



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 11, 2011

Mr. Justin Gordon
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2011-06572

Dear Mr. Gordon:

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# 418936 (OOG# 115-11).

The Office of the Governor (the "governor") received a request for all files pertaining to grants made by the Texas Enterprise Fund, for a specified time period, to California-based companies looking to expand their business in Texas or to California-based companies that relocated to Texas.¹ You state the governor has released some of the responsive applications in accordance with Open Records Letter No. 2010-07377A (2010). We note you have redacted bank account and routing numbers under section 552.136 of the Government Code pursuant to the previous determination issued in Open Records Decision No. 684 (2009).² See Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). Although the governor takes no position on whether the submitted information is excepted from disclosure, you state that release of this information may implicate the proprietary interests of third parties. Accordingly, you inform us that you notified Consolidated Electrical Distributors, Inc. ("CED"), SunPower Corporation ("SunPower"), and PETCO Animal

¹You state the governor received clarification regarding the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Supplies, Inc. ("PETCO") of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *see also* 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 under Act in certain circumstances). You state PETCO informed the governor that it does not object to the release of its information and, thus, you released PETCO's information to the requestor. We have received comments from CED. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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 letter, we have not received comments from SunPower explaining why its submitted information should not be released. Therefore, we have no basis to conclude SunPower has a protected proprietary interest in any portion of the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the governor may not withhold any portion of the submitted information on the basis of any proprietary interest SunPower may have in the information.

CED raises section 552.110 of the Government Code for its submitted information. 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." Gov't Code § 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* ORD 552 at 2. 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 must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown 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) 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Although CED raises section 552.110, it did not provide any arguments explaining how section 552.110(a) or section 552.110(b) is applicable to the requested information. Accordingly, we find CED has not shown any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. We also find CED has not established that release of the information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, the governor may not withhold any of the submitted information pursuant to section 552.110 of the Government Code. As no further exceptions to disclosure have been raised, the submitted information must be released.

³The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret:

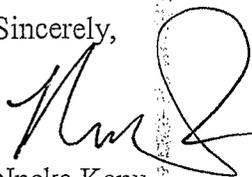
- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information 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).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 418936

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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