



July 16, 2002

Mr. Brad Norton  
Assistant City Attorney  
City of Austin Law Department  
P.O. Box 1546  
Austin, Texas 78767-1546

OR2002-3857

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165746.

The City of Austin (the "city") received a request for the following information:

- The settlement in the lawsuit between the city of Austin and Convergent Group Corp., A-01-CA-202 JN filed in U.S. District Court for the Western District of Texas.
- The 15-year service and meter purchase agreement between Austin Energy or the City of Austin and SchlumbergerSema, Inc.

You state that some responsive information, including the lawsuit settlement agreement, has been released to the requestor. You contend that a portion of the requested information is excepted from disclosure under section 552.133 of the Government Code, and may be excepted under section 552.110 of the Government Code. You assert that you notified SchlumbergerSema, the third party whose proprietary interests may be implicated by the request for information, of the request for information and of its right to submit reasons to this office as to why this information should be withheld from disclosure pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305(d) (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 Public Information Act in certain circumstances). You make no arguments regarding the proprietary nature of SchlumbergerSema's information; however, SchlumbergerSema has submitted a letter to this office arguing that a portion of the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code.<sup>1</sup> We have considered the exceptions claimed and reviewed the submitted representative sample of information.<sup>2</sup>

The city argues that a portion of the requested information is excepted from public disclosure under section 552.133 of the Government Code. Section 552.133 excepts from disclosure a public power utility's information related to a competitive matter. Section 552.133(b) provides:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b). A "competitive matter" is defined as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. Gov't Code § 552.133(a)(3). Section 552.133(a)(3) lists thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility

---

<sup>1</sup>Although SchlumbergerSema raised section 552.101 as an exception to disclosure, it did not submit to this office written comments stating the reasons why section 552.101 would allow the information to be withheld. We therefore do not address the section 552.101 claim. See Gov't Code §§ 552.301, .302.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. Gov't Code § 552.133(c).

The city council passed a resolution by vote pursuant to section 552.133 in which it defined certain information to constitute "competitive matters." The listed "competitive matters" are not clearly among the thirteen categories of information expressly exempted from the definition of competitive matter, and we have no evidence to conclude that the city council failed to act in good faith in adopting that resolution. You indicate that portions of the information that you submitted to us for review are reasonably related to several "competitive matters" adopted in that resolution. We agree. Consequently, we conclude that the information that you have marked is excepted from disclosure pursuant to section 552.133.

Finally, SchlumbergerSema claims that portions of the submitted information are excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure trade secrets 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 section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt.

b (1939).<sup>3</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

After reviewing SchlumbergerSema's brief, we conclude that it has demonstrated the applicability of section 552.110(a) to the Proprietary Software Interface Specifications submitted in Exhibit E. Thus, SchlumbergerSema has established a *prima facie* case for exception and this office has received no arguments that rebut SchlumbergerSema's claim as a matter of law. We have marked the information that the city must withhold from disclosure under section 552.110. Since you inform us that the remainder of the information that SchlumbergerSema claims is excepted from disclosure pursuant to section 552.110 has already been released to the requestor, we need not consider the applicability of your claimed exception to this information.

In summary, we agree that the information that the city has marked is reasonably related to several competitive matters in accordance with the city's resolution and, therefore, is excepted from disclosure pursuant to section 552.133. We have marked the information that the city must withhold from disclosure under section 552.110.

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

---

<sup>3</sup>The 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 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 § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

•

CN/jh

Ref: ID# 165746

Enc. Submitted documents

c: Ms. Leah Quin  
Austin American-Statesman  
305 South Congress Avenue  
Austin, Texas 78767  
(w/o enclosures)

Mr. Colin Flannery  
General Counsel  
SchlumbergerSema  
5599 San Felipe, Suite 1700  
Houston, Texas 77056-2728  
(w/o enclosures)