



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 6, 2004

Ms. Hadassah Schloss  
Open Records Administrator  
Texas Building and Procurement Commission  
P.O. Box 13047  
Austin, Texas 78711

OR2004-0074

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193765.

The Texas Building and Procurement Commission (the "commission") received a request for "the Price Lists for each of the vendors listed in [a particular] Contract." You state that "a copy of the Bid Tabulation" has been released to the requestor. Although you make no arguments and take no position as to whether the submitted information is excepted from disclosure, pursuant to section 552.305 of the Government Code, you notified thirty-nine interested third parties of the request and of their opportunity to submit comments to this office.<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 section 552.305 permits

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<sup>1</sup>Your brief to this office reflects that you notified the following third parties: Advantage Water Engineering LLC; Alpha Labs, Inc.; American Resource, Inc.; Amsolv Holding Company; Anderson Chemical Co., Inc.; Aqua Process, Inc.; Biocope, Inc.; Certified Labs, A Division of NCH Corp.; Chem Aqua, Inc.; Chemic, Inc.; ChemCal, Inc.; Chemical Specialties, Inc.; Chemico International, Inc.; Chemsearch, A Division of NCH Corporation; ChemTreat, Inc; Chlor Air; Chlorine & Chemical Supply Company; Cite Corporation; Delta Water Laboratories; Enviro Air and Water; Fort Bend Services, Inc.; Garratt-Callahan Company; G. E. Betz; GC3 Specialty Chemicals, Inc.; J&B Industries; K2 Chem; Longhorn Water Treatment, Inc.; Maintenance Engineering Ltd.; Mantek, A Division of NCH Corp.; Ondeo Nalco Company; Preventive/Predictive Maintenance Service; PMP Sales Associates, Inc.; Scale Free Company, Inc.; SMC Technologies, Inc.; SWE, Inc. dba Southwest Engineers; Specialty Chemical Technologies; United Worth Hydrochem Corp.; Water Treatment Services, Inc.; Wesco Chemicals, Inc.

governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received arguments from or on behalf of the following eight third parties: AmSolv; Anderson Chemical Company, Inc. ("ANCO"); Aqua Process, Inc. ("Aqua"); ChemCal, Inc. ("ChemCal"); the Garratt-Callahan Company ("Garratt"); Preventive/Predictive Maintenance Services, Inc. ("P/PM"); Scale Free Company, Inc. ("Scale Free"); and SMC Technologies ("SMC"). We have considered all claimed exceptions and reviewed the submitted information.

We begin by addressing the information pertaining to the thirty-one third parties that have not submitted arguments to this office. An interested third party is allowed 10 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). As of the date of this letter, none of the remaining thirty-one third parties has submitted to this office any reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of the submitted documents pertaining to these third parties constitutes proprietary information protected under section 552.110, and none of it may be withheld on that basis. See Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We turn now to the arguments we have received. Some of the third parties assert that their information should be withheld from disclosure because, in submitting the information to the commission, they requested or anticipated that it would be kept confidential. Information is not confidential under the Public Information Act (the "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). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement or statement specifying otherwise.

Aqua and ChemCal raise section 552.101 of the Government Code as a possible exception to disclosure. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that is considered to be confidential under other law. See Open Records Decision Nos. 611 at 1 (1992) (common law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (information made confidential by statute). However, neither Aqua nor ChemCal has directed our attention to any law under which any of the submitted

information is deemed confidential for purposes of section 552.101, nor are we aware of any such law. Furthermore, we note that only individuals, and not corporations, have a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see* Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings). We therefore conclude that no portion of Aqua or ChemCal's information is excepted from disclosure under section 552.101 of the Government Code.

Some of the third parties assert that their information is excepted from disclosure under section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception is designed to protect the interests of governmental bodies, not third parties. *Id.* Because section 552.104 is designed to protect the interests of governmental bodies and not third parties and the commission has chosen not to raise section 552.104 in this instance, none of the submitted information may be withheld on this basis.

We turn now to section 552.110 of the Government Code. This exception 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.

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.<sup>2</sup> *Id.* 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). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code 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[.]” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

AmSolv, P/PM, Scale Free, and SMC assert that their information is protected by section 552.110(b). Aqua contends that its information is protected by section 552.110(a). ANCO, ChemCal, and Garratt raise both subsections of section 552.110 with respect to their information.

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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).

Having considered the third parties arguments, we find that Aqua, ChemCal, and Garratt have each established that a portion of their information is protected under section 552.110.<sup>3</sup> Therefore, the commission must withhold this information. We find however that ANCO has neither shown that any of the information in its proposal meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim. Thus, we are unable to conclude that section 552.110(a) applies to any of ANCO's information. *See* ORD 402. In addition, we find that AmSolv, ANCO, P/PM, Scale Free, and SMC have each made only conclusory allegations that release of their respective information would cause them substantial competitive injury and have provided no specific factual or evidentiary showing to support their allegations. Accordingly, no portion of any of these companies' information may be withheld pursuant to section 552.110(b). We have marked those portions of the submitted information that the commission must withhold pursuant to section 552.110.

Finally, we note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, we have marked the submitted information relating to Aqua, ChemCal, and Garratt that the commission must withhold pursuant to section 552.110. The remaining submitted information must be released in accordance with applicable copyright laws.

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

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<sup>3</sup>We note that ChemCal makes arguments for withholding client lists and blending formulas. However, the records submitted by the commission do not contain such information. 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 decision from this office must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

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).

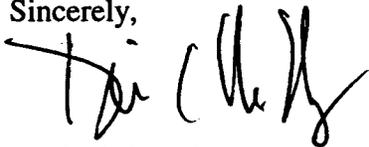
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



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Open Records Division

DCM/lmt

Ref: ID# 193765

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