



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 5, 1994

Ms. Terry G. Salem
Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR94-001

Dear Ms. Salem:

You ask whether certain information previously held by the Texas Air Control Board is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 17881.

The Texas Air Control Board (the "board") received a request for information relating to licenses and permits the board had issued Calabrian Chemical Company ("Calabrian") since 1980. Specifically, the requestor seeks four categories of information:

1. Any and all licenses and permits pertaining to Calabrian Chemical Company, located at 5500 Highway #366, Port Neches, Texas 77651
2. Any and all authorizations, exemptions, or variances granted to Calabrian;
3. Any and all documents pertaining to remedial actions involving or potentially involving Calabrian; and
4. Any and all documents pertaining to the compliance history of Calabrian, and any enforcement actions taken against Calabrian.

¹The Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

You have submitted to us for review the following two documents:

- (1) Permit update for sodium thiosulfate facility process description, received by [the board] September 3, 1985; and
- (2) Process description, Chemall--Port Neches Plant COSORB solvent manufacture flow diagram, and table 2C material balance.

You claim that these documents are excepted from required public disclosure by former section 3(a)(10) of the Open Records Act (now found at section 552.110 of the Government Code).

Pursuant to section 552.305 of the Government Code, we notified Calabrian and solicited arguments in support of your assertion that the requested information is excepted from required public disclosure by section 552.110. In response, we received a letter from Calabrian. Calabrian claims that the following information in possession of the board constitutes "trade secrets" and is excepted from required public disclosure under former sections 3(a)(4) (now found at section 552.104) and 3(a)(10) of the Open Records Act:

- (1) All information relating to chemical processes and designs, including without limitation information relating to sulphur dioxide production process, sodium metabisulfite production process, sodium bisulfite production process, sodium sulfite production process, cuprous iodide production process, hydroiodic acid production process, COSORB manufacturing process, cuprous chloride production process, and cupric chloride production process; and
- (2) All flow diagrams and listing of volume productions relating to the foregoing or any raw materials used in connection therewith.

Because neither you nor Calabrian claim that the remainder of the requested information is excepted from required public disclosure under section 552.110 or under any other exception in the Open Records Act, we presume that the remaining information has been or will be made available to the requestor. *See* Open Records Decision No. 409 (1984); *see also* Open Records Decision No. 363 (1983).

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect governmental interests in commercial transactions. Open Records Decision No. 541 (1990). Neither the board nor Calabrian indicate how the requested

information relates to a competitive bidding situation or to a commercial transaction to which the board is a party. Accordingly, the section 552.104 exception may not be properly invoked.

Section 552.110 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. Commercial or financial information is excepted under section 552.110 only if it is privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 9.

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 552.110 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 (1990) at 5-6.²

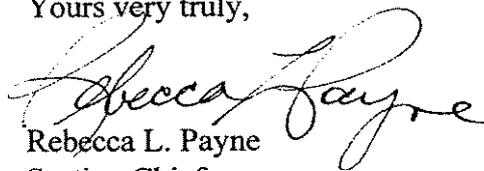
²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(Footnote continued)

The information submitted to us for review generally depicts process descriptions and diagrams of Calabrian facilities licensed by the board. We have considered Calabrian's arguments and its application of the six Restatement criteria and have examined the documents submitted to us for review. We conclude that Calabrian has established a *prima facie* case that the documents submitted to us for review constitute trade secrets. Furthermore, we are aware of no authority, and none has been brought to our attention, which rebuts the trade secrets claim as a matter of law. Accordingly, we conclude that the documents submitted to us for review must be withheld from required public disclosure under section 552.110 of the Open Records Act. The remaining information, however, must be released.

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 contact our office.

Yours very truly,



Rebecca L. Payne
Section Chief
Open Government Section

RLP/SA/GCK/rho

Ref.: ID# 17881, ID# 17906
ID# 17897, ID# 18051
ID# 18099

Enclosures: Submitted documents

(Footnote continued)

- (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). When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, there is no basis to withhold the information under section 552.110. *See* Open Records Decision No. 402 (1983).

cc: Ms. Lynn C. Giusti
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