



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 13, 2004

Mr. Scott A. Kelly
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200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2004-7810

Dear Mr. Kelly:

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# 208663.

The Office of the Texas State Chemist (the "office") received a request for all tonnage reports filed by facilities under section 141.072 of the Agriculture Code for calendar year 2003. You state that you notified approximately 2800 vendors of commercial feed in Texas whose proprietary interests may be implicated by the request for information of their right to submit arguments to this office as to why the submitted information should not be released. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You do not take a position as to whether the requested information is excepted under the Act. A number of third parties have responded to the notice and argue that the requested information is excepted under sections 552.101,

552.104, and 552.110 of the Government Code.¹ We have considered all submitted arguments and reviewed the representative sample of information submitted by the office.²

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). Those third parties who have not submitted to this office their reasons explaining why the requested information relating to them should not be released have provided this office with no basis to conclude that their responsive information is excepted from disclosure. See, e.g., *id.* § 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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that you may not withhold any portion of the submitted information relating to these parties on the basis of their proprietary interests.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Generally, a person may not manufacture or distribute commercial feed in Texas without a valid current license issued by the office's

¹The following individuals, companies, and third-party representatives have submitted arguments to us: Archer Daniels Midland Co.; Agua Dulce Grain Co., Inc.; Alderman-Cave Feeds; Alltech; Alpharma Inc.; Behrends Feed & Fertilizer; Howard C. Berger; Bill Barr & Co., Inc.; Bioproducts, Inc.; Bluebonnet Feeds; Bryant Grain Co.; Buckeye Nutrition; C.M. Caraway & Sons, Inc.; Cargill; CerCo; Coastal Warehouse; Coleman Grain, Inc.; Colorado County Rice Mill, Inc.; Covington & Burling; Crest Flavor Co.; Dad's Pet Care; Dakota Gold Marketing; Darling International, Inc.; D&D Commodities, Ltd.; Dorchester Grain Co., Inc.; DSM Nutritional Products, Inc.; Edmonson Wheat Growers; Garvey Processing, Inc.; Gorman Milling Co., Inc.; Griffin Industries, Inc.; Hi-Pro; Hubbard Feeds, Inc.; Intervet, Inc.; The Kent Group; Kerr Feed & Grain Co.; Land O Lakes Feed; Life Data Labs, Inc.; Manna Pro Corporation; Marshall Minerals, Inc.; M-G Inc.; Mid-South Milling Co., Inc.; Midwest Agri-Commodities; Milwaukee Grain & Feed; M&P Grain, Inc.; Muenster Milling Co., Inc.; Mumm's, Inc.; National By-Products, L.L.C.; Natura Pet Products; Novus International, Inc.; Nutra Blend Corporation; Nutro Products, Inc.; O'Neal's Feeders Supply, Inc.; Ms. Betty Pendleton; Petronila Grain Cooperative Association; Pilgrim's Pride Corporation; PMI Nutrition, Inc.; Poston Feed Mill; Prince Agri Products, Inc.; Producers Cooperative Elevator; Purina Mills, L.L.C.; Quality Liquid Feeds, Inc.; Rhodia, Inc.; Ridley Block Operations; Ridley Feed Ingredients; Frederick Sales, L.L.C.; SEM Minerals, L.P.; Stratford Grain Co.; Sunbird, Inc.; Sunshine Mills, Inc.; Texas Farm Products Co.; Thornton Feed Mill, Inc.; Vinson & Elkins, L.L.P.; Wells Pet Food Co.; Western Organics; Westway Feed Products; Williamson County Grain, Inc.; XF Enterprises, Inc.

²We 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.

Feed and Fertilizer Control Service (the "service") for each feed facility that manufactures or distributes commercial feed. Agric. Code § 141.021(a). For each state fiscal year, a person who manufactures or distributes commercial feed or a component of commercial feed in Texas must pay to the service an inspection fee, which is a set amount per ton of commercial feed. *Id.* § 141.071(a); *see id.* § 141.071(b) (inspection fee is 15-17 cents per ton). The person responsible for paying the inspection fee for a feed facility generating \$100 or more during a license year in tonnage fees must file with the service a quarterly sworn report either stating that no tonnage of commercial feed was distributed during the preceding quarter or setting forth the tonnage of all commercial feed that the feed facility manufactured or distributed in Texas during the preceding quarter. *Id.* §141.072(a).

Section 141.005 of the Agriculture Code provides the following:

(a) At least annually, the service shall publish:

(1) information concerning the sales of commercial feeds, together with data on commercial feed production and use as the service considers advisable;

(2) the results of the analyses of official samples of commercial feed distributed in this state as compared to the analyses guaranteed in the registration and on the label; and

(3) a financial statement showing the receipt and expenditure of funds by the service under this chapter.

(b) The service may publish other information relating to feed as the service considers necessary or desirable to the public interest. The service shall prescribe the form of publications under this section.

(c) A publication under this section may not disclose the scope of operations of any person.

Some of the third parties assert that the requested quarterly tonnage reports, which were filed pursuant to section 141.072, are confidential under section 141.005(c). However, section 141.005(c) does not make information confidential; instead, it only provides that the service may not disclose the scope of operations of any person in its annual publication concerning the sales of commercial feed in Texas. *See id.* § 141.005(a), (c); Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, none of the submitted information is confidential under section 141.005 and excepted from release under section 552.101 of the Government Code on that ground.

Other third parties assert that their information is excepted under section 552.101 of the Government Code. However, these parties have not directed our attention to any other law under which any of the requested information is deemed confidential for purposes of section 552.101, nor are we aware of any such law. We therefore conclude that no portion of the requested information is excepted from disclosure under section 552.101 of the Government Code.

W.F. Young, Inc. argues that its tonnage reports are confidential because they were submitted "with the expectation that [the information in them] would be maintained as confidential commercial information" and that their release "would violate the trust placed in Texas state authorities." However, information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See Attorney General Opinion JM-672 (1987)*; *see also Open Records Decision Nos. 541 at 3 (1990)* ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the submitted information is encompassed by an exception to disclosure, it must be released to the requestor, notwithstanding any expectation to the contrary.

Some of the third parties argue that the requested information is excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the interests of governmental bodies, not third parties. *Open Records Decision No. 592 (1991)*. As the office does not raise section 552.104, this section is not applicable to the requested information. *Id.* (section 552.104 may be waived by governmental body). Therefore, the requested information may not be withheld under section 552.104.

Most of the third parties assert that the requested information is excepted from release under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information whose release would cause a third party substantial competitive harm.

Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret 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. 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); *see also Huffines*, 314 S.W.2d at 776. 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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).

Section 552.110(b) 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." 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 requested information. *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).

Doane Pet Care Co. ("Doane") and Lyssy & Eckel, Inc. ("Lyssey & Eckel") assert that the customer information in their requested tonnage reports is a trade secret under section 552.110. Having considered these arguments, we conclude that, to the extent

³The following are the six factors that the Restatement gives 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 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).

Doane's and Lyssey & Eckel's tonnage reports contain customer information, such customer information must be withheld pursuant to section 552.110(a).⁴

A number of third parties also argue that the tonnage output information in the requested tonnage reports is a trade secret because a competitor, by examining that information, could ascertain the amount of feed a party is capable of producing. However, after reviewing these arguments and the information at issue, we conclude that this information is not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b (1939); see *Hyde Corp.*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Therefore, you may not withhold the tonnage output information under section 552.110(a).

We also find the remaining third parties have not established that the release of any of the remaining information at issue would likely cause those parties substantial competitive harm. Therefore, none of the remaining information at issue is excepted from release under section 552.110(b). See Gov't Code §§ 552.110(b).

To conclude, the office must withhold any customer information in the tonnage reports of Doane and Lyssey & Eckel under section 552.110(a). The remaining information 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

⁴Because we are able to resolve this under section 552.110(a), we do not address the other arguments for exception of this information.

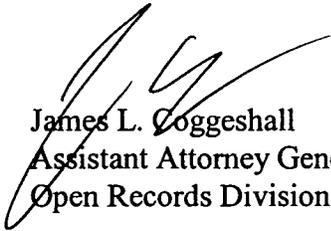
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 208663

Enc. Submitted documents

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(w/o enclosures)

Third parties
(w/o enclosures)