



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

August 11, 1994

Honorable Garry Mauro
Commissioner
General Land Office
1700 North Congress Avenue
Austin, Texas 78701-1495

Open Records Decision No. 627

Re: Whether section 552.113 of the Government Code exempts from public disclosure certain geological and geophysical information and data and related questions (RQ-372)

Dear Commissioner Mauro:

You have requested that we determine whether chapter 552 of the Government Code exempts from required public disclosure certain geological and geophysical information and data in the custody of the General Land Office (the "office"). You specifically ask about section 552.113 of the Government Code. The office has received two requests for information in your possession that you believe section 552.113 protects.

Section 552.113 of the Government Code exempts from required public disclosure

- (1) an electric log confidential under Subchapter M, Chapter 91, Natural Resources Code; or
- (2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency. [Footnote omitted.]

Section 552.113 protects the commercial value of geological and geophysical information. Open Records Decision Nos. 504 (1988) at 2; 479 (1987) at 2. This office construed the predecessor to section 552.113, V.T.C.S. article 6252-17a, section 3(a)(13), in Open Records Decision No. 504. That opinion examined the history of section 3(a)(13) and found that the Texas Legislature had based the section on a similar provision, exemption 9, in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(9). Open Records Decision No. 504 at 2. We therefore looked to federal court decisions for guidance in determining the proper construction of section 552.113. *Id.* at 3.

Significantly, we found that federal courts analyzed the applicability of exemption 9 using the same test that they employed to analyze the applicability of exemption 4, the trade secret exemption. *Id.* at 4. Consequently, to determine the applicability of the

statutory predecessor to section 552.113, we employed the same test that we used to determine whether the predecessor to section 552.110 of the act, Texas's counterpart to federal exemption 4, protected commercial information (including trade secrets) from required public disclosure. *Id.* Under the test we used to determine the applicability of the statutory predecessor to section 552.110, commercial information was

"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.

Id. (quoting Open Records Decision No. 494 (1988)).

Since the issuance of Open Records Decision No. 504, this office has re-examined the analysis we used to determine the applicability of section 552.110 of the Government Code. *See generally* Open Records Decision No. 592 (1991). In Open Records Decision No. 592 this office noted that, although we applied the federal test to determine whether the statutory predecessor to section 552.110 authorized a governmental body to withhold information as "commercial or financial information," the language of the state exception differed significantly from the language of federal exemption 4. *See id.* at 7. Because of the significant difference in language between the statutory predecessor to section 552.110 and the federal exemption, this office concluded that we should not apply the federal test to determine whether the statutory predecessor to section 552.110 of the act requires a governmental body to withhold certain information from required public disclosure. *Id.*

We now must reconsider whether the test we adopted in Open Records Decision No. 504 remains a viable test of the applicability of section 552.113. We conclude that it does not. Significantly, we based our rejection of the federal test that we used to determine the applicability of the commercial or financial prong of section 552.110 on a linguistic difference between the state and federal provisions. Section 552.113 as originally enacted also differed linguistically from its federal counterpart. The federal provision, 5 U.S.C. § 552(b)(9), as it existed when the Texas Legislature enacted the Open Records Act, protected "geological or geophysical information or data, including maps, concerning wells."¹ The federal exemption is a very broad exception to the general

¹We note that the federal and state provisions differ in the usage of commas. The federal exemption, 5 U.S.C. § 552(b)(9), places commas before and after the phrase "including maps." Thus, the federal exemption protects "geological or geophysical information or data, including maps, concerning wells." Section 552.113 of the Government Code, on the other hand, protects "geological or geophysical information or data, including maps concerning wells, . . ." For purposes of this opinion, we need not determine whether this difference is a meaningful one.

requirement in the Freedom of Information Act that an agency must make its information available to the public. See 5 U.S.C. § 552(a). Thus, the balancing test federal courts employed to determine the applicability of exemption 9 served to limit the exemption.²

On the other hand, section 552.113 of the Government Code, as the legislature originally enacted it, protected from required public disclosure "geological and geophysical information and data including maps concerning wells, *except information filed in connection with an application or proceeding before an agency.*" (Emphasis added.) Thus, the state version excepted from required public disclosure a more limited class of information than federal exemption 9. Grafting an additional balancing test to the plain language of section 552.113(2) to further limit the scope of the exception is, in our opinion, unnecessary. To the extent that Open Records Decision No. 504 is inconsistent with this opinion, it is overruled.

Accordingly, section 552.113 excepts from required public disclosure all "geological or geophysical information or data including maps concerning wells," unless the information is filed in connection with an application or proceeding before an agency. Section 552.113(1), which references chapter 91 of the Natural Resources Code, does not apply to any governmental agency other than the Railroad Commission because chapter 91 applies only to the Railroad Commission.³ We interpret "geological or geophysical information" as section 552.113(2) uses the term to refer only to geological and geophysical

²The test to determine whether exemption 9 of the Freedom of Information Act protects geological and geophysical information concerning wells is three-pronged: (1) whether the federal agency wishes to claim the exemption; (2) whether release of the information would damage the proprietary interest of private entities; and (3) whether the public interest in the information outweighs the damage to private entities' private interests. See Open Records Decision No. 504 (1988) (interpreting *Pennzoil Co. v. Federal Power Comm'n*, 534 F.2d 627 (5th Cir. 1976); *Reliability of Elec. & Gas Serv.*, Opinion No. 687, 51 F.P.C. 464 (1974)).

³Section 91.553 of the Natural Resources Code makes confidential in certain circumstances only an electric log that a person is required to file with the Railroad Commission. We understand that a person may file the same electric log with the office, but section 91.553 does not expressly deem the electric log confidential when it is in the possession of the office. To alleviate this anomalous situation, your office has developed a policy for responding to requests for geological and geophysical information that protects all such data from disclosure, except (1) electric logs more than five years old, and (2) electric logs less than five years old that are available to the public from the commission. You ask if this policy is permissible. We conclude that it is not. See Open Records Decision No. 144 (1976) at 2. In our opinion, if the legislature wanted to make confidential under section 91.553 of the Natural Resources Code electric logs that are filed with the office, it would have so provided expressly. Of course, section 552.113 of the act may authorize the office to withhold the information if the office wishes to raise that exception.

information regarding the exploration or development of natural resources.⁴ Furthermore, we reaffirm our prior determination that section 552.113 protects only geological and geophysical information that is commercially valuable. See Open Records Decision Nos. 504 (1988) at 2; 479 (1987) at 2. Thus, we conclude that section 552.113(2) protects from public disclosure only (i) geological and geophysical information regarding the exploration or development of natural resources that is (ii) commercially valuable.⁵

We next consider the particular information for which you have received requests. The first request is for "a copy of the 1" correlation log" for a well Mobil Oil Corporation drilled on a state tract (SL 69027) in 1974. You state that Mobil submitted the requested log to fulfill requirements of its state lease agreement; it did not submit the log in conjunction with an application or other proceeding. You further state that the well operator clearly marked the log "confidential" before releasing it to the office.

We conclude that the copy of the one-inch correlation log requested here is geological and geophysical information regarding the exploration or development of natural resources. Section 552.113(2) thus authorizes the office to withhold the information if it is commercially valuable. We note that Mobil Oil Corporation (now Mobil Producing Texas & New Mexico Inc.) has stated that, because it no longer operates the lease on SL 69027 or any adjacent tract of land, it does not object to the release of the log. Consequently, we lack sufficient facts to determine whether this information is commercially valuable to a current lessee of that tract or to another party or entity. If your office still desires to withhold the requested information under section 552.113(2), you must, within ten days of the issuance of this decision, inform this office as to why the information is commercially valuable.

You next ask whether it makes "any difference that the information was submitted to and received by" the office as proprietary information with the expectation that the office would keep the information confidential. Information is not confidential under the act simply because the party submitting it marks the information confidential. Open Records Decision No. 575 (1990) at 3 (citing *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977)). Furthermore, a

⁴By "information regarding the exploration or development of natural resources," we mean information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation.

⁵For example, while we overrule the rationale of Open Records Decision No. 504, we do not overrule the conclusion of that decision: section 552.113 does not apply to pollution abatement information. Pollution abatement information, while it may be commercially valuable, is not geological or geophysical information regarding the exploration or development of natural resources. Nor is information about oil, gas, or water that has been pumped and then stored underground, either in a tank or a naturally occurring underground cavity.

governmental body may not agree to keep information confidential unless a statute *specifically* authorizes the governmental body to do so. Open Records Decision Nos. 444 at 6, 437 at 4 (1986); 425 (1985) at 4; 414 (1984) at 3.

You also ask whether "the existence of interpretation of the raw data on the log by either the company submitting the log or by" office staff affects the disclosability of the log, or whether the office may delete such interpretative notations if the act requires disclosure of the electric log. Unless the interpretations constitute "geological or geophysical information," section 552.113(2) does not authorize the office to withhold the interpretations from required public disclosure.

You finally suggest that sections 552.104 and 552.110 (formerly V.T.C.S. art. 6252-17a, § 3(a)(4), (10)) might limit the disclosure of well logs and other geological and geophysical data submitted to the General Land Office Pooling Committee in connection with the consideration of a pooling application, even if the office retains the information for other purposes. We do not understand you to be asking specifically about the one-inch correlation log that Mobil Oil Corporation submitted to your office, but generally about geological and geophysical information that the office receives. Accordingly, we will answer your question in general terms.

Any geological and geophysical information filed with the office in connection with an application, including a pooling application, before the office is expressly excluded from the reach of section 552.113(2). The office may withhold such information under another exception to section 552.021 of the Government Code (formerly V.T.C.S. art. 6252-17a, § 3(a)) if another exception applies to the requested information. Whether a particular exception applies in a particular circumstance must be determined on a case-by-case basis, however.⁶

⁶As we have stated above, you specifically have suggested sections 552.104 and 552.110 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The principal purpose of section 552.104 is to protect a governmental body's interests in relation to competition for a contract or benefit. Open Records Decision No. 592 (1991) at 8. The legislature designed the section to protect the interests of the governmental body, not the interests of private parties. *Id.* at 9. To succeed on its claim that section 552.104 applies, a governmental body must show the potential for harm to the governmental body in a particular bidding situation. Open Records Decision No. 541 (1990) at 4.

Section 552.110 of the Government Code excepts from required public disclosure "a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 protects two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person. We understand you to be particularly interested in the trade secret prong of section 552.110.

In making trade secret determinations under section 552.110, this office will accept a claim as valid if the claimant establishes a *prima facie* case for its assertion of trade secrets that is un rebutted *as a*

The second request the office has received is for "copies of logs, cores, tests, etc. . . . in connection with the drilling and evaluation" of a test well a state sulphur leaseholder drilled. You advise that paragraph 7 of the lease between the office and the lessee under which the test well was drilled provides as follows:

7. A log, sample analysis, or other information obtained from each test drilled on the area covered by this lease shall be filed in the GENERAL LAND OFFICE upon request. An evaluation map or plat shall be filed in the GENERAL LAND OFFICE within ninety (90) days after any drilling, sampling or other valuation program shall have been completed or abandoned, and the correctness of such map shall be sworn to by the LESSEE or his representative. Said map shall show geological formations penetrated, the depth, thickness, grade, and mineral character of all ore bodies, the water bearing strata, the elevation and location of all test holes, and other pertinent information. Further, LESSEE must furnish annually on each anniversary date of this lease a map or plat showing all workings.

(footnote continued)

matter of law. Open Records Decision No. 552 (1990) at 5. Whether a claimant makes a prima facie case depends on whether its arguments as a whole correspond to the criteria for trade secrets detailed in the *Restatement of Torts and adopted by the Texas courts. Id. at 2-3.* According to section 757 of the Restatement of Torts, 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." See *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). The Restatement lists six criteria 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 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).

Said information will be held confidential during the term of the lease. [Emphasis supplied.]

You note that the lessee released all rights to the lease on June 12, 1992. Thus, the requested information is no longer confidential under paragraph 7 of the lease. *But see supra* pages 4-5 (stating that governmental body cannot agree to keep information confidential unless statute specifically authorizes governmental body to do so). In addition to claiming that section 552.113 excepts the requested information from required public disclosure, you raise sections 552.101, 552.104, and 552.110 (formerly V.T.C.S. art. 6252-17a, § 3(a)(1), (4), (10)).

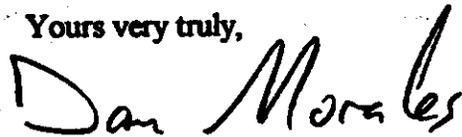
We consider first your claim that section 552.113 of the Government Code protects the requested information. We understand that neither of the exclusions to section 552.113 applies to the requested information, *i.e.*, the information was not filed in connection with an application or proceeding before an agency and the information is not an electric log confidential under subchapter M, chapter 91, of the Natural Resources Code. We believe, however, that the requested information is commercially valuable geological and geophysical information about the exploration or development of natural resources. Accordingly, section 552.113 authorizes the office to withhold the requested information. Because we conclude that section 552.113 authorizes the office to withhold the information, we need not consider whether sections 552.101, 552.104, or 552.110 apply.

Finally, in regard to the second request for information, you ask to what extent, if any, our determination that the requested information is subject to disclosure depends upon the language of the last sentence of paragraph 7 of the lease involved. Because a governmental body cannot make information confidential simply by agreement (*see supra* pages 4-5), our conclusion is based entirely on the provisions of the act. The language of paragraph 7 is, in this instance, inconsequential.

S U M M A R Y

Section 552.113 of the Government Code excepts from required public disclosure "geological or geophysical information or data, including maps concerning wells" unless the information is filed in connection with an application or proceeding before an agency. Section 552.113(1) of the Government Code, which references chapter 91 of the Natural Resources Code, applies only to the Railroad Commission and has no effect on the interpretation of section 552.113(2) as it applies to other governmental agencies. Section 552.113(2) applies only to commercially valuable geological and geophysical information about the exploration or development of natural resources. To the extent that Open Records Decision No. 504 (1988) is inconsistent with this opinion, it is overruled.

Yours very truly,



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