



May 14, 2001

Ms. Genevieve G. Stubbs
Senior Associate General Counsel
Texas A&M University System
301 Tarrow, 6th Floor
College Station, Texas 77840-7896

OR2001-1974

Dear Ms. Stubbs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 147183.

The Texas A& M University System (the "system") received a request for information concerning the Nutro Company of California ("Nutra"). You state that you have released all of the requested information with the exception of one document. You raise no exception to the required public disclosure of that document, which you have submitted as Exhibit C. Pursuant to section 552.305 of the Government Code, you notified Nutro, whose proprietary interest may be implicated by the public release of portions of the information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 the Public Information Act in certain circumstances). Nutro asserts that the information is excepted from public disclosure by section 552.110 of the Government Code.

Before we consider Nutro's arguments, we must address a procedural matter. The system failed to seek this decision and submit requisite information to this office within the Act's deadlines. *See* Gov't Code § 552.301. This failure results in the presumption that the requested information is public. *Id.* § 552.302. In order to overcome this presumption, a governmental body must provide compelling reasons why the information should not be

disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994). A compelling reason exists where a third party's privacy or proprietary interests are at stake. See Open Records Decision No. 150 (1977). Therefore, we will consider Nutro's arguments.

Nutro raises section 552.110, which protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision, 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.

First, we address Nutro's assertion that the protocol methodology described in the document is excepted from disclosure by the "trade secret" prong of section 552.110. See Gov't Code, § 552.110(a). 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). 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.

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

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

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).

Nutro argues:

The protocol methodology that is described in the document is a trade secret. Development of the methodology was difficult, time-consuming, and costly. The methodology, in turn, allowed the development of novel, unprecedented product (Natural Choice™ Odor Control), and measurement of its performance. We believe release of this document would do financial harm to Nutro.

We also request that this document not be released because it constitutes commercial information the disclosure of which would cause substantial competitive harm to Nutro. Specifically, the information contained in the document regarding our studies on Nutro's Natural Choice™ Odor Control is not readily available to competitors and is not disseminated publicly. The information would assist Nutro's competitors who have not yet developed an "odor control" product because it would disclose the trade secret methodology. This would cause Nutro substantial harm in the cat food market, particularly because at present, Nutro is the only company with an odor control food on the market.

Nutro has not provided arguments under the six criteria as set out by the Restatement. Most importantly, Nutro has not demonstrated the specific measures taken to protect the secrecy of the information or the extent to which the information is not known outside of the company's business. Therefore, we find that Nutro has not made a *prima facie* showing under the trade secret prong of section 552.110.

Next, we address Nutro's assertion under the second prong of 552.110, that the document constitutes commercial information that disclosure of which would cause Nutro substantial competitive harm. To succeed on a section 552.110 claim under the second prong, a party 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). Gov't Code § 552.110(b); *see also National Parks &*

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).

Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Nutro has not provided arguments demonstrating specific factual evidence that disclosure would cause substantial competitive harm. Consequently, we find that Nutro has not established the applicability of section 552.110(b). Thus, we conclude that the system must release Exhibit C 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).

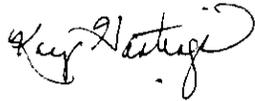
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/LM/seg

Ref: ID# 147183

Encl. Submitted documents

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