



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2007

Ms. Chelsea Thornton
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2007-05114

Dear Ms. Thornton:

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#276291.

The Office of the Governor (the "governor") received a request for copies of all compliance and verification reports for thirty-six specific entities that have received money from the Texas Enterprise Fund. You claim that the submitted information is excepted from disclosure under section 552.110 of the Government Code.¹ You also believe that the submitted information may contain proprietary information that is subject to exception under the Act and, pursuant to section 552.305 of the Government Code, state that you will notify the interested third parties of the request and of their opportunity to submit comments to this office.² 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 to disclosure in certain circumstances). We have received correspondence from

¹Although both the governor and Ruiz raise sections 552.106, 552.107, and 552.111 of the Government Code, they have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we do not address these exceptions. Gov't Code § 552.301(e)(1)(A).

²The interested third parties are Countrywide Financial, Texas A&M Lexicon, Washington Mutual Bank ("Washington"), Sematech, Inc., Vought, UTHSC, MDA, GEMS, Tyson Foods, Texas Energy Center, Texas Instruments, Home Depot, Citgo Petroleum Corporation ("Citgo"), Cabela's, Maxim Integrated Products, Ruiz Food Products, Inc. ("Ruiz"), Huntsman, Koyo Steering, Raytheon Company ("Raytheon"), O&D USA, Lee Container, Superior Essex Communications, Baylor College of Medicine, Learn & Tigre, Hilmar Cheese, Sanderson Farms, Sino Swearingen Aircraft, ADP, Samsung, T-Mobile, Torchmark, Hewlett-Packard, Motiva, Newly Weds Foods, and Trace Engines and Alloy Polymers.

Citgo, Raytheon, Ruiz, Sematech, and Washington. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that the submitted information does not include compliance and verification reports for the following requested entities: Texas A&M Lexicon, Vought, UTHSC, MDA, GEMS, Texas Energy Center, Texas Instruments, Home Depot, Cabela's, Huntsman, Koyo Steering, O&D USA, Lee Container, Superior Essex Communications, Baylor College of Medicine, Learn & Tigre, Hilmar Cheese, Sanderson Farms, Sino Swearingen Aircraft, T-Mobile, Torchmark, Hewlett-Packard, Motiva, Newly Weds Foods, and Trace Engines and Alloy Polymers. We therefore assume that the governor has released any information that is related to these entities, to the extent that such information existed when the governor received the request. If not, then the governor must release any such information at this time.³ See Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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 information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have only received arguments from Citgo, Raytheon, Ruiz, Sematech, and Washington explaining why their information should not be released. Therefore, we determine that none of the other interested parties have demonstrated that any of the submitted information is confidential or proprietary for purposes of the Act. See *id.* §§ 552.101, .110; Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

The governor, Citgo, Raytheon, and Ruiz assert that a portion of the submitted information may not be disclosed because the information at issue has been made confidential by agreement or assurances. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); 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 Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

³We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.-San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

The governor, Ruiz, and Washington assert that a portion of the submitted information is excepted under section 552.101 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 exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.–Houston [14th Dist.] 1989), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Neither the governor, Ruiz, nor Washington, have directed our attention to any law under which any of the submitted information is considered to be confidential for the purposes of section 552.101. Therefore, the governor may not withhold any of the submitted information under this exception.

Raytheon seeks to withhold a portion of its submitted information under section 552.102 of the Government Code. Section 552.102 excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102(a) is applicable to personnel information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). As the information at issue does not consist of personnel information pertaining to public officials or employees, none of this information may be withheld under section 552.102 of the Government Code.

Both Ruiz and Washington raise 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.” Gov’t Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to Gov’t Code § 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the governor has submitted no arguments under section 552.104, the governor may not withhold any the submitted information under this exception. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). *see also* Gov’t Code § 552.301(e)(1)(A).

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

the release of which 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.” *Id.* § 552.110(a). 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.⁴ 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). However, we cannot conclude that section 552.110(a) applies 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).

⁴The 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).

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.” Gov’t Code § 552.110(b). 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).

Citgo, Ruiz, and Sematech argue that release of their information would harm the governor’s ability to attract qualified bidders in the future. This argument relies on the test announced in *National Parks* pertaining to the applicability of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. *See National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *see also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (commercial information is excepted from required public disclosure if information is voluntarily submitted to government and information is of a kind that the provider would not customarily make available to the public). Although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, *pet. denied*). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain bids and information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will only consider Citgo, Ruiz, and Sematech’s claims regarding their own commercial interests.

Sematech and Ruiz seek to withhold some or all of their information under section 552.110(a) of the Government Code. After reviewing the arguments of Sematech and the information it seeks to withhold, we conclude that Sematech has established a *prima facie* case that a portion of its submitted information constitutes a trade secret. The governor, Citgo, Raytheon, Ruiz, and Washington seek to withhold some or all of the submitted information under section 552.110(b) of the Government Code. Having considered the arguments of Ruiz and Washington, and the information at issue, we determine that a portion of this information constitutes commercial or financial information, the release of which would cause each company substantial competitive harm. Therefore, the governor must

withhold the information we have marked under section 552.110 of the Government Code.⁵ We determine that no portion of the remaining information constitutes a trade secret for section 552.110 purposes. We further determine that the governor, Citgo, Raytheon and Washington have failed to demonstrate that the remaining information constitutes commercial or financial information the release of which would cause substantial competitive harm. Consequently, no portion of the remaining information may be withheld under section 552.110 of the Government Code.

Finally, we note that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *Attorney General Opinion JM-672 (1987)*. A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990)*.

In summary, the governor must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released. Information that is protected by copyright must be released in accordance with copyright law.

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, upon receiving this ruling, the governmental body

⁵As our ruling is dispositive, we need not address Sematech or Ruiz's remaining arguments against disclosure of this information.

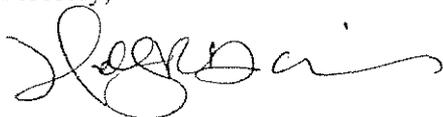
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 Office of the Attorney General 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. 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,



Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/eeg

Ref: ID# 276291

Enc. Submitted documents

c: Ms. Katie Fairbank
c/o Ms. Chelsea Thornton
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711
(w/o enclosures)