

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



October 10, 2000

Ms. Barbara Jo Fratila
Assistant General Counsel
Port of Houston Authority
P.O. Box 2562
Houston, Texas 77252-2262

OR2000-3910

Dear Ms. Fratila:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 139924.

The Port of Houston Authority (the "authority") received a request for information relating to freight handling. The authority claims that some of the information encompassed by item No. 5 of the request is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. The authority also believes that certain information responsive to item Nos. 2 and 5 of the request implicates the privacy or property interests of third parties. Pursuant to section 552.305 of the Government Code, the authority notified the third parties whose interests may be affected of their right to submit arguments to this office as to why the information in question should not be released. *See Gov't Code § 552.305(d)*; 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 to disclosure under Public Information Act in certain circumstances). The authority submitted to this office representative samples of the records that it seeks to withhold under sections 552.107 and 552.111.¹ The authority also submitted the information that it believes may implicate the third parties' interests. This office received comments submitted by or on behalf of Ceres Gulf, Inc. ("Ceres"), Cooper/T. Smith Stevedoring ("Cooper"), P&O Ports Texas, Inc. ("P&O Ports"), and Strachan Shipping Company ("Strachan").²

¹This letter ruling assumes that the representative samples you submitted are truly representative of the requested information as a whole. This ruling neither addresses nor authorizes the authority to withhold any requested information that is substantially different from the submitted information. *See Gov't Code § 552.301(e)(1)(D)*; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²We received no comments from Chaparral Stevedoring Company of Texas, Inc., J.J. Flanagan Stevedores, Shippers Stevedoring Company, or Stevedoring Services of America. As the authority takes no position with regard to the requested information that relates to these four parties, that information must be released.

Initially, we must address the authority's failure to comply fully with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes the procedures that a governmental body must follow in asking for a decision by this office as to whether requested information may be withheld from the public. Section 552.301(b) provides that "[a] governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written [information] request." Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301 in requesting an attorney general decision, the requested information is presumed to be subject to public disclosure and must be released unless there is a compelling reason to withhold any of that information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ).

The authority seeks to withhold, under sections 552.107 and 552.111, information that is encompassed by item No. 5 of the request for information. You inform us that the authority received the information request on July 26, 2000; thereafter, the authority had ten business days, or until and including August 9, 2000, in which to comply with section 552.301(b). By letter dated July 26, you asked the requestor to specify the time frame of item No. 1 of the request for information.³ By letter dated August 2, you also asked the requestor to specify the time frame of item No. 5 of the request for information. By letter dated August 3, you requested our decision regarding the privacy and proprietary interests of the third parties and submitted the information that implicates those parties' interests. On August 4, you received correspondence in which the requestor narrowed the time frame of item No. 5 of his request. By letter to this office dated August 18, you claimed that some of the information that is responsive to item No. 5 of the information request, as clarified by the requestor, is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You submitted representative samples of the information that the authority seeks to withhold under those exceptions with your letter of August 18.

You characterize the authority's correspondence with the requestor as an effort to obtain clarification of item Nos. 1 and 5 of the request for information. Section 552.222(b) of the Government Code provides that "[i]f what information is requested is unclear to a governmental body, the governmental body may ask the requestor to clarify the request." This office previously has held that a request "must sufficiently identify the information requested and an agency may ask for a clarification if it cannot reasonably understand a particular request." Open Records Decision Nos. 663 at 4 (1999), 23 at 1-2 (1974); *see also* Open Records Decision No. 304 (1982) (governmental body sought clarification as to particular documents sought when requestor asked for all documents relating to particular issue). We agree that the authority acted appropriately in asking the requestor to specify a time frame for item Nos. 1 and 5 of the request

³You inform us that the authority has made the information that is responsive to item Nos. 1, 3, and 4 of the request, and part of the information that is responsive to item No. 2, available to the requestor. Therefore, the circumstances surrounding your clarification of item No. 1 of the information request are not at issue in this decision.

for information. We note, however, that a clarification under section 552.222 merely tolls the governmental body's deadline for requesting an attorney general decision under section 552.301(b). *See* ORD 663 at 3-5. A clarification does not trigger a new ten business day time interval under section 552.301(b) at such time as the clarification is received. *Id.* In this instance, the authority's correspondence with the requestor regarding item No. 5 of the request encompassed the three-day period from August 2 through August 4. However, *seventeen* business days elapsed between July 26, the date of the authority's receipt of the information request, and August 18, the date of your correspondence with this office in which you first raised sections 552.107 and 552.111. Thus, and even allowing for the three days encompassed by your clarification of item No. 5 of the request, the remaining fourteen business day interval between your initial receipt of the information request and your eventual assertion of sections 552.107 and 552.111 represents a failure to comply timely with section 552.301(b).

As the authority failed to comply with section 552.301(b) in raising sections 552.107 and 552.111, the information that you seek to withhold under those exceptions is presumed to be public and must be released unless there is a compelling reason why any of that information should be withheld. *See* Gov't Code § 552.302. Sections 552.107 and 552.111 are discretionary exceptions to required public disclosure that a governmental body may waive. Therefore, the authority's claims under those exceptions are not compelling reasons that overcome your failure to comply with section 552.301(b). *See* Open Records Decision Nos. 665 at 2 n.5 (2000), 630 at 3 (1994). The statutory presumption of openness may be overcome by a showing that the information at issue is deemed to be confidential under some other source of law or that the interests of third parties are at stake. *See* ORD 630 at 3. However, you do not claim, and it is not apparent to this office, that any of the information that the authority seeks to withhold is either confidential or implicates the interests of third parties. Thus, the information encompassed by item No. 5 of the request that the authority seeks to withhold is not excepted from disclosure and must be released.

We next address the claims of the private parties. Ceres argues that the information in question relating to Ceres is excepted from disclosure under sections 552.110 and 552.131 of the Government Code. Cooper, P&O Ports, and Strachan confine their arguments to section 552.110.⁴

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) 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. *See* Gov't

⁴We note that Ceres and Cooper also raise section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 protects information that is deemed to be confidential under some source of law beyond chapter 552 of the Government Code. *See* Open Records Decision No. 630 at 3 (1994); *see also* *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (common law privacy); Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Neither Ceres nor Cooper directs our attention to such a source of law under which any of the information in question is subject to a right of privacy or is made confidential by a statute.

Code § 552.110(a), (b). Ceres, Cooper, P&O Ports, and Strachan all submit arguments under section 552.110.

Section 552.110(a) excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Both Ceres and Cooper contend that requested information relating to their operations should be withheld from disclosure under 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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If, as is true here, a governmental body takes no position on the application of the “trade secrets” component of section 552.110 to requested information, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁵ *See Open Records Decision No. 552 at 5* (1990).

Both Ceres and Cooper identically contend that the requestor, Coastal Terminal Operators, Inc. (“Coastal”), “has issued its request . . . for the sole purpose of utilizing this information to go

⁵The Restatement of Torts lists 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 other 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 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

into direct competition with stevedores such as Ceres [and] Cooper at the [authority's] Turning Basin Area Wharves[.]” Ceres seeks to have withheld, as trade secrets, (1) information relating to its customers, including their respective identities, 1999 projected tons of cargo, wharfage assessments, and wharfage revenues; (2) summaries of generated and estimated revenues to the authority from Ceres for 1999; and (3) freight handler performance reports, which according to Ceres reveal its actual revenues and related information. Cooper asserts that the identities of its customers and the prices and revenue generated from its customers constitute a trade secret that is excepted from disclosure under section 552.110(a). Both Ceres and Cooper contend that the disclosure of the information in question would permit Coastal to mimic processes and business practices in which they have invested time and expense and would allow Coastal to have access to customer lists that Ceres and Cooper have kept confidential.⁶

We have considered the arguments of Ceres and Cooper, reviewed their respective affidavits, and carefully examined the information that each contends should be withheld as trade secret information under section 552.110(a). We find that both Ceres and Cooper have demonstrated that the identities of their customers constitute trade secrets. Accordingly, we conclude that the identities of Ceres' and Cooper's customers are excepted from disclosure under section 552.110(a). *See* Open Records Decision No. 552 (1990) (discussing status of customer lists under statutory predecessor). We have marked that information. We are not persuaded, however, by the parties' arguments with regard to the other information that Ceres and Cooper claim should be withheld under section 552.110(a). We are not satisfied that either Ceres or Cooper has established that the information relating to the companies' past or projected operations and revenues qualifies as a trade secret under the definition in *Hyde Corp. v. Huffines* and section 757 of the Restatement of Torts. *See also* Open Records Decision No. 319 at 3(1982) (stating that statutory predecessor ordinarily does not protect information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Section 552.110(b) of the Government Code excepts from disclosure “[c]ommercial 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[.]” Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury likely would result from release of the information at issue. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 at 5-6 (1999); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Ceres, Cooper, P&O, and Strachan invoke section 552.110(b).

Although most of its arguments are devoted to section 552.110(a), Ceres also refers to the information relating to its operations and revenue as commercial and financial information. We therefore understand Ceres also to be raising section 552.110(b). We find, however, that Ceres

⁶In support of its arguments under section 552.110, Ceres has submitted an affidavit signed by Kaare Eileraas, an officer of the company. Cooper has submitted an affidavit signed by Britton Cooper, Vice President - Operations.

has not made a specific factual or evidentiary showing that the release of any information other than its customer list would subject Ceres to any specific or immediate threat of competitive harm. Accordingly, we conclude that the rest of the information relating to Ceres is not excepted from disclosure under section 552.110(b).

Cooper seeks the withholding, under section 552.110(b), of its freight handler performance reports for the fourth quarter of 1999 and the first quarter of 2000 and information relating to its customers' projected total annual tonnage. Cooper asserts that these documents "contain commercial and financial information which, if disclosed, would cause substantial competitive harm." We have carefully reviewed the information in question. Once again, we are not persuaded that Cooper has made a sufficient showing that the disclosure of information other than the identities of Cooper's customers would result in any specific prospect of competitive harm. Therefore, we conclude that the balance of the information relating to Cooper is not excepted from disclosure under section 552.110(b).

P&O Ports also submitted comments to this office, claiming that a freight handling assignment and certain leases should be withheld from disclosure under section 552.110(b).⁷ P&O Ports asserts that the documents in question "contain proprietary and secret commercial and financial information which, if given to a third party, could cause our company substantial competitive harm." Upon careful review, we conclude that the identities of the customers of P&O Ports are excepted from disclosure under section 552.110(b). We have marked the information relating to P&O Ports that the authority must withhold. The rest of the information relating to P&O Ports is not excepted from disclosure and must be released.

Strachan seeks to have two freight handler performance reports and information relating to its customers and their tonnages withheld under section 552.110(b).⁸ Strachan asserts that it disclosed the information in question to the authority with the understanding that such information would remain confidential. Strachan also argues that the disclosure of information relating to its customers, revenue, and operations would enable competitors to use that information against Strachan and thereby give them an unfair competitive advantage. With regard to Strachan's expectation of confidentiality, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific statutory authority to keep the information confidential. Information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. See *Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d at 676-78; Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986). Neither Strachan nor the authority directs our attention to any statute that provides for the confidentiality of the

⁷This office is informed that the parent entity of P&O Ports acquired Fairway Terminal Corporation earlier this year and that the name of the latter entity has been changed to P&O Ports Texas, Inc. Therefore, in considering the arguments of P&O Ports, we address the information relating to Fairway Terminal Corporation that the authority submitted to this office.

⁸In support of its arguments, Strachan submits the affidavit of R. Norman Lamb, vice president of the company.

information in question. Accordingly, that information may not be withheld simply because Strachan anticipated that it would not be disclosed. Turning to Strachan's claim under section 552.110(b), we are persuaded by the company's arguments that public disclosure of its customer base would subject Strachan to a specific risk of competitive harm. We further find, however, that a sufficient showing of such harm has not been made with respect to the other information that Strachan claims must be withheld under section 552.110(b). We therefore conclude that the identities of Strachan's customers are excepted from disclosure under section 552.110(b). We have marked that information. The balance of the information relating to Strachan is not excepted under section 552.110(b).

Lastly, we address Ceres' claim under section 552.131 of the Government Code.⁹ Section 552.131 provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect *that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:*

(1) *a trade secret of the business prospect; or*

(2) *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.*

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from the requirements of Section 552.021.

(c) After an agreement is made with the business prospect, this section does not except from the requirements of Section 552.021 information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

⁹As amended by the 76th Legislature, chapter 552 of the Government Code includes four different exceptions to disclosure denominated as section 552.131. Ceres raises the section 552.131 that was added by the Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 9, 1999 Tex. Gen Laws 4500, 4503.

Gov't Code § 552.131. (Emphasis added.) Given the language of section 552.131, we conclude that this section is not applicable to the information at issue. We first note that section 552.131 applies to information pertaining to a business "that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body." Gov't Code § 552.131(a). We find no evidence in the submitted information, and neither Ceres nor the authority informs us, that the information in question relates to economic development negotiations between the authority and a business prospect. *Id.* Further, section 552.131(a) excepts from public disclosure only "trade secrets" and "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." To that extent, section 552.131 is co-extensive with section 552.110. Because Ceres has not demonstrated that the information relating to Ceres, other than the identities of its customers, is excepted from public disclosure under section 552.110, none of the remaining information may be withheld pursuant to section 552.131(a). Finally, we find no evidence in the information before us that the authority has offered any business prospect "a financial or other incentive" so as to trigger the applicability of section 552.131(b).

In summary, the authority must release the information that it seeks to withhold under sections 552.107 and 552.111, as the authority failed to comply with section 552.301(b) in raising those exceptions, and they are not compelling reasons that overcome the presumption under section 552.302 that the requested information is public. The information relating to Ceres and to Cooper is not excepted from disclosure under section 552.101, and the information relating to Ceres is not excepted under section 552.131. The identities of the customers of Ceres, Cooper, P&O Ports, and Strachan are excepted from disclosure under section 552.110. We have marked that information. The balance of the information relating to Ceres, Cooper, P&O Ports, and Strachan is not excepted from disclosure and 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

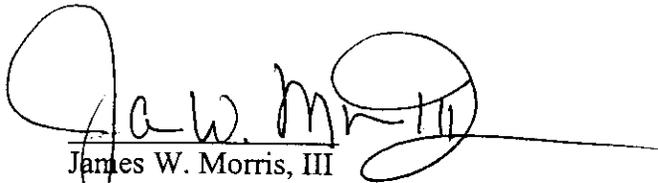
day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 139924

Encl. Submitted documents

cc: Mr. James W. McPherson
President
Coastal Terminal Operators, Inc.
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(w/o enclosures)

Mr. Michael D. Williams
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(w/o enclosures)

CAUSE NO. GN003127

PORT OF HOUSTON AUTHORITY,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
GREG ABBOTT, ATTORNEY	§	
GENERAL OF TEXAS,	§	
Defendant.	§	200 TH JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. The parties announce to the Court that all matters of fact and things in controversy between them have been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor was sent reasonable notice of this setting and of the parties' agreement that the Authority may withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor, James W. McPherson, Coastal Terminal Operators, Inc., has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, documents represented by Exhibits F and G, attached to the Authority's letter to the Attorney General, dated August 18, 2000, and further described in the privilege log, Exhibit I-1, attached to Plaintiff's motion for summary judgment in this lawsuit, is excepted from disclosure by Tex. Gov't Code §§ 552.107(1) (Exhibit F) and 552.111

FILED
 04 MAY 18 AM 8:44
Marianne Rodriguez
 DISTRICT CLERK
 TRAVIS COUNTY, TEXAS

(Exhibit G).

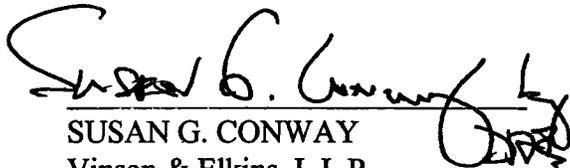
2. The Authority may withhold the information at issue from the requestor.
3. All costs of court are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 18th day of MAY, 2004.

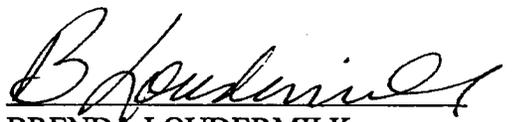


PRESIDING JUDGE

APPROVED:



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