



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

August 30, 1991

Mr. Allen P. Beinke, Jr.
Executive Director
Texas Water Commission
P.O. Box 13087 Capitol Station
1700 North Congress Avenue
Austin, Texas 78711-3087

OR91-389

Dear Mr. Beinke:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252- 17a, V.T.C.S. Your request was assigned ID# 11811.

You have received a third party request for authorization to review information in the Sikes Superfund Site Remediation file which relates to International Technology Corporation (IT). We have received a brief from IT which advises us of their consent to the release of certain portions of the requested information and of their arguments for exempting other documents from release. The following documents have been submitted for our review:

- A. FIGURE 3.1.5-1-ALT Facility Layout Map
- B. FIGURE 3.2.1.3-1-ALT (Sheets 1 & 2) Alternate Incineration Layout Map
- C. Alternate Technical Proposal, Dated February 14, 1990
- D. IT/Davy Joint Venture Agreement
- E. Addendum - IT/Davy Joint Venture Agreement

IT does not object to release of items A and B in their entirety and portions of items C, D, and E. However, IT objects to public disclosure of certain technical information contained in item C, several articles of the Joint Venture Agreement (item D), and portions of the Addendum (item E). IT claims exemption from public disclosure of this information under section 3(a)(10) of the Open Records Act.

We have considered the exceptions IT claimed, specifically section 3(a)(10),

and have reviewed the documents at issue. Previous open records decisions issued by this office resolve your request. Section 3(a)(10) provides the following exception:

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

V.T.C.S. art. 6252-17a, 3(a)(10)

IT has claimed exemption under both the trade secrets and commercial and financial information aspects of section 3(a)(10). The two categories of information excepted by § 3(a)(10) must be considered separately. Open Records Decision No. 496 (1988).

The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). That definition provides in part:

A trade secret may consist of 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 . * * * . 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.

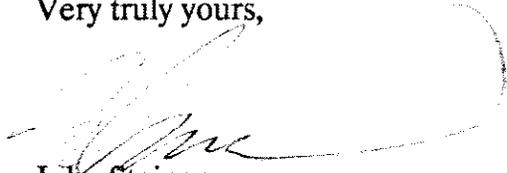
IT has submitted information explaining why the requested information comprises a trade secret. Because this office cannot resolve questions of fact, it has been our practice to rely upon the business entity to determine whether the trade secret criteria are satisfied. Open Records Decision No. 541 (1990). Moreover, as no opposing argument has established that the information in question cannot be considered a trade secret, we conclude that IT has made a *prima facie* case that the information in item C constitutes a trade secret. See Open Records Decision No. 552 (1990). Accordingly, the documents which reveal this information are excepted

from disclosure by section 3(a)(10).

Section 3(a)(10) also protects certain commercial and financial information that need not constitute a trade secret. Open records decisions in the past have relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act (FOIA) in applying section 3(a)(10) to commercial information. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, in a recent open records decision, Open Records Decision No. 592 (1991), the logic of relying on federal interpretations of exemption 4 of FOIA was reexamined. As a consequence of this reexamination, the basis for exempting commercial and financial information pursuant to federal interpretations of exemption 4 was overruled. Unless the information requested includes trade secrets or is "privileged or confidential" under the common or statutory law of Texas, it cannot be withheld under section 3(a)(10). Because the Joint Venture Agreement (item D) and Addendum (item E) are not trade secrets and are not protected by the common or statutory law of Texas, they may not be withheld under section 3(a)(10).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-389.

Very truly yours,



John Steiner
Assistant Attorney General
Opinion Committee

JS/GCK/lb

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