



August 28, 2001

Mr. Patrick W. Linder  
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7550 West IH-10, Suite 800  
San Antonio, Texas 78229-5815

OR2001-3796

Dear Mr. Linder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151291.

The Brownsville Public Utilities Board (the "BPUB"), which you represent, received a request for the responses to RFP-P#054-01, Digital Orthophotos, Planimetrics, and Contours. You indicate that a portion of the requested information has been made available to the requestor, but claim that the remaining portion of requested information is excepted from disclosure under sections 552.101, 552.110, and 552.113 of the Government Code. In addition, because you believe the privacy and/or property rights of certain third parties may be implicated, you notified Landata Geo Services, Inc., Surdex, MARKHURD, Williams-Stackhouse, Inc., and Merrick & Company of the request.<sup>1</sup> Of these entities, this office received a response only from Surdex, which raises section 552.110 of the Government Code. We have considered the arguments submitted by Surdex, as well as those of BPUB, and have reviewed the submitted information.

Initially, we note that you have raised sections 552.101 and 552.113. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Upon review of the submitted information, we are unable to conclude that any of the information is confidential by law, nor do you refer

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<sup>1</sup>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 Public Information Act in certain circumstances).

us to any law that would make the information confidential. Therefore, the submitted information may not be withheld under section 552.101.

Section 552.113 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is:

....

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

In Open Records Decision No. 627 (1994), this office concluded that section 552.113(a)(2) protects from public disclosure only commercially valuable geological and geophysical information regarding the exploration or development of natural resources. Open Records Decision No. 627 at 3-4 (1994) (overruling rationale of Open Records Decision No. 504 (1988)). After reviewing the information you submitted to this office, we conclude that section 552.113(a)(2) was not intended to protect the type of information at issue here. We therefore conclude that the BPUB may not withhold any of the requested information pursuant to section 552.113.

We next address the applicability of section 552.110 to the requested 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).<sup>2</sup> This office

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<sup>2</sup>The 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 Surdex, we conclude that Surdex has failed to establish that the information it submitted to BPUB is protected either as a trade secret or as commercial or financial information under section 552.110. Surdex also notes that the information it submitted to BPUB was marked "Confidential" when submitted, and therefore it is not open to the public. However, information is not confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977), see Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Thus, the information at issue is subject to disclosure under the Act. As neither Surdex nor any of the other entities that responded to the request for proposal and whose information is at issue in this ruling has established that their information is excepted from disclosure under section 552.110 of the Government Code, we conclude that the requested information must be released to the requestor.

To summarize, the requested information may not be withheld under sections 552.101, 552.110, or 552.113 and therefore it 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# 151291

Enc. Submitted documents

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