



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 23, 1997

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

OR97-1695

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 107435.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information relating to environmental permits for Horsehead Resource Development Co., Inc. ("HRD"). The commission has released some of the requested information. However, you explain that the commission has some information that was marked "confidential" when submitted to the commission. You are concerned that this information is excepted from disclosure pursuant to section 382.041 of the Health and Safety Code in conjunction with section 552.101 of the Government Code. You have submitted the information at issue to this office for review.

Pursuant to section 552.305, we notified HRD of the request for information. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). HRD responded to our notification by asserting that the submitted information is protected under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. HRD also contends that the trade secret prong of section 552.110 of the Government Code excepts the information from disclosure.

Section 552.101 of the Government Code excepts from disclosure information that is confidential by statutory law. In Open Records Decision No. 652 (1997), this office concluded that section 382.041 of the Health and Safety Code protects information submitted to the commission if a *prima facie* case is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and if the submitting party identified the information as confidential when it submitted the information to the commission. According to the Restatement of Torts, a trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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.* Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (Emphasis added).<sup>1</sup>

You indicate that HRD identified the information at issue as confidential when it submitted the information to the commission. The information at issue consists of a "modeling analysis" and a "process description." We conclude that HRD has demonstrated, by a *prima facie* case, that the "process description" constitutes a trade secret. We have marked the "process description" accordingly, and the commission must withhold it from disclosure under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code.

On the other hand, HRD has not established that the "modeling analysis" constitutes a trade secret. The "modeling analysis" appears to be "information as to single or ephemeral events in the conduct of the business," not "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). Therefore, the "modeling analysis" is not excepted from required public disclosure under either section 552.101 or the trade secret prong of section 552.110 of the Government Code. Open Records Decision No. 552 (1990) (trade secret prong of section 552.110 also requires governmental body to establish *prima facie* case that information is trade secret). We conclude that the commission must release the "modeling analysis."

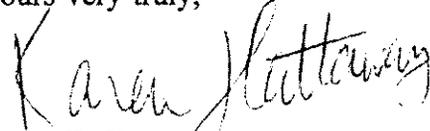
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<sup>1</sup>There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [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.

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,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref.: ID# 107435

Enclosures: Marked documents

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