



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 21, 2004

Mr. Jerry Bruce Cain
Assistant City Attorney
City of Laredo
P.O. Box 579
Laredo, Texas 78042-0579

OR2004-6068

Dear Mr. Cain:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205657.

The City of Laredo (the "city") received a request for six categories of information relating to the non-exclusive commercial container refuse gathering and disposing franchise ordinance. You inform us that the city is releasing some of the requested information. You take no position with regard to the public availability of the rest of the requested information. You believe, however, that the remaining information may implicate the proprietary interests of Jerry Resendez Enterprises, Inc., dba Trashco Sanitation ("Trashco"). You have submitted the information in question. You also have notified Trashco of this request for information and of its right to submit arguments to this office as to why information relating to Trashco should not be released.¹ We received correspondence from an attorney for Trashco. We also received comments from the requestor.² We have considered all of the submitted arguments and have reviewed the submitted information.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (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 certain circumstances).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Initially, we address the requestor's comments regarding Open Records Letter No. 2003-8121 (2003). The requestor contends that the prior ruling pertains to the same subject matter as the present request for information and that the city may not seek another ruling at this time. We note that the information encompassed by the prior ruling included "[a] list of all existing commercial accounts served, including customer name, address, frequency pick-up, size of container (in cubic yards) or type of service and charge for same *for the years 2000, 2001, 2002 and 2003*[" (Emphasis added.) In the present instance, the city informs us that the submitted information is encompassed by a request for "[a] list of all existing commercial accounts served, including customer name, address, frequency pick-up, size of container (in cubic yards) or type of service and charge for same *for the fourth quarter of 2003 and the first quarter of 2004*[" (Emphasis added.) We therefore agree that to the extent that any of the submitted information was at issue in Open Records Letter No. 2003-8121 (2001), the prior ruling constitutes a previous determination with regard to any such information. Accordingly, the city must dispose of any such information in accordance with Open Records Letter No. 2003-8121 (2003). See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (delineating elements under which attorney general decision constitutes first type of previous determination for purposes of Gov't Code § 552.301(a)).

With regard to the submitted information that is not encompassed by the prior ruling, we address the city's obligations under section 552.301 of the Government Code. This section prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. See Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. See *id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. See *id.* § 552.302.

You inform us that the city received the present request for information on April 23, 2004. Your request for this decision is dated May 13, 2004. Thus, the city did not request this decision within the ten-business-day period prescribed by section 552.301(b). Any information that is not encompassed by the prior ruling is therefore presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information. See also *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381

(Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Trashco contends that the information at issue is excepted from disclosure under sections 552.104 and 552.110.³ Section 552.104 protects the interests of governmental bodies, not the proprietary interests of a private party such as Trashco. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Furthermore, section 552.104 is a discretionary exception to disclosure that a governmental body may waive. *See* Gov't Code § 552.007; Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). The city has waived section 552.104 in failing to comply with section 552.301. *See* Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Therefore, the city may not withhold any of the information at issue under section 552.104. However, a claim under section 552.110 can provide a compelling reason for non-disclosure under section 552.302. Accordingly, we will address Trashco's arguments under section 552.110 with regard to the submitted information that is not encompassed by the prior ruling.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret 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.” *See* Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, 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 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.

³Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104(a).

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the 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). However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

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 also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Trashco asserts that the submitted information contains a customer list and customer pricing information that constitute a trade secret under section 552.110(a). Trashco also asserts that its customer list and pricing information are excepted from disclosure under section 552.110(b). Having considered the company's arguments, we find that Trashco has shown that its customer information qualifies as a trade secret under section 552.110(a). We have received no arguments that rebut this claim as a matter of law. We therefore conclude that the submitted customer information is excepted from disclosure under section 552.110(a), to the extent that the customer information is not encompassed by the prior ruling. We also conclude that Trashco has shown that the submitted pricing information is excepted from disclosure under section 552.110(b), to the extent that the pricing information is not encompassed by the prior ruling. Therefore, the customer and pricing information that we have marked must be withheld under section 552.110, to the extent that the marked information is not encompassed by the prior ruling. We find that Trashco has not otherwise

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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).

demonstrated that any of the remaining information qualifies as a trade secret or that the release of any of the remaining information would be likely to cause Trashco any substantial competitive harm. We therefore conclude that none of the remaining information that is not encompassed by the prior ruling is excepted from disclosure under section 552.110.

In summary: (1) the city must dispose of any submitted information that was at issue in Open Records Letter No. 2003-8121 (2003) in accordance with that ruling; and (2) to the extent that the submitted information was not at issue in the prior ruling, the city must withhold the information that we have marked under section 552.110 of the Government Code. Any remaining information that was not at issue in the prior ruling 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).

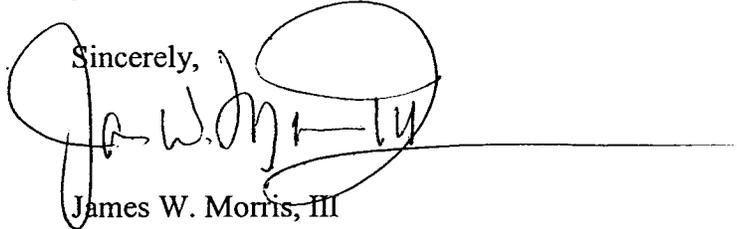
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "James W. Morris, III", is written over a horizontal line. The signature is stylized and includes a large circular flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID#

Enc: Submitted documents

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