



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 16, 2009

Mr. John James Tintera
Acting Executive Director
Railroad Commission of Texas
P.O. Box 12967
Austin, Texas 78711-2967

OR2009-05059

Dear Mr. Tintera:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 338801.

The Railroad Commission of Texas (the "commission") received a request for information that would allow the requestor to identify customers and delivery points of Energy Transfer Fuel, L.P. ("ETF") on the commission's Gas Services Division's 2007 Annual Report and tariff reports. The commission takes no position on whether the submitted information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of ETF. Accordingly, you inform us, and provide documentation showing, that you notified ETF of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from a representative of ETF. We have considered the arguments submitted by ETF and reviewed the submitted information.¹ We have also

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *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.

considered comments submitted by the requestor and several interested parties. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

ETF contends that its customer names and delivery point information are excepted from disclosure under section 552.110. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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. 1957); *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); *see also Huffines*, 314 S.W.2d at 776. 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable

²The 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 other 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).

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) protects “[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). This exception to disclosure 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.³ *Id.*; *see also* ORD 661 at 5-6.

ETF contends that its customer names are trade secrets excepted under section 552.110(a). Further, we understand by the substance of ETF’s argument that the delivery points associated with its customer names are also trade secrets because this information reveals its customer list. In correspondence to this office, Mr. Rex White, an interested third party, contends that ETF’s customer information has already been published via the commission’s P-4 form. We note that when a third party publishes the identities of its customers on its website or otherwise, this office cannot conclude that the identities of the customers qualify as trade secrets. However, the commission informs this office that “a search of the [c]ommission’s P-4 forms that designate ETF as a gatherer or first purchaser will not provide the requestor the requested ETF customer list.” Thus, in this instance, based on the representations of the commission, we understand that ETF’s customer list has not been published via the P-4 form or otherwise. Accordingly, after reviewing the information at issue and considering all of the submitted arguments, we find that ETF has made a *prima facie* case that its customer names and delivery points are protected as trade secret information. *See* Open Records Decision Nos. 552; 437 (1986); 306 (1982); 255 (1980) (customer lists may be withheld under predecessor to section 552.110). Further, none of the arguments of the requestor or any of the third parties rebut these claims as a matter of law.⁴

³We note that in interpreting section 552.110, this office does not strictly adhere to the standards used by the federal courts when interpreting the federal Freedom of Information Act. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied) (holding that *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) was not a judicial decision within the meaning of former section 552.110). This office applies the standard expressly stated in section 552.110(b), which requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of Gov’t Code § 552.110(b) by Seventy-sixth Legislature).

⁴Mr. White asserts that the commission’s implementation of customer codes on the tariff filings pursuant to section 7.315(c)(4) of title 16 of the Texas Administrative Code renders articles 104.003, 104.004, and 121.104 of the Utilities Code ineffective. This issue is beyond the scope of this division’s authority in issuing open records decisions. *See* Gov’t Code § 552.301(a) (division’s authority is limited to determining whether requested information falls within an exception to disclosure). We note that this ruling only addresses whether the requested customer names and delivery points are excepted under section 552.110(a), and does not address “the tariffs applicable to each operator.” Thus, this ruling is limited to issues within the scope of our authority.

Thus, we find that the commission must withhold the customer names and delivery point information we have marked under section 552.110(a). The remaining information must be released to the requestor. As our ruling is dispositive, we need not address ETF's argument under section 552.110(b).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



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Assistant Attorney General
Open Records Division

CMN/dls

Ref: ID# 338801

Enc. Submitted documents

c: Requestor
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