



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 21, 1997

Ms. Katherine B. Cahill  
Senior Counsel  
San Antonio Water System  
P.O. Box 2449  
San Antonio, Texas 78298-2449

OR97-0105

Dear Ms. Cahill:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103002.

The San Antonio Water System ("SAWS") received a request "to view and copy" manifests for liquid waste transported by Envirowaste Management ("Envirowaste"). You state that this is the same general type of information as that considered in prior decisions from this office, Open Records Letter No. 96-1083 (1996) and Open Records Letter No. 96-1793 (1996).<sup>1</sup> You state that SAWS objects to disclosure of the requested manifests for the same reasons discussed in these prior decisions. It is our understanding that SAWS asserts that the Envirowaste manifests at issue are excepted from disclosure pursuant to sections 552.104 and 552.110 of the Government Code.

Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. You have not explained how release of the manifests at issue would affect the governmental body's interests. Thus, you have not shown the applicability of section 552.104.

Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or

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<sup>1</sup>Open Records Decision No. 96-1793 (1996) modified Open Records Letter No. 96-1083 (1996).

judicial decision.” Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; see Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term “trade secret” from the Restatement of Torts, section 757 (1939), 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. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event 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 or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be property acquired or duplicated by others.

*Id.*; see also Open Records Decision No. 522 (1989).

This office cannot conclude that information is a trade secret unless the governmental body or the third party whose interests are at issue provides evidence of the

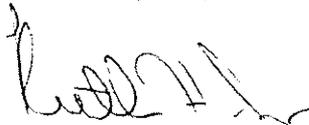
factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Pursuant to section 552.305 of the Government Code, this office provided Envirowaste the opportunity to explain why the manifests should not be disclosed. However, Envirowaste has not responded. Neither Envirowaste nor SAWS has provided facts sufficient to show the applicability of the factors necessary to establish a trade secret claim. See Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information).

Neither have Envirowaste or SAWS shown that the manifests come within the commercial or financial aspect of section 552.110. "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted), "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 also Open Records Decision No. 639 (1996) at 4. The manifests may not be withheld from disclosure under section 552.110.

You also ask if SAWS can seek pre-payment of all costs for copying the information at issue, including labor, materials, and overhead. Section 552.261 of the Government Code provides that the cost of providing copies of public information "shall be an amount that reasonably includes all costs related to reproducing the public information, including costs of materials, labor, and overhead." The Texas General Services Commission sets rules specifying the methods and procedures for determining such costs. Gov't Code § 552.262. As we advised you in Open Records Letter No. 96-1083 (1996), you should contact the Texas General Services Commission if you have questions concerning the cost of providing copies of public information.

We are resolving this matter with an 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 should 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,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 103002

Enclosures: Submitted documents

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