematic and a customer list, both submitted as part of Ward Diesel's bid proposal, are trade secrets and therefore excepted from disclosure under section 552.110 of the Government Code. We have considered the exception Ward Diesel claims and reviewed the submitted information that is at issue.

Section 552.110(a) provides:

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

Gov't Code § 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

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). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether 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).

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 party’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 (1990). However, where no evidence of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

In regard to the customer list, a document titled, "Partial User's List," Ward Diesel states that currently, its competitors would "have an extremely difficult time in identifying Ward Diesel's customers." It also explains that it has expended "considerable financial resources and employee time in developing its markets." The disclosure of the names of Ward Diesel's customers "would severely undermine the results of these expenditures" while enabling competitors to solicit Ward Diesel's customers.

In regard to the pictorial schematic at issue, a diagram titled, "Vehicle Air Source to 'No Smoke' Components," Ward Diesel states that the diagram "constitutes a compilation of information used in Ward Diesel's business that gives Ward Diesel an opportunity to obtain an advantage of competitors." It further explains that public release of the diagram would reveal "detailed information regarding the components of the Ward Diesel system that a competitor could imitate." Moreover,

While Ward Diesel has obtained a license to utilize the patented process for the diesel exhaust filtration system it bid to the [city], the particular components are acquired from outside sources and Ward Diesel utilizes every effort to insure that only certain of its employees are aware of the source of these components. Second, the schematic itself could be copied by competitors and used in competitors' marketing materials.

We find that Ward Diesel has established a *prima facie* case that the customer list and schematic at issue are trade secrets and are therefore excepted under section 552.110(a). Accordingly, the city must withhold these two documents. The city must release the remainder of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

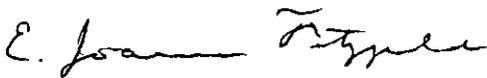
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\er

Ref: ID# 140903

Encl: Submitted documents

cc: Mr. Ted Siska
AirCor Corporation
POD 416
Pelham, NH 03076
(w/o enclosures)

;

Mr. Donald W. Mustico
Ziff, Weiermiller, Hayden & Mustico
P.O. Box 1338
Elmira, NY 14902-1338
(w/o enclosures)