



January 31, 2002

Mr. Michael D. Chisum
General Counsel
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2002-0469

Dear Mr. Chisum:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157965.

The Texas Department of Licensing and Regulation (the "department") received two requests for the "Manufacturer's and Builder's Monthly Reports" submitted to the department by certain named companies. You contend that the information in these reports that reveals the companies' sales information and the names and addresses of companies' customers is excepted from disclosure under section 552.110 of the Government Code. Additionally, you have requested a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information is excepted from public disclosure.

We will first address your contention that the customer information contained in the records at issue constitutes "trade secret" information under section 552.110(a) and "commercial or financial" information under section 552.110(b) of the Government Code. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See 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.¹ *See id.* This office has held that we must accept a 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. *See* 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); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 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).

After reviewing your arguments, we do not believe that you have established that the customer information contained in the requested records come within either branch of section 552.110. Accordingly, we must address the arguments we received from the notified third parties. In accordance with section 552.305(d), the department was required to notify the interested third parties whose information is at issue of the records request and of their right to submit arguments to this office as to why their information should not be released to the public. *See* Gov't Code § 552.305(d); 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 to disclosure under Public Information Act in certain circumstances). An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B).

This office did not receive responses from most of the interested third parties. Consequently, this office has no basis on which to conclude that any portion of the following companies' records is excepted from public disclosure under section 552.110: Amtex, Indicom Buildings, Inc., King's Custom Builders, Inc., Porta-Kamp Construction, Inc., RMD Manufacturing, United Modular Technology-Glen Rose, Whitley Texas, Mobile Modular Management Corporation, Gateway Development Resources, Inc., General Modular

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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Corporation, Vanguard Modular Building Systems, LLC, GE Capital Modular Space, McGrath-Mobile Modular, Nortex Modular Space, or Warrior Group. Accordingly, no portion of these companies' records may be withheld under section 552.110.

Comark Building Systems, Inc. ("Comark") responded to your section 552.305 notice, but did not raise any exception to disclosure with regard to its information. We therefore conclude that no portion of Comark's records may be withheld under section 552.110.

The following companies contend that information identifying their respective customers constitute either trade secret or commercial/financial information under section 552.110: Acton Mobile Industries, Inc., ATCO Structures, Inc., Morgan Buildings & Spas, Inc., Ramtech Building Systems, Satellite Shelters, Inc., and Williams Scotsman.² After reviewing these companies arguments, we conclude that each of these companies have established the applicability of section 552.110 to their customer lists. Consequently, the department must withhold all client identifying information contained in these companies' records.

Additionally, one of the interested third parties, Morgan Buildings & Spas, Inc. ("Morgan"), contends that all of its information is made confidential under a provision of the Texas Administrative Code. Section 70.64 of chapter 16 of the Administrative Code provides as follows:

(a) All designs, plans, specifications, compliance control programs, manuals, on-site construction instructions and documentation, information relating to alternate methods or materials, or any other documents submitted by a manufacturer to the council, the department, or local building official are proprietary information and shall only be used for purposes of assuring compliance with the provision of the Industrialized Housing and Buildings Act (the Act) and this chapter.

(b) The items and information set forth in subsection (a) of this section furnished by the manufacturer to the council, the department, or local building official shall not be copied or distributed to any other person except with the manufacturer's written permission *or under the direction of the Texas attorney general pursuant to applicable law relating to public records as set forth in Texas Civil Statutes, Article 6252-17a [now chapter 552 of the Government Code]*. [Emphasis added.]

²Although one of the third parties, Acton Mobile Industries, Inc. ("Acton"), contends that its pricing information is excepted from public disclosure under section 552.110, none of Acton's records contains pricing information. Consequently, we do not address Acton's arguments here.

Consequently, the information at issue is specifically made subject to, and may be withheld only in accordance with, the provisions of the Public Information Act.

Morgan also contends that its information is excepted from public disclosure under section 552.104 of the Government Code. 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.* Consequently, none of Morgan's information may be withheld under section 552.104.

Another interested third party, ATCO Structures, Inc. ("ATCO"), contends that its information revealing "the size of the product sold" and the "number of units sold per month" constitutes "commercial or financial information" protected from public disclosure under section 552.110(b) of the Government Code. In this instance, ATCO has not demonstrated how the release of this information would result in substantial competitive injury. Consequently, only ATCO's customer identifying information may be withheld pursuant to section 552.110(b).

Finally, we note that some of the documents at issue contain e-mail addresses of the companies' contact individuals. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.³ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

(a) An e-mail address *of a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

Gov. Code § 552.137. This office has no basis on which to conclude that any of the individuals whose e-mail addresses are contained in the records at issue have authorized the release of their e-mail address. Accordingly, section 552.137 of the Government Code requires the department to withhold the e-mail addresses of the members of the public contained in the records at issue, unless the communicant has affirmatively consented to its release. We note, however, that some of the e-mail addresses belong solely to the companies themselves. We do not believe that section 552.137 was intended to protect such e-mail addresses; consequently, those e-mail addresses must be released.

³House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5. The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

To summarize, the department must withhold the requested information pursuant to section 552.110 as discussed above. The department must also withhold pursuant to section 552.137 the e-mail addresses of individuals. The remaining information contained in the requested records must be released.

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).

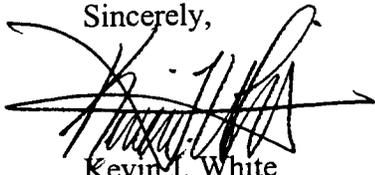
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Kevin J. White
Assistant Attorney General
Open Records Division

KJW/RWP/sdk

Ref: ID# 157965

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