



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 31, 2003

Ms. Amanda Crawford
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2003-2162

Dear Ms. Crawford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178694.

The Office of the Attorney General (the "OAG") received a request for information relating to the OAG's recent settlement with Household International, Inc. ("Household") and its affiliates as well as, certain complaint records. You state that some of the requested information has been released. You also state that the requestor does not seek the personal financial information of consumers or the e-mail addresses of private citizens. Thus, this ruling does not address the public nature of that information. You claim, however, that Household has objected to the release of the remaining responsive information. Although you raise no exception to disclosure on behalf of the OAG or make any arguments regarding the proprietary nature of the submitted information, you have notified Household of the request for information and of its opportunity to submit comments to this office. *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 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). Household responded to your notice by asserting that the submitted information is excepted from disclosure under sections 552.101, 552.103,

and 552.110 of the Government Code.¹ We have considered Household's arguments and reviewed the submitted information. We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (permitting interested party to submit reasons why requested information should or should not be released).

Initially, Household claims that some of the submitted documents must be withheld because they were provided to the OAG with the understanding that they would remain confidential. It is well-settled that the Public Information Act prevents a governmental body from promising to keep information confidential unless it is statutorily authorized to do so. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Furthermore, information that is subject to the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Consequently, the submitted information may not be withheld unless it falls within an exception to disclosure. Accordingly, we will address Household's arguments under sections 552.101, 552.103, and 552.110 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Although Household raises section 552.101, the company does not refer us to, nor are we aware of, any statute outside the Public Information Act that would make the submitted information confidential. Therefore, we conclude that the submitted information is not excepted from disclosure under section 552.101.

Household also claims that some of the submitted records are excepted from disclosure under section 552.103. Section 552.103(a) of the Government Code, commonly known as the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. Gov't Code § 552.103(a). Since the purpose of section 552.103 is to protect the governmental body's position in litigation, the exception does not implicate a third party's rights. *See* Open Records Decision No. 541 (1990). Furthermore, the exception is waived if not timely raised by the governmental body. *Id.*; *see Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating that governmental body may waive Gov't Code § 552.103). In this instance, the OAG does not claim that any of the information at issue is excepted under section 552.103. In fact, based on our review of the records, not only has the litigation concluded but all of the submitted information has been seen by Household. Therefore, we conclude that none of the submitted information may be withheld under section 552.103. *See generally* Attorney General Opinion MW-575 (1982); Open Records

¹As the private e-mail addresses are not in dispute, we will not address Household's arguments under section 552.137 of the Government Code.

Decision Nos. 350 (1982) (noting that applicability of Gov't Code § 552.103(a) ends once litigation has been concluded), 349 (1982), 320 (1982) (stating that once information has been obtained from or provided to opposing party in litigation, it is not excepted from disclosure under Gov't Code § 552.103(a)).

Finally, Household claims that some of the submitted information is protected from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110.

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 is exempted 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. Open Records Decision No. 552 (1990). However, where no demonstration 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).

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 National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In support of its section 552.110 claim, Household states only that the submitted information should be protected from disclosure because it is critical to maintaining the company’s competitive position in the market. The company has not, however, provided us with any specific facts or arguments to support this allegation. *See* Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure). Furthermore, Household has failed to demonstrate any of the factors necessary to establish a trade secret claim. *See* Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, we conclude that Household has not established that any of the submitted information is protected by section 552.110. Since Household has failed to demonstrate that any of its claimed exceptions to disclosure apply, we conclude that the information at issue must be released.

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).

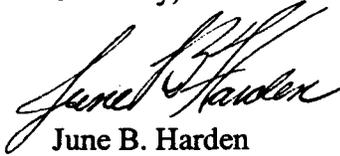
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 178694

Enc: Submitted documents

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