



November 16, 2001

Mr. W. Lane Lanford  
Executive Director  
Public Utility Commission of Texas  
P.O. Box 13326  
Austin, Texas 78711

OR2001-5309

Dear Mr. Lanford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155075.

The Public Utility Commission of Texas (the "commission") received a request for copies of earnings reports, audit reports, RUS forms, affiliate activities reports, and payments and compensation reports filed with the commission by the Colorado Valley Telephone Cooperative (the "cooperative") for the years 1998, 1999, and 2000. You inform us that the commission has released certain responsive information, and that the cooperative did not file a RUS form for the year 2000. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). However, you have submitted as responsive to the request information labeled Exhibits H, I, J, K, and L. Although the commission takes no position as to the confidentiality of the requested information, pursuant to section 552.305, you notified the cooperative of the request for its information and invited it to submit arguments to this office as to why the information at issue should not be released.<sup>1</sup> The cooperative timely submitted arguments to this office and contends that a portion of the information contained in the requested documents is excepted from disclosure under section 552.110 of the Government Code. We have considered the exceptions raised by the cooperative and have reviewed the submitted information.

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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 Open Records Act in certain circumstances).

Initially, we note, and you inform us, that the submitted information states on the face of the documents that it is confidential and excepted from disclosure under sections 552.101, 552.104 and 552.110 of the Government Code. Information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.*, Open Records Decision No. 180 (1977). Further, section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." As neither the commission nor the cooperative makes an argument under section 552.101 to withhold the requested information, we find that none of the requested information may be withheld under that provision. We will next address the cooperative's arguments under section 552.110.

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. *See* Gov't Code § 552.110(a), (b). 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 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).

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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).

Upon review of the arguments submitted by the cooperative, we find that the cooperative has established that release of the following information would cause it substantial competitive harm: in submitted Exhibit H, entitled "Telephone Utilities Earnings Report of [the cooperative] to the [commission] for the Twelve Months Ending December 31, 2000," the answers to questions 16b, 17, 20a, and 22b-h; lines 1-13, 15-24, 26-32, 36, 38, 40, and 42 in Schedule I; lines 1-13, 15-24, 26-32, 36, 38, 40, and 42 in Schedule Ia; Schedules II through VII; Schedule XIV; Supplemental Schedule 1; and Supplemental Schedule 3. Therefore, this information must be withheld under section 552.110(b).

In submitted Exhibit I, entitled "[Cooperative] Consolidated Financial Statements As of December 31, 2000 and 1999 With Independent Auditor's Report, the cooperative has established that release of the following information would cause it substantial competitive harm: page 5, Consolidated Balance Sheets, Liabilities and Equities; page 6, Consolidated Statements of Revenue; page 7, Consolidated Statement of Changes in Members' Equity; page 8, Consolidated Statement of Cash Flows; and pages 9-16, the marked information in note 1, and notes 2-12 in their entirety.<sup>3</sup> Therefore, this information must be withheld under section 552.110(b).

In submitted Exhibit J, entitled "[Cooperative] Annual Report of Affiliate Activities Required by Sub. Rule 26.84 To Be Filed Under Project 18693 December 31, 1998," the cooperative has established that release of the following information would cause it substantial competitive harm: sections IIIA, IIIB, and IIIC, to include the attached contracts enumerated in IIIC. Therefore, this information must be withheld under section 552.110(b). With regard to sections I and II which the cooperative seeks to withhold, we note that section 552.110 does not ordinarily protect information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing. Open Records Decision No. 319 at 3 (1982). Accordingly, this information must be released to the requestor.

In submitted Exhibit K, entitled "[Cooperative] Annual Report of Affiliate Activities Required by Sub. Rule 26.84 To Be Filed Under Project 23913 December 31, 2000," the cooperative has established that release of the following information would cause it substantial competitive harm: sections IIIA, IIIB, and IIIC. Therefore, this information must be withheld under section 552.110(b).

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<sup>3</sup>We note that the cooperative also seeks to withhold page 4, "Consolidated Balance Sheets. Assets" within submitted Exhibit I. However, the information submitted to this office by the commission as Exhibit I did not contain a page 4. Therefore, this ruling does not address this information, and is limited to the information submitted as responsive by the commission. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

In submitted Exhibit L, entitled "[Cooperative] Annual Report Required by Sub. Rule 26.77 To Be Filed Under Project 24093 December 31, 2000," the cooperative has established that release of the following information would cause it substantial competitive harm: sections 1-8. Therefore, this information must be withheld under section 552.110(b).

To summarize, the commission must withhold the following information pertaining to the cooperative under section 552.110(b): 1) in Exhibit H, the answers to questions 16b, 17, 20a, and 22b-h; lines 1-13, 15-24, 26-32, 36, 38, 40, and 42 in Schedule I; lines 1-13, 15-24, 26-32, 36, 38, 40, and 42 in Schedule Ia; Schedules II through VII; Schedule XIV; Supplemental Schedule 1; and Supplemental Schedule 3; 2) in Exhibit I, page 5, Consolidated Balance Sheets, Liabilities and Equities; page 6, Consolidated Statements of Revenue; page 7, Consolidated Statement of Changes in Members' Equity; page 8, Consolidated Statement of Cash Flows; and pages 9-16, the marked information in note 1, and notes 2-12 in their entirety; 3) in Exhibit J, sections IIIA, IIIB, and IIIC, to include the attached contracts enumerated in IIIC; 4) in Exhibit K, sections IIIA, IIIB, and IIIC; and 5) in Exhibit L, sections 1-8. The remainder of the submitted information 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 Texas Building and Procurement 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# 155075

Enc. Submitted documents

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