



April 26, 2000

Ms. Susan Combs  
Commissioner  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711-2847

OR2000-1619

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134503.

The Department of Agriculture (the “department”) received a request for thirteen categories of information related to the department’s seed certification program. You assigned this request department tracking number TDA-PIR2000-048. You claim that the requested information is excepted from disclosure under section 552.110 of the Government Code. You have submitted a representative sample of the responsive information to this office for review.<sup>1</sup>

You indicated that the interests of a third party, Lark Seeds International (“Lark”), are implicated by the release of the responsive information. You relate that you have notified Lark of the pending request, pursuant to Government Code section 552.305. Representatives of Lark submitted comments to this office, asserting that sections 552.103, 552.104, 552.110 and 552.111 of the Government Code except responsive information from disclosure. Sections 552.103, 552.104 and 552.111 protect the interests of governmental bodies and do not protect the interests of parties which submit information to governmental bodies. Open Records Decision No. 592 (1991). Because the department does not raise these exceptions, no information may be withheld under these exceptions. Gov’t Code § 552.007; *See also Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.-Austin 1999).

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<sup>1</sup>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.

We first note that the requestor seeks certain tangible items (seed samples) which are not “public information” subject to disclosure under chapter 552 of the Government Code. The requested seed samples need not be released. *See* Open Records Decision No. 581 (1990).

The department submitted the following categories of responsive information, which we have numbered for reference purposes.

- (1) origin and breeding history
- (2) number of seed tags in designated fields (untitled document)
- (3) number of tags requested (tag request)
- (4) number of requested labels (request for certification labels)
- (5) application to SSPB to produce seed under certification
- (6) number of labels (shipping invoice)
- (7) description of plant variety
- (8) previous growing history (supplement sheet)
- (9) field map
- (10) acreage planted (application for field inspection)

The department highlighted parts of this information to indicate the portion that it asserts is “[p]ossible commercial or financial information of a proprietary nature the disclosure of which would cause competitive harm.” It has also withheld documents in their entirety in certain categories. We have reviewed the submitted information and considered the application of section 552.110 of the Government Code.

Section 552.110 provides,

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

We first turn to the application of the trade secrets exception, Government Code section 552.110(a). 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. 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 of 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 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, *supra*; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if sufficient facts to establish a *prima facie* case that the information is a trade secret are alleged and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5. In this case, neither the department nor Lark has provided sufficient facts to establish that any of the requested information is protected as a trade secret.

We next examine the commercial or financial information exception, Government Code section 552.110(b). Lark contends that the information responsive to each request category should be withheld. However, Lark does not provide any specific factual evidence that disclosure of this information would cause it substantial competitive harm. We conclude that Lark has not demonstrated that the responsive information is excepted from disclosure by section 552.110(b) of the Government Code.

The department asserts that access to certain responsive information would reveal the growers' production and marketing strategies and that

[t]he agricultural niche for producers of innovative pure genetic seeds and plants is highly specialized and very expensive. Seed and plant developers may spend millions of dollars crossing different varieties to develop a particular strain of seed or plant that suits a particular agricultural region in both domestic and international areas. Once developed, each unique seed or plant type is proprietary and belongs to the producer. One of the vital competitive advantages that a seed producer has over his competitors is the producer's strategic use of his resources to produce new seeds and plants. Divulging how many acres a Texas producer dedicates to a particular variety of seed allows the producer's competitor to gauge just how much of the particular seed variety the producer will market.

We conclude that the department has demonstrated by assertion of specific factual evidence that release of information which reveals how many acres a Texas producer dedicates to a particular variety of seed would cause substantial competitive harm to the person from whom that information was obtained. We find that the information in categories designated above as 1 and 7 does not reveal the protected acreage information. This information may not be withheld under section 552.110(b). We find that the information highlighted by the department in categories designated above as 2, 3, 4, 5, 6, 9, and 10, as well the document withheld in its entirety in category 8, reveals how many acres a Texas producer dedicated to a particular variety of seed. This information may be withheld under section 552.110(b) of the Government Code. All other responsive information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns  
Assistant Attorney General  
Open Records Division

MJB/nc

Ref: ID# 134503

Encl Submitted documents

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