



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 23, 1994

Ms. Helen M. Gros  
Senior Assistant City Attorney  
City of Houston  
Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR94-477

Dear Ms. Gros:

Ms. Gretchen Kuehn Bohnert asked whether certain information was subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned her request ID# 25458.

The City of Houston (the "city") has received a request for "a copy of all Houston Department of Health files associated with the Scott Speciality Gases facility located at 3714 Lapas Drive . . . includ[ing], but . . . not limited to, all files related to site visits, violations, complaints, permits, monitoring data, and health assessments." You have submitted some of the requested information to us for review.<sup>1</sup> You claim that sections 552.101 and 552.110 of the Government Code exempt it from required public disclosure.

Section 552.101 exempts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert section 552.101 in conjunction with the informer's privilege. The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.]

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<sup>1</sup>Because you do not comment on the remainder of the requested information, we presume that it has been or will be made available to the requestor. *See* Open Records Decision No. 363 (1983).

The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of *citizens* to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. [Emphasis added.]

The informer's privilege aspect of section 552.101 protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3; 208 (1978) at 1-2. When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515; 191 (1978). For example, the informer's privilege aspect of section 552.101 does not protect memoranda and written statements complaining of a fellow employee's work performance when those statements do not reveal the violation of specific laws to the officials charged with enforcing those laws. See Open Records Decision Nos. 579 (1990) at 8; 515 at 3. If the informer's privilege does apply, it may except from disclosure the content of the informer's communication when the content of the communication could reveal the informer's identity. Open Records Decision No. 377 (1983) at 1.

We have examined the document for which you assert the informer's privilege. The document details a report of alleged chemical contamination and includes information regarding the location of the alleged contamination and health problems that residents in the area attribute to the alleged contamination. Although some of the information that the complainant provided the city about the alleged contamination could be construed as revealing criminal or illegal behavior, it is not clear from the document itself that the complainant considered herself to be reporting criminal or illegal behavior. We conclude, therefore, that the informer's privilege does not apply in this instance.

Finally, you claim that section 552.110 excepts some of the requested information from required public disclosure. Pursuant to section 552.305 of the Government Code, we have notified the third party whose proprietary interests are implicated here. In response, we have received a brief from Scott Specialty Gases, Inc. ("Scott"), in which Scott claims that sections 552.101 and 552.110 of the Government Code except some of the requested information from required public disclosure.

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. Scott claims that some of the information that you submitted to us for review constitutes trade secrets. Scott has submitted the information for which it seeks protection in exhibits 1 through 6.

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 (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 . . . . A trade secret is 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. [Emphasis added.]*

RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 the private owner's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.<sup>2</sup> This office has held that the volume and location of chemicals used in manufacturing may be a trade secret. *See* Open Records Decision No. 554 (1990). The identities of unusual chemicals used in the manufacturing process have also been withheld. *Id.*

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<sup>2</sup>The 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 at 2, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

We have examined the information for which Scott seeks trade secret protection. Scott submitted the information to the city in response to a city investigation of Scott's facility. The information includes information detailing the Scott facility's internal process, including a flow diagram for the manufacturing process for low concentration sulfur mixtures; schematic diagrams showing the operational layout of the plant; a detailed procedure of the mechanics and chemistry of the sulfur scrubbing process; a list of the chemicals kept by Scott and the respective quantities; and information concerning the control processes that Scott uses to remediate residuals. We conclude that the respondent has made a prima facie case that this information constitutes trade secrets. We have marked the information that the city must withhold from public disclosure under section 552.110 of the Government Code. We conclude, however, that Scott has not made a prima facie case that all of the information constitutes trade secrets. Some of the information that Scott submitted to us for review is of a general nature, *e.g.*, cover letter correspondence to the city, inventories of submitted information, and a map indicating the plant's location. Such information does not reveal any information regarding Scott's technical processes and may not be withheld from required public disclosure under section 552.110.

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 this office.

Yours very truly,



Susan L. Garrison  
Assistant Attorney General  
Open Government Section

SLG/GCK/rho

Enclosures: Marked documents

Ref.: ID# 25458

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