



January 23, 2001

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

OR2001-0226

Dear Ms. Fratila:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143469.

The Port of Houston Authority (the "authority") received a request for five categories of information that relate to operations at the authority's Woodhouse Terminal. You inform us that certain responsive information has been made available to the requestor. The authority has taken no position with regard to release of the remainder of the responsive information. However, you have notified five interested parties of the request for information pursuant to section 552.305 of the Government Code. *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). Texas Stevedores, Inc., ("Texas Stevedores"), Barbours Cut Intermodal Services, ("Barbours Cut"), and Stevedoring Services of America ("SSA") did not respond to this office. We therefore have no basis for concluding that the information of Texas Stevedores, Barbours Cut or SSA is excepted from required public disclosure. Cooper/T. Smith Stevedoring ("Cooper/T. Smith") and Empire Stevedoring, Inc. ("Empire") responded with letters to this office arguing that the requested information at issue relating to those two companies is excepted from disclosure under section 552.110 of the Government Code. We have considered the arguments of Cooper/T. Smith and Empire and have reviewed the submitted information.

Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. 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 at 2 (1990). 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).¹ 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 at 5-6 (1990).

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

After reviewing the information at issue and the arguments set forth by Cooper/T. Smith and Empire, we conclude that Cooper/T. Smith has demonstrated that release of the information it seeks to withhold, a letter dated December 9, 1997 identifying customers at Woodhouse Terminal, and the projected tonnage guarantee for that terminal, is excepted from disclosure as commercial or financial information under section 552.110(b).² However, we further conclude that Empire makes only conclusory assertions for purposes of section 552.110(b), and provides no facts to support their section 552.110(a) trade secret argument. Therefore,

¹The 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.

²As we resolve your request for a ruling concerning the information relating to Cooper/T. Smith under section 552.110(b) of the Government Code, we need not address Cooper/T. Smith's argument under section 552.131.

we find that the requested information relating to Empire is not excepted under section 552.110, and it must be released to the requestor.

To summarize, the authority must withhold the responsive information relating to Cooper/T. Smith pursuant to section 552.110(b) of the Government Code. The remaining responsive information relating to Texas Stevedores, Barbours Cut, SSA, and Empire, must be released to the requestor.

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 Hadassah Schloss at 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 143469

Encl. Submitted documents

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