



March 8, 1999

Mr. Kenneth Stewart
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR99-0648

Dear Mr. Stewart:

You ask 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# 122661.

The Texas Department of Public Safety (the "department") received a request for records pertaining to the department's breath alcohol testing program and the Intoxilyzer 5000 having serial number 68-001870. You contend the requested information is excepted from required public disclosure pursuant to sections 552.103, 552.108, and 552.110 of the Government Code. You have submitted a representative sample of the documents at issue.¹

Because you contend that section 552.103 excepts all of the requested information from public disclosure, we will address the applicability of this exception first. To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You contend that section 552.103 applies to the requested information because the

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

documents are being used in existing criminal litigation. Please note, however, that because the department would not be a party to any criminal litigation that would result from its criminal investigation, section 552.103 is not applicable in this instance. The department therefore may not withhold any of the information at issue under this exception.

You next contend that section 552.108 excepts the requested information from public disclosure. Section 552.108(a)(1) of the Government Code excepts from required public disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Section 552.108(b)(1) excepts from public disclosure an internal record or notation of a law enforcement agency that is maintained for internal use in matters relating to law enforcement if release of the internal record or notation would interfere with law enforcement or prosecution. Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We have reviewed your section 552.108 arguments and conclude that you have not shown how release of the submitted information would interfere with law enforcement or prosecution. Thus, you may not withhold the submitted information under section 552.108.

Lastly, you contend that section 552.110 protects the requested information because the information is a trade secret. 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.), *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 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) (emphasis added). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² We have reviewed the submitted information and conclude that it is not a trade secret as defined by the Restatement of Torts.³ Therefore, you may not withhold the submitted information under section 552.110.

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.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 122661

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

³We note that you did not submit the requested computer program and user's manual as part of the representative sample of information.

Enclosures: Submitted documents

cc: Mr. Todd A. Blomerth
Blomerth and Payne
103 South Main Street
Lockhart, Texas 78644
(w/o enclosures)