



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

DAN MORALES
ATTORNEY GENERAL

March 18, 1997

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation
Commission
P.O. Box 13087
Austin, Texas 78711-3087

Open Records Decision No. 652

Re: Whether Health and Safety Code
section 382.041 supplants common law trade
secret protection for certain information
filed with the commission and related
questions. (ORQ-2)

Dear Mr. McCalla:

The Texas Natural Resource Conservation Commission (the "commission") has received several written requests for information that was provided to the commission by various companies. With regard to each of the requests, the commission asks this office to determine whether the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code.

Section 552.101 of the Government Code excepts from required public disclosure "information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information made confidential by specific statutes. Section 382.041 of the Health and Safety Code provides:

- (a) Except as provided by Subsection (b), a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.
- (b) A member, employee, or agent of the commission may disclose information confidential under Subsection (a) to a representative of the United States Environmental Protection Agency on the request of a representative of that agency [under specified circumstances].¹

¹The requests for information at issue were not made by representatives of the Environmental Protection Agency. Therefore, we do not address subsection (b) of section 382.041.

Before we consider the specific information protected by section 382.041, it is necessary to address the procedural application of this statute. In Attorney General Opinion H-836 (1976) this office interpreted the statutory predecessor to this provision, section 1.07 of the Texas Clean Air Act, article 4477-5, V.T.C.S., and held that the Texas Air Control Board (the “board”) (the statutory predecessor to the commission) was required to make an initial determination as to whether any requested information relates to secret processes or methods of manufacture or production, and whether the information was identified as confidential when submitted. The opinion cited former section 3.01, article 4477-5 V.T.C.S. (current version at Health & Safety Code §382.011), which provided that the “board [now the commission] shall administer the provisions of this Act” and emphasized that the board must make an initial determination as to whether information was protected by the statute. Attorney General Opinion H-836 (1976) at 2. The opinion noted, however, that if the board determined that the requested information was protected under this provision, the board must request an attorney general’s decision pursuant to the Open Records Act. *Id.*

In the situation at hand, the commission made an initial determination that the information sought by one of the requestors does not relate to the secret processes or methods of manufacture as provided by section 382.041. The commission therefore recommends that this office find that this requested information may not be withheld from disclosure. In regard to the other requests, however, the commission has taken no position regarding whether the information is protected under section 382.041. Instead, the commission raises section 552.305 of the Government Code, which allows a governmental body to decline to release requested information for the purpose of seeking an attorney general’s decision. Under section 552.305(c), a governmental body may, but is not required to, submit reasons why the information should be withheld or released.

When the commission requests a decision from the attorney general on whether information is protected under section 382.041 of the Health and Safety Code, this office will issue an opinion consistent with the provisions of subchapter G of chapter 552 of the Government Code. If the commission takes no position pursuant to section 552.305 of the Government Code, or has determined that requested information is not protected, this office will issue a decision based on a review of the information at issue and on any other information provided to this office by the commission or third parties.² *See* Gov’t Code §§ 552.305, .306. Additionally, as previously held, even when the commission determines that requested information is protected under section 382.041, unless there is a previous determination from the attorney general that the information is excepted from disclosure,

²Although section 382.011(a)(1) of the Health and Safety Code provides that the commission “shall administer [the provisions of] this chapter,” it is unnecessary to consider whether this provision requires the commission to make an initial determination of whether requested information is protected by section 382.041. The attorney general will render a decision pursuant to section 552.306 of the Government Code when it receives a proper request for a ruling under section 552.305. Any information that the commission may provide regarding whether the information is protected under section 382.041 will, of course, aid this office in making a determination on whether the information is excepted from disclosure.

the commission must seek an opinion from the attorney general to withhold information. Gov't Code § 552.301(a); Attorney General Opinion H-836 (1976) at 2. In each of these situations, the attorney general will determine if the requested information is protected under section 382.041 based on the information supplied to this office. Gov't Code § 552.306; *c.f.* Gov't Code § 552.303 (attorney general may determine if governmental body's submission of information is sufficient to render decision and may request additional information). If the information submitted to this office does not establish that the requested information is excepted from disclosure, the information must be released. Gov't Code § 552.021.

Having determined the procedures for applying section 382.041, we must determine the scope of this provision. Section 382.041 protects information (1) "relating to secret processes or methods of manufacture or production" and (2) that was identified as confidential by the submitting party when it was submitted to the commission. Attorney General Opinion M-957 (1971) at 2. In Attorney General Opinion H-836 (1976), this office considered the meaning of "relating to the secret processes or methods of manufacture or production," and noted that the Texas Supreme Court has adopted the definition of "trade secret" contained in the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). This office suggested that the Restatement definition of a trade secret should be used when considering whether information is related to the "secret processes or methods of manufacture or production" under the predecessor to section 382.041. Attorney General Opinions H-836 (1976) at 3, M-957 (1971) at 1-2.

According to the Restatement of Torts, a trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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). There are six factors listed by the Restatement which should be considered when determining whether information is 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 to [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.

Id.

We believe that the definition of trade secrets contained in the Restatement of Torts and adopted by the Texas Supreme Court for use in common law trade secret actions is the appropriate standard to use when determining if information is “relating to the secret processes or methods of manufacture or production” under section 382.041. We therefore reaffirm the rationale in Attorney General Opinions H-836 (1976) and M-957 (1971) and hold that information is protected under section 382.041 if (1) it is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and (2) the information was identified as confidential by the submitting party when it was submitted to the commission.

We note that this office also applies the Restatement of Torts standard for establishing trade secret protection under section 552.110 of the Government Code. Open Records Decision No. 552 (1990). Section 552.110 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.” In order to withhold information under section 552.110, the commission or the company whose records are at issue must make a prima facie case to this office that the information at issue is a trade secret, Open Records Decision No. 552 (1990) at 5, or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision, Open Records Decision No. 639 (1996).³

In Open Records Decision No. 639 (1996), the Attorney General held that the case of *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which interprets exemption four of the federal Freedom of Information Act (“FOIA”), was a “judicial decision” for purposes of section 552.110. Consequently, if a governmental body or other entity can meet the test established in *National Parks & Conservation Ass’n*,

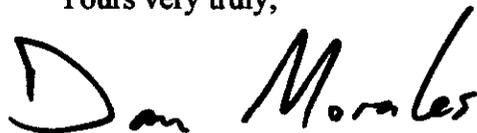
³If it is established that information is excepted from disclosure under section 552.101 of the Government Code in connection with section 382.041 of the Health and Safety Code, the information will also be excepted from disclosure under the trade secret portion of section 552.110 of the Government Code. The only additional statutory requirement for information to be protected under section 382.041 is that the information must be “identified as confidential” when submitted to the commission. We note, however, that among the factors to be considered when determining if information is a trade secret is the extent of measures taken by [the company] to guard the secrecy of the information. Restatement of Torts § 757 cmt. b (1939). Thus, to be considered a trade secret under either section 382.041 or section 552.110, it is probable that information will have been identified as confidential in order to show that the company took steps to protect the secrecy of the information.

the information may be withheld from disclosure. To be held confidential under *National Parks & Conservation Ass'n*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks & Conservation Ass'n*, 498 F.2d at 766. To succeed with a claim under the commercial or financial information portion of section 552.110, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. Open Records Decision No. 639 (1996) at 4.

S U M M A R Y

Section 382.041 of the Health and Safety Code protects information submitted to the Texas Natural Resource Conservation Commission (the "commission") if a prima facie case is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and if the information was identified as confidential by the submitting party when it was submitted to the commission. When an attorney general decision is requested regarding the application of section 382.041, this office will make a determination based on a review of the information at issue and any information submitted by the commission or any third parties. Section 552.110 of the Government Code may also exempt the information from required public disclosure if a governmental body or third party establishes that the information is a trade secret or commercial or financial information.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

DAN MORALES
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