



November 2, 2001

Mr. Michael Greenberg
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-5040

Dear Mr. Greenberg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154317.

The Texas Department of Health (the "department") received a request for copies of all records pertaining to OTC Distribution, Inc. ("OTC") and a specified dietary supplement product. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.110 of the Government Code.¹ You state, and provide documentation showing, that you notified OTC of the request for 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 Public Information Act (the "Act") in certain circumstances). OTC responded to the notice by submitting arguments to this office for withholding portions of the submitted information under section 552.110 of the Government Code. We have considered the arguments of all parties and have reviewed the submitted information.

¹ Although you claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code, you offer no explanation as to why this particular exception to disclosure is applicable to the submitted information. *See* Gov't Code § 552.301(e)(1)(A), .302. Accordingly, we do not address your claim regarding section 552.101 of the Government Code.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108

Gov't Code § 552.022(a)(1). The submitted information constitutes information encompassed by section 552.022(a) and, therefore, may only be withheld to the extent it is confidential under "other law" or is excepted from disclosure under section 552.108 of the Government Code. You claim that the submitted information is excepted from disclosure in its entirety pursuant to section 552.103 of the Government Code. However, section 552.103 is a discretionary exception under the Act and, therefore, is not "other law" for the purpose of section 552.022.² Accordingly, you may not withhold any of the submitted information from disclosure pursuant to section 552.103 of the Government Code.³

However, you claim that some of the submitted information that you have marked may be excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110(a) protects trade secrets of private parties. 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

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

³ We note that even if the submitted information was not encompassed by section 552.022(a)(1) of the Government Code, you have not met your burden of demonstrating that it is excepted from disclosure pursuant to section 552.103 of the Government Code. *See* Open Records Decision No. 452 at 4 (1986) (stating that governmental body must provide concrete evidence showing that claim that litigation may ensue is more than mere conjecture when establishing that litigation is reasonably anticipated)

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). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law.⁴ *See Open Records Decision No. 552 at 5 (1990).*

Section 552.110(b) 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.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See Open Records Decision Nos. 639 at 4 (1996)* (to prevent disclosure of commercial or financial information, 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).

OTC contends that some of the information that the department has marked pertaining to OTC’s list of customers is excepted from disclosure under section 552.110(a) because the information meets the six criteria for determining whether particular information constitutes a trade secret. Based on OTC’s arguments and our review of this information, we agree that the department must withhold this information from disclosure pursuant to section 552.110(a) of the Government Code as OTC’s trade secret information. *See Open*

⁴The 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 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).*

Records Decision Nos. 552 (1990), 437 (1986) (finding that customer lists may be withheld from disclosure under section 552.110). OTC also contends that the release of some of the information that the department has marked would provide OTC's competitors with customer product preferences, as well as pricing information. OTC argues that the release of the product preference and pricing information would provide competitors with an opportunity to entice OTC's customers with a similar product at a lower price. Based on our review of OTC's arguments and this information, we agree that the department must withhold this information from disclosure pursuant to section 552.110(b) of the Government Code.

In summary, the department must withhold all of the information you have marked pursuant to section 552.110 of the Government Code. However, the department must release the remaining submitted information 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).

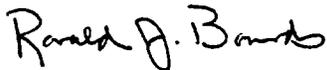
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 154317

Enc. Submitted documents

cc: Mr. Christopher J. Scanlan
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(w/o enclosures)