



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 5, 1996

Mr. John A. Riley  
Litigation Support Division  
Texas Natural Resource  
Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR96-1599

Dear Mr. Riley:

The Texas Natural Resource Conservation Commission (the "commission") received two open records requests for the commission's records regarding Griffin Industries ("Griffin"). The first seeks information relating only to Griffin's rendering plant in Bastrop County. The second seeks information relating to all of Griffin's facilities in Texas. You state that you have released to both requestors some responsive documents. However, you seek to withhold other records pursuant to sections 552.101, 552.103, 552.107, and 552.110 of the Government Code. Your request for rulings on each of these requests have been assigned ID# 40623 and ID#100535, respectively.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. In this instance, you have made the requisite showing that the information you seek to withhold under section 552.103 relates to pending litigation between TNRCC and Griffin. These records may therefore be withheld at this time, with the following exceptions.

We note that Griffin representatives have previously had access to a few of the records submitted to this office. Absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, these records, and any other commission records previously shared with or provided by Griffin, may not be withheld from the requestor

pursuant to section 552.103 or any other exception to disclosure that you have raised.<sup>1</sup> See Open Records Decision Nos. 574 (1990) (section 552.107 does not apply to communications that are not confidential). We have marked some documents which apparently have been shared with Griffin and which, therefore, must be released.

You also seek to withhold, under section 552.101 and the "informer's privilege," the names and addresses of individuals contained in "complaint forms" and "complaint entry forms" regarding Griffin and alleged violations of the "Clean Air Act," chapter 382 of the Health and Safety Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The "informer's privilege" aspect of section 552.101 protects the identity of persons who report violations of the law. Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 (1981), 279 (1981); see also Open Records Decision No. 208 (1978). This may include enforcement of quasi-criminal civil laws. Open Records Decision Nos. 515 (1988), 391 (1983). Because part of the purpose of the privilege is to prevent retaliation against informants, the privilege does not apply when the informant's identity is known to the individual who is the subject of the complaint. See Open Records Decision No. 208 (1978). In addition, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Rovario v. United States*, 353 U.S. 53, 60 (1957). Assuming that Griffin representatives have not been made aware of the identity of any of the complainants, we agree that the commission may withhold those individuals' names and addresses pursuant to the informer's privilege. As you have raised no other exceptions to public disclosure of these complaint forms or complaint entry forms, the remaining information contained in these documents must be released.

You also raise section 552.110 on behalf of Griffin for one document, an engineering drawing. Pursuant to section 552.305, this office notified Griffin of the open records request. See Gov't Code § 552.305; Open Records Decision No. 542 (1990). Griffin responded to our notification by asserting that this document contains confidential trade secret information and should not be disclosed under the Open Records Act. Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

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<sup>1</sup>We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 a single or ephemeral event 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.

Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(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, *supra*; *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). However, Griffin has made only general, conclusory assertions that the drawing is a trade secret, without providing any relevant information regarding the factors necessary to make a section 552.110 claim. We conclude that Griffin has failed to establish a prima facie case that this information is a trade secret and, therefore, the commission may not withhold this information as a "trade secret" under section 552.110.<sup>2</sup>

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<sup>2</sup>Griffin has not claimed that that this information is either commercial or financial information and, therefore, we need not address the second part of section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Todd Reese". The signature is written in a cursive style and is underlined with a long horizontal line extending to the right.

Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref: ID# 40623, 100535

Enclosures: Marked documents

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