THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

April 24, 1990

Honorable Kent Hance
Chairman
Railroad Commission of Texas
P.O. Drawer 12967
Austin, Texas 78711-2967

Open Records Decision No. 552

Re: Whether data submitted to the Railroad Commission is excepted from disclosure under sections 3(a)(4) or 3(a)(10) of the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1946)

Dear Mr. Hance:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

On December 28, 1989, the Railroad Commission received an open records request for information that furnishes the names of customers and contracting parties identified only by number in the tariff filings and 1988 annual reports of Lone Star Gas Company and Access Energy Corporation (hereinafter "Lone Star" and "Access," respectively). On January 24, 1990, this office received the Railroad Commission's request for an attorney general opinion pursuant to section 7 of the Open Records Act.

When a governmental body fails to request an attorney general opinion within a reasonable time, no later than ten days after receiving an open records request, the requested information is presumed public. This presumption may only be overcome by a compelling demonstration that the information should not be released to the public, or if an exception designed to protect the interest of a third party is applicable. Open Records Decision No. 150 (1977). The exception from public disclosure in question here, section 3(a)(10), is such an exception. Open Records Decision No. 319 (1982).

Subsequent to the open records request discussed above, the Railroad Commission received a second open records request, from a separate requestor, for the key to the codes

used to identify Lone Star's customers. You have requested an attorney general opinion with respect to this second request. We will consider both requests in this opinion.

Pursuant to section 7(c) of the Open Records Act, the Railroad Commission has chosen not to submit reasons why the requested information should or should not be withheld from public disclosure, leaving that to interested parties. We have received a number of briefs and comments from interested parties with respect to this matter, including both of the parties making the open records requests, Lone Star, and several other parties not directly affected. After notice that this matter had been referred to this office for an opinion, Access has elected not to take a position.

Section 3(a)(10) of the Open Records Act excepts

> trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Section 3(a)(10) protects third-party interests that have been protected by courts. Open Records Decision No. 514 (1988). It protects two different categories of information: 1) trade secrets and 2) commercial or financial information.

The determination of whether any particular information is a trade secret under Texas law is a fact question. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts section 757, 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.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958). Noting that an exact definition of a trade secret is not possible, the Restatement lists six factors to be considered in determining whether particular information constitutes 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;

6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts section 757, comment b (1939). It is worth noting that the above listed factors are indicia of whether information is a trade secret. Whether any individual factor will constitute a sine qua non will depend on the specific information being considered.

The Restatement specifically mentions customer lists as a type of information that may be a trade secret. This office has found customer lists to be trade secrets excepted from public disclosure. Open Records Decision Nos. 255 (1980); 89 (1975). In its brief, Lone Star alleges, with respect to the six factors listed by the Restatement, facts which indicate the value of the information to the company and the steps the company has taken to ensure the secrecy of the information. Moreover, Lone Star makes it clear that what is at issue is not only the names of customers, but the resultant contract and pricing information which may be ascertained by matching the customer names to other information in its required filings with the Railroad Commission. We conclude that Lone Star has made a prima facie case that the information in question constitutes a trade secret.

Opposing briefs offer arguments in rebuttal to Lone Star's factual allegations. In addition, our attention has been directed to a number of cases in which a court has held customer lists not to be trade secrets. See, e.g., Richardson & Assoc. v. Andrews, 718 S.W.2d 833 (Tex. App. -

Houston [14th Dist.] 1986, no writ); Research Equipment Co. v. Galloway, 485 S.W.2d 953 (Tex. Civ. App. - Waco 1972, writ dism'd); SCM Corp. v. Triplett Co., 399 S.W.2d 583 (Tex. Civ. App. - San Antonio 1966, no writ). In each of these cases, the determinative consideration was a finding of fact that the information in question was readily ascertainable from other sources. In another case, however, the court, noting that the various pieces of information which made up a customer list were undoubtedly known to some members of the public, held that the list, when taken together with cross-referenced customer history information, constituted a trade secret. Expo Chemical Co. v. Brooks, 572 S.W.2d 8, 12 (Tex. Civ. App. - Houston [1st Dist.] 1978), rev'd on other grounds, 576 S.W.2d 369 (Tex. 1979). We have found no case, and none has been brought to our attention, that resolves the question before us as a matter of law. As noted above, whether information constitutes a trade secret under Texas law is a question of fact. In this instance the relevant facts are in dispute.

Section 7(b) of the Open Records Act charges this office with deciding, consistent with the standards of due process, whether requested information is excepted from public disclosure. See Kneeland v. National Collegiate Athletic Assoc., 650 F. Supp. 1064, 1074 (W.D. Tex. 1986), rev'd on other grounds, 850 F.2d 224 (5th Cir. 1988). However, we cannot resolve disputes of fact in the opinion process. Where fact issues are not resolvable as a matter of law or ascertainable from the face of documents submitted for our inspection, we rely on the representations of the governmental body requesting our opinion. In Open Records Decision No. 426 (1985) we stated:

> The Harris County Appraisal District is in the best position to determine whether Cole-Layer-Trumble's arguments satisfy applicable requirements for classifying the requested documents as "trade secrets." As attorney for the district, you have endorsed the company's arguments. Because this office cannot resolve such questions of fact, we accept your endorsement. Based on these arguments, we conclude that the "trade secrets" criteria are satisfied in this instance. We therefore conclude that the requested information is protected from required disclosure under section 3(a)(10) of the Open Records Act.

In Open Records Decision No. 550 (1990) we found, on the basis of undisputed facts alleged by the governmental body asserting section 3(a)(10), that the information sought to be withheld was not, as a matter of law, the kind of information that could constitute a trade secret. The Railroad Commission has taken no position with respect to the trade secret claim of Lone Star. As section 7(c) of the Open Records Act now expressly permits governmental bodies to defer their burden of establishing that requested information comes within an exception to public disclosure when a third-party's property or privacy rights are at issue, we must develop a standard consistent with due process for rendering opinions in such instances.

Where, pursuant to section 7(c) of the Open Records Act, a governmental body takes no position on a claim that information is excepted from public disclosure by a third party's property interests, and where relevant facts are in dispute, we are of the opinion that the attorney general must accept a claim for exception as valid if the prima facie case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law. To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact. See Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

We conclude that as Lone Star has made a prima facie case that the information in question constitutes a trade secret, and as no opposing argument has established that, as a matter of law, the information in question cannot be considered a trade secret, we must accept Lone Star's claim as valid for purposes of rendering our opinion. Accordingly, we advise the Railroad Commission that the requested information relating to Lone Star Gas Company should be withheld. As Access has taken no position in this matter, we have no information on which to establish any exception to public disclosure with respect to the information relating to Access. Accordingly, the information relating to Access Energy Corporation must be released.

S U M M A R Y

Where, pursuant to section 7(c) of the Open Records Act, a governmental body takes no position on a claim that information is excepted from public disclosure by a third party's property interests, and where

relevant facts are in dispute, we are of the opinion that the attorney general must accept a claim for exception as valid if the prima facie case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law.

Very truly yours,

Jim Mattox

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