



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 30, 1993

Mr. Kevin K. Zarling
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR93-049

Dear Mr. Zarling:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former article 6252-17a, V.T.C.S)¹. Your request was assigned ID# 18161.

The Texas Department of Agriculture (the "department") has received a request for information held by the department as the state agency responsible for certifying the identity and genetic purity of classes of seeds and plants. Specifically, the requestor seeks:

seed maps and number of acres for all certified seed growers except Littlefield Delinting Co. on acres that [have] been approved for certification for the year 1992 on [Paymaster HS-26 and Paymaster HS-200 Cotton Seed Varieties.]

The two seed varieties are "owned" by Cargill, Inc., of Minneapolis pursuant to the federal Plant Variety Protection Act, 7 U.S.C. §§ 2321 - 2582, which seeks to encourage research by giving the breeder of a novel plant variety certain exclusive property rights in it. 7 U.S.C. § 2531 ("plant variety protection shall have the attributes of personal property"), 2581. The breeder of a novel variety of plant may apply for a certificate of Plant Variety Protection, which certifies that he has the right "to exclude

¹The Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

others from selling the variety,² or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety." *Id.* §§ 2401 - 2442, 2483.³ Thus, federal law gives Cargill considerable control over the amount of its certified seed that is produced and marketed in Texas and other states.

Cargill allows the propagation and sale of the two certified seed varieties in Texas through licensing to growers. The department obtained the requested information from the licensed growers. See Agric. Code §§ 62.005 - 62.008. You state that licensed certified seed producers generally regard acreage information as confidential, and you request a ruling so that interested parties may submit their reasons for withholding this information.

Pursuant to section 552.305 of the Government Code, we notified the companies whose interests may be affected by disclosure of the information submitted to us for review. In response, we received letters from Cargill, Inc., and from several certified seed producers licensed by Cargill to grow one or both of the certified seed varieties. The respondents claim that the requested information is excepted from required public disclosure by former sections 3(a)(1), 3(a)(4), and 3(a)(10) of the Open Records Act (now found at sections 552.101, 552.104, and 552.110, respectively, of the Government Code).

We turn first to Cargill's claim that the requested information constitutes a trade secret protected from disclosure to the public by section 552.110.

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, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. The Restatement gives 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 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

²A narrow exception permits sales of a protected variety of seed from one farmer directly to another farmer. 7 U.S.C. § 2543; *Delta and Pine Land Company*, 694 F.2d 1012 (5th Cir. 1983).

³The term of protection is 18 years. 7 U.S.C. § 2483.

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, 306 (1982); 255 (1980). The kind of information that may qualify as a trade secret is described as follows:

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, . . . [but] 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).

This office is unable to resolve disputes of fact and must rely on the facts alleged or upon facts that are discernible from the documents submitted for inspection. Open Records Decision No. 552 (1990). For this reason, we will accept a claim for exception as a trade secret as valid when a *prima facie* case is made that the requested information constitutes a trade secret and no argument is made that rebuts that claim as a matter of law. Open Records Decision No. 552 at 5-6.

The letter from Cargill, Inc., states that the data sought by the requestor includes the size of seed blocks, the names of growers, and the locations where the certified seed is being grown. It states that the requested information is not known outside the company's business and is not available to employees and "certainly not to other contract growers." The information is kept in confidential files accessible only to Cargill's local management. The letter further states that this information is invaluable to Cargill:

because it takes years to establish reliable, consistent contract growers for cotton seed, especially for a seed we have researched and developed for commercial use. . . . Obviously, if in the hands of a competitor, this information would give him/her an unfair advantage. . . . [F]or several years, Cargill has invested its time and expertise in establishing reliable, consistent growers. Cargill has

invested substantial sums of money to research and monitor the growers in its target market area. . . .

We believe that Cargill has made a prima facie case that the list of licensed growers is a trade secret. It is a "compilation of information" used in Cargill's business, which gives Cargill an opportunity to obtain an advantage over competitors who do not have this list. Cargill has developed a list of cotton seed growers that are able to produce seed of reliable, consistent quality. Knowledge of this list would enable a competitor to contract with the same growers without spending the time and money necessary to evaluate the ability of the growers to produce seed of the required quality.

Cargill also states that a competitor who knows the size of seed blocks, the names of growers, and the area over which seed is being grown would be able to determine "almost exactly how much seed will be coming into the market," and adjust his price for cotton seed to the disadvantage of Cargill. Federal law gives Cargill considerable control over the sale of its certified seed, including seed produced by other growers.⁴ The requested information, which would enable a competitor to compute the amount of Cargill's certified seed reaching the market, is a "compilation of information," used in Cargill's business, which gives Cargill "an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT OF TORTS § 757 cmt. b (1939). *See generally* Open Records Decision No. 107 (1975) (inventory information appearing on grain warehouse reports of Department of Agriculture is within former exception 3(a)(10)). Cargill has made a prima facie case that the requested information in its entirety is excepted from public disclosure by section 552.110, and no argument has been made that rebuts this claim. Accordingly, the requested information is excepted from public disclosure as trade secret information belonging to Cargill, Inc. We need not address claims made that the requested information is within other exceptions to the Open Records Act.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Susan Garrison
Assistant Attorney General
Open Government Section

⁴ *Delta and Pine Land Company, supra* at n. 1.

SG/GCK/lmm

Ref.: ID# 18161
ID# 18381
ID# 18388
ID# 18399

Enclosures: Submitted documents

cc: Mr. Arthur Summers
Littlefield Delinting Co.
Box 346
Littlefield, Texas 79339
(w/o enclosures)

Ms. Laura W. Miller
Cargill, Inc.
Minneapolis, MN 55440
(w/o enclosures)