



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 5, 1996

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-1600

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40620.

The Texas Natural Resource Conservation Commission (the "commission") has received a request "to review and copy any and all information in the possession or control of the [commission], which pertains to the existence of any permits relating to air, water, or solid waste issued to Ethyl Corporation" and "any documents which relate to any violations, notices of violations, consent orders, or settlement agreements arising out of air, water or solid waste violations at any facility owned or operated by Ethyl Corporation located in Texas." You have submitted to this office a representative sample¹ of twenty-three files of the commission relating to air permits which Ethyl Corporation has identified as "confidential and/or trade secrets," and ask whether this information is excepted from disclosure pursuant to section 552.101 in conjunction with section 382.041 of the Health and Safety Code.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Pursuant to section 552.305, we notified Ethyl Corporation of this open records request. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). Ethyl Corporation responded to our notification by asserting that the requested information is a trade secret and, therefore, excepted from required public disclosure under section 552.110 of the Government Code.²

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:

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.

²Ethyl Corporation also asserts that only seven of the twenty-three files which the commission states are responsive to this request relate to Ethyl Corporation. Ethyl Corporation explains that the remaining sixteen files relate to the production units of another corporation, Albemarle Corporation, to which Ethyl Corporation sold its interest in February, 1994. Ethyl Corporation asserts that the commission has mis-designated the remaining documents as being responsive to this request and only addresses the seven files, relative to permit numbers 4551 and 18161, in its arguments against disclosure.

This office cannot resolve factual disputes and can only rule on the information provided to us--our ruling in this open records letter is limited to that information. It is up to the commission to accurately determine whether the remaining sixteen files are truly responsive to this request. We remind the commission, however, that the release of confidential information may constitute a criminal offense. Gov't Code § 552.352.

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).³ When a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.

We have considered Ethyl Corporation’s arguments with regard to that information it seeks to withhold as trade secret information under section 552.110. We conclude that Ethyl Corporation has made a prima facie case that the information at issue is protected under the trade secret prong of section 552.110. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the information at issue may not be disclosed to the requestor.⁴

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 may 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 with a large, sweeping initial "T".

Todd Reese
Assistant Attorney General
Open Records Division

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³The 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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

⁴As we conclude that the requested information is protected under the trade secret prong of section 552.110, we need not address whether section 382.041 of the Health and Safety Code is applicable.

Ref.: ID# 40620

Enclosures: Submitted documents

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