



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 23, 1996

Mr. Rick Perry  
Commissioner  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR96-1247

Dear Commissioner Perry:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 40346.

The Texas Department of Agriculture (the "department") received a request for the following information concerning Holland Cotton Seeds:

1. How many acres Holland got certification for 1379.
2. Confirmation that none of their varieties other than 1379 were requested for certification during 1994 and 1995.
3. Under the Texas Department of Agriculture the following varieties do exist.

... [listing several Holland varieties]

As responsive to this request, you submitted to this office two department forms (TDA S308F) that concern the genetic certification of cotton seed varieties for Holland Cottonseed. The department raises no exception to the required public disclosure of the requested information. Since the property and privacy rights of the company that produces cottonseed under the trade name of Holland CottonSeeds, CAS Custom Farming, Inc. ("CAS"), are implicated by the release of the requested information here, this office notified that company of this request. *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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). CAS asserts that the requested information is excepted from required public disclosure based on section 552.110 of the Government Code.

Section 552.110 of the Government Code excepts from required public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Thus, this exception refers to two categories of information: (1) trade secrets and (2) commercial or financial information obtained from a person. CAS asserts that the requested information falls into both categories of information.

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. 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, . . . [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). The Restatement also lists the following 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.

*Id.*

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 (1990) at 5-6. CAS states as follows:

[B]oth the number of acres and the varieties that have been certified or have not been certified involve disclosure [of] very delicate financial information and trade secrets that will be used . . . by [CAS's competitor's] competing and marketing activities and in [CAS's] competitor's attempt to prevent my client from marketing its product in the nation of Greece. . . . The disclosure of the [requested] information . . . is likely to cause substantial harm to the competitive position of my client.

The disclosure of the acres involved in connection with "certification for 1379" as well as confirmation as to whether or not certification has been obtained concerning other varieties and whether or not "under the Texas Department of Agriculture" certain varieties "do not exist" will involve disclosure of information with which . . . [CAS's] competitors can calculate the exact amount of inventory available (by checking the number of acres for certification) as well as . . . what items or varieties we can expect in our inventory in the future by knowing what varieties have been or have not been certified. . . .

The submission of this information . . . to [CAS's competitors] will be giving them very valuable information that would result in a very valuable competitive edge loss to my client not only in this nation but also abroad.

We do not believe CAS has established that the information at issue is a trade secret. CAS has not explained how the information is "used in its business." It appears to us to be information about a "single or ephemeral event in the conduct of its business,"

its certification for a particular cotton seed variety at a certain time, not "a process or device for continuous use in the operation of the business." Moreover, CAS has failed to address any of the Restatement's six trade secret criteria. The department may not withhold the information under section 552.110 as a trade secret.

In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). CAS asserts that the release of the information will cause substantial harm to its competitive position.

A business enterprise cannot succeed in a *National Parks & Conservation Ass'n* claim by mere conclusory assertion of a possibility of commercial harm. To prove substantial competitive harm, the party seeking to prevent disclosure 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. See Open Records Decision No. 639 (1996). We do not believe CAS has shown that competitive injury would likely result from disclosure of the information here. Even assuming a competitor could use the information to calculate CAS's inventory of a particular cottonseed variety-- an assumption we do not make-- CAS has failed to explain how that information can be used by its competitor to cause substantial harm to its cotton production business. Accordingly, we cannot conclude that the department may withhold the information under section 552.110 as confidential commercial or financial information.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo  
Assistant Attorney General  
Open Records Division

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Enclosures: Submitted documents

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(w/o enclosures)