



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1993

Mr. Ignacio Ramirez, Sr.
City Attorney
City of Baytown
P.O. Box 424
Baytown, Texas 77522-0424

OR93-207

Dear Mr. Ramirez:

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# 19169.

The City of Baytown (the "city") has received a request for information relating to a chemical plant located in the city. Specifically, the requestor seeks "copies of public documents relating to the EniChem facility in Baytown, Texas . . . that were written after June 1, 1990," including:

permit applications or permit modifications;

correspondence and memoranda relating to actual or proposed construction of new facilities or modification of existing facilities; and

correspondence and memoranda regarding requirements for new or modified facilities.

You seek to withhold the requested information in deference to a third party's proprietary interests.

Pursuant to section 7(c) of the Open Records Act, we have notified the party whose interests may be affected by disclosure of the information submitted to us for review. In response, we have received a letter from EniChem Elastomers Americas, Inc. ("EniChem"). EniChem contends that some of the requested information is protected from disclosure by sections 3(a)(10) and 3(a)(11) of the Open Records Act.

Section 3(a)(10) protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and

(2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. EniChem asserts that some of the requested information constitutes trade secrets and should therefore be withheld from public disclosure under section 3(a)(10).

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, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. 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, . . . [but] 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).

This office has previously held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6.¹

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (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); see also Open Records Decision Nos. 319, 306 (1982); 255 (1980).

EniChem seeks to withhold two general categories of information:

1. plot plans and process diagrams of the plant that show the equipment used in the plant and its layout, and
2. the identity of certain chemicals.

EniChem specifies several documents which contain information revealing secret processes and methods of manufacture and production and advises us that these documents reveal the plant design and layout and the volume and location of chemicals. In addition, EniChem explains that the identities of certain chemicals merit trade secret protection because they are not commonly used in the thermoplastic elastomers manufacturing business and relate to a secret process of manufacture. Having examined the documents submitted to us for review, we conclude that EniChem has made a *prima facie* case establishing that some of the requested information revealing EniChem's plant design and production technology, as well as the identity of certain chemicals, constitutes "trade secrets." Accordingly, the following information may be withheld from required public disclosure under section 3(a)(10) of the Open Records Act:

1. The process flow diagram of the blending and stripping units (Project N. JB-89119; Drawing No. F-401);
2. The piping and instrument diagram of the primary shaker screen and dewatering expeller line, including the tables of "normal process effluent" and "TPE material balance." (Project No. JB-89119; Drawing No. EF-701);
3. All diagrams attached to the building permit applications and building permits, including the plans and drawings attached to Permit Nos. 18484, 17715, 17939, and 17940;
4. Drawings and plot plans from Project No. JB-89119, including Drawing Nos. P-006, Revision #1, P-002, Revision #2, P-005, Revision #1, P-001, Revision #1, G-001, Revision #2;
5. Flow diagrams included as part of EniChem's POTW permit application;
6. Flow diagrams and plans from the Wastewater Engineer's files that relate to EniChem's equipment layout or production or manufacturing process; and
7. Documents referencing the identity of the chemicals for which you seek trade secret protection.

These documents have been marked and may be withheld in their entirety. With respect to the remainder of the requested information, however, we conclude that EniChem has not made a *prima facie* case. Accordingly, this information may not be withheld from required public disclosure under section 3(a)(10) of the Open Records Act.

EniChem also claims that some of the requested information is excepted from required public disclosure by section 3(a)(11) of the Open Records Act, which excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." Section 3(a)(11) of the Open Records Act, however, is intended to protect the interests of governmental bodies, not third parties. *See* V.T.C.S. art. 6252-17a, § 7(c). Therefore, EniChem lacks standing to raise this particular exception. Accordingly, the remaining information must be released in its entirety.²

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 OR93-207.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Opinion Committee

LRD/GCK/le

Ref.: ID# 19169
ID# 19292
ID# 19460

Enclosures: submitted documents

cc: Mr. Scott E. Schang
Cleary, Gottlieb, Steen & Hamilton
1752 North Street, Northwest
Washington, D.C. 20036
(w/o enclosures)

²EniChem also asserts that the request does not encompass some of the documents submitted. It is the *city's* duty to make a good faith effort to determine what documents in its custody are responsive to the request. Open Records Decision No. 561 (1990). This office does not normally make determinations regarding the responsiveness of documents to a request, and therefore assumes that the documents submitted to us for review are responsive. Thus, the city may not withhold any of the requested information merely because a third party contends that it is not responsive to the request.

Mr. James R. Imrie
Enichem Elastomers Americas, Inc.
4803 Decker Drive
Baytown, Texas 77521
(w/o enclosures)

Ms. Lisa Crosswell
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002
(w/o enclosures)