



January 14, 2002

Mr. Don R. Lane
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OR2002-0202

Dear Mr. Lane:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#157325.

The Pampa Economic Development Corporation, Inc. (the "PEDC"), which you represent, received a request for "a copy of the Dairy Strategies consulting report recently completed on the Top O'Texas Dairy." You submitted the information in question to this office for our review. Gov't Code §552.301(e)(1)(D). You do not claim any exceptions to disclosure, nor do you claim that the information should be released to the requestor.

Pursuant to section 552.305 of the Government Code, you notified the Top O'Texas Dairy of the request for information and of Top O'Texas Dairy's right to submit arguments to this office as to why the requested information should be withheld from disclosure. *See* Gov't Code § 552.305(d); 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 to disclosure under Public Information Act in certain circumstances). Top O'Texas Dairy has submitted comments in which it argues that portions of its proposal are excepted from disclosure under sections 552.110, 552.113 and 552.131 of the Government Code. We have considered the exceptions which Top O'Texas Dairy has claimed and reviewed the submitted information.

Section 552.113 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is:

....

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

In Open Records Decision No. 627 (1994), this office concluded that section 552.113(a)(2) 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 3-4 (1994) (overruling rationale of Open Records Decision No. 504 (1988)). Top O'Texas Dairy has not demonstrated that the report is commercially valuable geological or geophysical information regarding the exploration or development of natural resources. After reviewing the requested information, we therefore conclude that the PEDC may not withhold any of the requested information pursuant to section 552.113.

Section 552.110 of the Government Code protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure two types of information: (1) trade secrets and (2) 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. *See* Gov't Code § 552.110(a), (b). Top O'Texas Dairy's comments appear to invoke both components of section 552.110.

The Texas Supreme Court has adopted the definition of a "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. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to requested information, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits

an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). In this instance, Top O'Texas Dairy does not address the six factors that are relevant to the question of whether a private party has made a *prima facie* case under section 757 of the Restatement of Torts.¹ *Id.* Nor does Top O'Texas Dairy explain how the requested information meets the Restatement definition of a trade secret. We therefore conclude that Top O'Texas Dairy has not demonstrated that any of the information in question constitutes a protected trade secret under section 552.110(a) of the Government Code.

Top O'Texas Dairy also raises section 552.110(b), which excepts from 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[.]” Gov’t Code § 552.110(b). This exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury likely would result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). We have carefully considered Top O'Texas Dairy’s comments and have thoroughly examined the report that Top O'Texas Dairy claims should be withheld from disclosure. We conclude, however, that Top O'Texas Dairy has not demonstrated that the report is excepted from disclosure under section 552.110(b). Therefore the report may not be withheld under section 552.110 of the Government Code. *See also* Open Records Decision No. 319 at 3 (1982) (stating that statutory predecessor to section 552.110 ordinarily does not protect information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Section 552.131 applies to information relating to “economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body[.]” Gov’t Code § 552.131(a). Section 552.131(a) excepts such information to the extent it relates to a trade secret of the business prospect or comprises commercial or financial information “for

¹The Restatement of Torts lists the following six factors as indicia of whether 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 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.” Because neither the PEDC nor Top O’Texas Dairy submitted arguments with reference to section 552.131(a), we have no basis for concluding that any of the information at issue must be withheld under this provision. *See id.* §552.301(e)(1)(A) (requiring governmental body to submit to the attorney general written comments stating reasons why stated exceptions apply that would allow the information to be withheld).

In summary, neither the PEDC or the Top O’Texas Dairy has shown the applicability of an exception to disclosure. Accordingly, the PEDC must release the Top O’Texas Dairy’s consultant’s report in its entirety.

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).

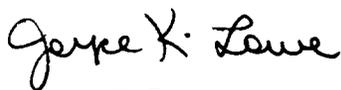
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at the Texas Building and Procurement 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,



Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 157325

Enc: Submitted documents

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