



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 31, 2002

Mr. Ken Johnson  
Assistant City Attorney  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2002-7486

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174320.

The City of Waco (the "city") received a request for "the franchise records pertaining to Time Warner Cable and ClearSource." The requestor states that he specifically "would like to know how many customers each [franchisee] has in Waco, dating as far back as [the city's] records go." You informed the requestor that the city will release to her documents that are not exempt from disclosure. You state that the release of the franchisees' monthly reports, which you have submitted to this office for review, may implicate the proprietary rights of Time Warner Cable ("Time Warner") and Grande Communications ClearSource, Inc. ("ClearSource"). Consequently, you notified these companies of the request for information under section 552.305 of the Government Code.<sup>1</sup> You assert that the submitted information is excepted from required public disclosure under section 552.110. Additionally, Time Warner and ClearSource have submitted briefing to this office in which they contend that the submitted information is excepted from disclosure under section 552.110 of the Government Code. We have considered all claimed exceptions and reviewed the submitted information.<sup>2</sup>

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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).

<sup>2</sup>You have submitted to this office four franchise monthly reports. We assume that these monthly reports are representative samples of the information at issue. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.110 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. With respect to the trade secret prong of section 552.110, we note that 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939). 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>3</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). A business entity raising the commercial and financial information prong of section 552.110 is required to provide this office a specific factual or evidentiary showing, not conclusory or generalized

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<sup>3</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).

allegations, that it would suffer substantial competitive injury from disclosure of its information. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

Both Time Warner and ClearSource contend that the submitted information is excepted from disclosure under section 552.110(b). Specifically, Time Warner argues that the public release of its "subscriber information" would enable its competitors to "track the impact" of Time Warner's "promotions, new products, and pricing on [Time Warner] subscriptions [which] would allow [Time Warner's] competitors to tailor their promotions and pricing accordingly," which would result in "substantial competitive injury" to Time Warner. Based on Time Warner's arguments and our review of the submitted information, we find that Time Warner has demonstrated that the public release of the submitted subscriber information would cause it substantial competitive harm. Accordingly, you may withhold this information from required public disclosure under section 552.110(b).

Turning to ClearSource's section 552.110(b) claim, ClearSource asserts that if its information were released to the requestor, "[e]stablished competitors would be able to evaluate ClearSource's marketing strategies and extrapolate the success of such efforts based upon the information contained in these reports, substantially harming ClearSource's position as a new competitor." Based on ClearSource's arguments and our review of its submitted information, we find that ClearSource has demonstrated that the public release of its information would cause it substantial competitive harm. Accordingly, you may withhold this information from required public disclosure under section 552.110(b). In light of this conclusion, we need not address ClearSource's section 552.110(a) claim or the city's arguments under section 552.110.

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

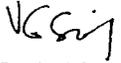
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

  
V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/sdk

Ref: ID# 174320

Enc: Submitted documents

c: Mr. Mike Copeland  
900 Franklin Avenue  
Waco, Texas 76701-1906  
(w/o enclosures)