



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

February 28, 2003

Ms. Zandra L. Narvaez  
Attorney  
Legal Services Division  
City Public Service of San Antonio  
P.O. Box 1771  
San Antonio, Texas 78296-1771

OR2003-1288

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177403.

City Public Service of San Antonio, Texas ("CPS") received a request for the following five categories of information from Lone Star Ash, Inc.:

1. Any and all contracts awarded to Boral Material Technologies, Inc., within the last ten years;
2. Any and all documentation reflecting the price requested or offered for fly ash;
3. Any and all agreements, signed by this entity, with Boral Material Technologies, Inc.;
4. Any and all public bids submitted by Boral Material Technologies, Inc., within the last ten years; and
5. The name and title of each employee and officer involved in the production or sale of fly ash.

You inform us CPS does not have information responsive to categories one, two, and four. Also, you explain CPS has released a chart containing the information requested in category five. With respect to information requested in category three, you state CPS has responsive documents that it does not object to releasing to the requestor; however, as the information may contain proprietary and confidential third party information, CPS has notified Boral

Material Technologies, Inc. (“Boral”) pursuant to section 552.305 of the Public Information Act (the “Act”). *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 a governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Boral, represented by Arter & Hadden, LLP, has submitted a letter to this office arguing that information responsive to category three of the request is excepted from disclosure under sections 552.110 and 552.133 of the Government Code. Boral claims no exceptions to the disclosure of the information requested in category five. We have considered Boral’s arguments and we have reviewed the submitted information.

In its letter to this office, Boral states, “[T]he contracts [responsive to category three of the request] contain sensitive and secret pricing (and other) information that could be used by Boral’s competitors in the formation of competing bids.” We interpret this statement as Boral’s assertion of section 552.110 of the Government Code, which protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* 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 [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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 to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

To establish the applicability of sections 552.110(a) and (b), Boral merely makes the conclusory and generalized allegation quoted at the beginning of this discussion. Therefore, we find Boral has not met its burden of making a *prima facie* case as required by section 552.110(a). *See* Gov’t Code § 552.110(a). Further, Boral has not made a factual or evidentiary showing that release of the information would result in substantial competitive injury. *See* Gov’t Code § 552.110(b); *see also Nat’l Parks*, 498 F.2d. 765; ORD 661. Consequently, we conclude CPS may not withhold Boral’s information under section 552.110 of the Government Code.

Next, section 552.133 excepts from disclosure a public power utility's information related to a competitive matter. The exception defines "public power utility" as an "entity providing *electric or gas* utility services that is subject to the provisions of this chapter." Gov't Code § 552.133(a)(1) (emphasis added). In addition, a "competitive matter" is defined as "a utility-related matter that the public power utility governing body in good faith determines by a vote under this section is related to the public power utility's competitive activity[.]" Gov't Code § 552.133(a)(2). Section 552.133, enacted as part of Senate Bill 7, the electric utility restructuring bill, protects the competitive interests of a public power utility. The legislative history of section 552.133 supports this conclusion. At the public hearing of March 8, 1999, Senator Wentworth explained, "[t]he whole purpose of [creating section 552.131, the predecessor to 552.133] is to require certain documents to be provided but not to put the municipally owned utility at a competitive disadvantage." In this instance, CPS indicates a release of the submitted information would not subject it to a competitive disadvantage as CPS specifically states it has no objection to releasing the responsive documents. Therefore, because section 552.133 protects the competitive interest of a public power utility, and not that of a third party such as Boral, we conclude CPS may not withhold the requested information based on Boral's assertion of section 552.133 of the Government Code.

In summary, as CPS claims no exceptions to disclosure of the responsive documents and Boral has not established the applicability of any asserted exceptions, CPS must release 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 Dep't of Pub. 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,



Christen Sorrell  
Assistant Attorney General  
Open Records Division

CHS/seg

Ref: ID# 177403

Enc: Submitted documents

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