



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 12, 2004

Ms. Lisa Cowling Tschirhart
Staff Counsel
Brazos River Authority
P.O. Box 7555
Waco, Texas 76714-7555

OR2004-1058

Dear Ms. Tschirhart:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 196073.

The Brazos River Authority (the "authority") received a request for copies of correspondence from August 1, 2003 to the present related to a consultant who appeared on a particular agenda and "from Jan. 1, 2003, to the present regarding Mesa Water's recently announced memorandum of understanding with the [authority]." You claim that the some of the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also believe that the requested information implicates the proprietary interests of a private third party, Mesa Water Incorporated ("Mesa"). You notified Mesa of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.¹ We have considered the claimed exceptions and reviewed the submitted information.

Initially, we address the authority's obligation under section 552.301 of the Government Code. Subsections 552.301(a) and (b) of the Act provide:

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances).

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301(a)-(b). Further, section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. As you acknowledge, the authority did not state the exceptions that apply within the ten business day time period, and did not provide this office with general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld within the fifteen business day time period as prescribed by section 552.301 of the Government Code. Thus, the authority failed to comply with section 552.301 in requesting a ruling from this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.104, a discretionary exception under the Act, does not constitute a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision Nos. 592 (1991) (governmental body may waive section 552.104), 522 (1989) (discretionary exceptions in general). However, section 552.110, which protects the interests of third parties, can provide a compelling reason to overcome the presumption of openness. Accordingly, we will address the applicability of this exception as argued by the third party.

Mesa argues that portions of its information are excepted under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” 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).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, 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 also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.² See Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient

²The 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).

to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

Section 552.110(b) 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. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Mesa explains that the Memorandum of Understanding it has signed with the authority is nonbinding, and does not provide for any specific services by either party. Mesa further explains that a more detailed agreement is under negotiation, and will address “what services should be included, and the compensation to the [a]uthority for such services.” Mesa asserts that release of the information at issue would “allow competitors a chance to undercut Mesa’s pricing” and would “severely impair Mesa’s ability to negotiate at a fair price,” potentially impacting the compensation due to the authority under such a contract. After reviewing Mesa’s arguments and the submitted information, we conclude that Mesa has established the applicability of section 552.110(b) to the information that Mesa seeks to withhold. Thus, the authority must withhold the information related to Mesa that we have marked under section 552.110(b). The remaining submitted information must be released 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 196073
Enc. Submitted documents

c: Mr. Robert Elder
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)

c: Mr. Monty Humble
Vinson & Elkins
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
(w/o enclosures)