



**THE ATTORNEY GENERAL
OF TEXAS**

April 26, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Allen Beinke
Executive Director
Texas Water Commission
P. O. Box 13087
Austin, Texas 78711

Open Records Decision No. 494

Re: Whether federally re-
quired reports of releases
of certain hazardous sub-
stances into the environment
are excepted from disclosure
under the Texas Open Records
Act, article 6252-17a,
V.T.C.S., when the reports
indirectly reveal customer
list information (RQ-1263)

Dear Mr. Beinke:

You ask whether certain information about hazardous substances reported to the Texas Water Commission pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. When chemical companies deliver their products to customers, they routinely transfer their chemicals from large tank trucks to stationary storage tanks on the customer's premises. Information you submit to this office indicates that during this transfer small amounts of hazardous substances are frequently released into the environment. When releases of hazardous substances reach a certain level, they must be reported to the federal Environmental Protection Agency through the National Response Center. See 42 U.S.C. § 9603. Section 9603(a) requires the National Response Center to notify "all appropriate Government agencies, including the Governor of any affected state" of releases reported under section 9603. See also 42 U.S.C. § 9603(c) (notice to "affected State agency"). The Linde Division of Union Carbide, one of the companies that has made such reports, requested that the Texas Water Commission treat the location of the chemical releases as confidential because

public dissemination of these locations would reveal their customers' identities.¹

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. Your letter does not raise any specific exceptions. The Open Records Act does not require this office to raise and consider exceptions you have not raised. Because you refer to customer identities and because of the letter from Union Carbide to the commission that you submitted with your request, we assumed you intended to raise section 3(a)(10). You later verified this intent. In the future, however, if you wish to withhold information, you should raise specific exceptions to avoid waiving their protection.

Section 3(a)(10) excepts

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Section 3(a)(10) is patterned after exemption 4 of the Federal Freedom of Information Act (FOIA), 5 U.S.C. section 552(b)(4), and protects third party interests that are protected by statute or by judicial decision. Open Records Decision Nos. 309 (1982); 107 (1975).

Section 3(a)(10) consists of two parts: trade secrets and commercial or financial information. Different tests are applicable under each part. Whether customer list information meets these tests depends on the facts in each case. See Attorney General Opinion H-1070 (1977).

Court decisions protect "trade secrets" as defined in the Restatement of Torts:

1. This decision does not address the status of the transfer of this information from the federal government to the states. See generally Interco Inc. v. Federal Trade Commission, 478 F.Supp. 103, 106 (D.D.C. 1979) (release of customer list to state attorneys general for investigations not a release to the public under the Federal Freedom of Information Act).

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 list of customers.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958).

The Restatement lists six factors for determining whether particular information constitutes a trade secret:

1. the extent to which the information is known outside of the company's business;
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 its information;
4. the value of the information to the company and to its competitors;
5. the amount of effort or money expended by the company in developing this information;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757, Comment b (1939).

Customer lists are not protected as trade secrets unless they meet these six criteria. See Expo Chemical Co., Inc. v. Brooks, 572 S.W.2d 8 (Tex. Civ. App. - Houston [1st Dist.] 1978), rev'd on other grounds, 576 S.W.2d 369 (Tex. 1979); cf. West v. Pennyrich International, Inc., 447 S.W.2d 771 (Tex. Civ. App. - Waco 1969, no writ). In the Expo Chemical case, the court of appeals addressed the denial of a temporary injunction to protect detailed customer list information that included cross-reference material about the products purchased by the customers. The court concluded that the customer list was a trade secret entitled to protection by injunction because the cross-reference information had taken effort to compile, was very valuable in the business of chemical

brokering, and had been treated as confidential. 572 S.W.2d at 12. The court noted, however, that the customer names were well-known in the industry. Id. Consequently, it is not likely that the customer names absent the detailed purchasing history in that case would have constituted a trade secret. The Texas Supreme Court reversed and remanded the case because the court of appeals had prematurely addressed the merits of the case and because the trial court's temporary injunction record disclosed a factual dispute regarding the general availability in the industry of the customer information. Brooks v. Expo Chemical Co., Inc., 576 S.W.2d 369, 371 (Tex. 1979). The decision in West v. Pennyrich International, supra, is of little help here because the court simply found that the trial court had not clearly abused its discretion in holding that a customer list could constitute a trade secret. 447 S.W.2d at 773.

Moreover, it is significant that these cases addressed the question of customer lists as trade secrets in the context of contracts not to compete with previous employers. Under this type of contract, an express promise not to reveal customer lists is ordinarily made. This fact may reduce the courts' reliance on the trade secret factors. No reported Texas case deals with the question of customer lists as trade secrets in the context of the Texas Open Records Act.

Several attorney general opinions have addressed the availability of customer lists under the Open Records Act but without extensive discussion or analysis. See Attorney General Opinion H-1070 (1977); Open Records Decision Nos. 255 (1980); 89 (1975); see also Open Records Decision No. 107 (1975). In Attorney General Opinion H-1070, this office simply stated that customer information might, depending on the facts in individual cases, be excepted from disclosure under section 3(a)(10). Open Records Decision No. 89 expressly relied on a presumption that certain customer list information met the tests applicable under section 3(a)(10). Although Open Records Decision No. 107 did not address the availability of customer lists, the authorities it relied on mentioned customer lists. Open Records Decision No. 255 relied, without discussion, on Open Records Decision No. 107 to extend section 3(a)(10) to include customer lists. None of the decisions discussed how specific customer lists met the six Restatement factors.

As noted, section 3(a)(10) is patterned after exemption 4 of the federal act. Accordingly, federal cases

ruling on exemption 4 of the FOIA are relevant. Open Records Decision No. 107. Federal authority indicates that customer lists do not ordinarily constitute trade secrets. See, e.g., Martin Marietta Corporation v. Federal Trade Commission, 475 F.Supp. 338 (D.D.C. 1979); Central Specialties Co. v. Schaefer, 318 F.Supp. 855, 859 (N.D. Ill. 1970); Cudahy Company, v. American Laboratories, Inc., 313 F.Supp. 1339, 1343-45 (D. Neb. 1970).

Because neither the Texas Water Commission nor the company in question has overcome the Open Records Act's presumption of openness by showing how this customer information meets the six trade-secret criteria, it may not be withheld as a trade secret under section 3(a)(10) of the Open Records Act.

Section 3(a)(10) also protects certain commercial or financial information that need not constitute a trade secret. Open records decisions rely on federal cases ruling on exemption 4 of the federal act in applying section 3(a)(10) to commercial information. See, e.g., Open Records Decision No. 309 (1982). The federal test is as follows:

commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added.)

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

You do not indicate that releasing this information will impair your ability to obtain it in the future. See Chrysler Corp. v. Brown, 441 U.S. 281, 292-93 (1979) (agency must endorse interest in confidentiality). As indicated, section of the CERCLA requires companies to report releases of hazardous substances. Section 9603 provides expressly for notice to the states in which releases occur. When reports are required by law, the government's ability to obtain the information in the future is ordinarily not impaired by release of the information. Open Records Decision Nos. 203 (1978); 173 (1977).

The second National Parks test is whether release of the information will cause substantial competitive harm to the person from whom the information was obtained. Cf. Audio Technical Services, Ltd. v. Department of the Army, 487 F.Supp. 779, 782 (D.D.C. 1979) (customer list included within technical information held "important" to entity's competitive position). In Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979), the court stated:

[i]n order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is [sic] all that need be shown. (Emphasis added.)

Federal cases determining the applicability of exemption 4 of the FOIA under the "substantial competitive injury" test hold that the burden of proof is on the agency or the company wishing to have the information withheld and that general allegations of unspecified competitive harm will not suffice. See, e.g., Burnside-Ott Aviation Training v. United States, 617 F.Supp. 279, 286 (S.D. Fla. 1985); Sears, Roebuck and Co. v. General Services Administration, 402 F.Supp. 378, 383 (D.D.C. 1975). The company at issue here has made only general allegations of unspecified competitive harm.

Moreover, if information can be relatively easily ascertained from other sources, release of the information is unlikely to cause substantial competitive harm. Sears, 402 F.Supp. at 383. For example, in Braintree Electric Light Department v. Department of Energy, 494 F.Supp. 287, 290 (D.D.C. 1980), the court held that the identities of customers purchasing fuel oil from a specific company could not be considered confidential because trucks bearing the company's logo were highly visible when making deliveries and because purchasers in the oil industry are well known.

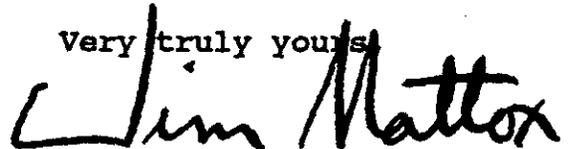
Finally, federal cases applying exemption 4 require a balancing of the public interest in disclosure with the competitive injury to the company in question. See, e.g., Pennzoil Company v. Federal Power Commission, 534 F.2d 627, 632 (5th Cir. 1976). The public may have a legitimate interest in knowing when and where dangerous chemicals are released into the environment.

In light of these authorities the information at issue does not on its face meet the section 3(a)(10) tests. Because the company at issue and the commission have failed to overcome the Open Records Act's presumption of openness by demonstrating that releasing the location of releases of hazardous substances will cause it substantial competitive harm, the information must be released.

S U M M A R Y

Federally required reports provided to the Texas Water Commission about releases of hazardous substances into the environment that indirectly reveal customer identities are not excepted from disclosure under section 3(a)(10) of the Texas Open Records Act, article 6252-17a, V.T.C.S., when the governmental agency or private entity seeking confidentiality fails to establish that the customer information is maintained as a trade secret or that its release would cause substantial competitive injury.

Very truly yours,



J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

Prepared by Jennifer Riggs
Chief, Open Government Section
of the Opinion Committee