



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 16, 1998

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

OR98-0152

Dear Mr. McCalla:

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# 111602.

The Texas Natural Resource Conservation Commission (the "commission") received a request for six categories of information regarding "the former Harvey Industrial site in Athens, Texas," a specified permit account, and a particular corporation. You indicate that the commission is making available to the requestor portions of the requested information. You have submitted certain information and ask whether it is confidential under section 552.101 of the Government Code, in conjunction with section 382.041 of the Health and Safety Code, and section 552.110. We have considered the exceptions you claim and have reviewed the submitted documents.<sup>1</sup>

You assert that the information regarding Lorax Corporation ("Lorax") and its processes are excepted from disclosure by sections 552.101 and 552.110 of the Government Code. You have also indicated that Lorax identified some of the documents as confidential at the time that it submitted the documents to the commission. Therefore, you assert

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<sup>1</sup>Initially, you asserted that the submitted information at issue is excepted from required public disclosure pursuant to sections 552.101, 552.107, 552.110, and 552.111 of the Government Code. However, in your submitted brief you only explained how sections 552.101 and 552.110 applied to the submitted information. The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Therefore, in this ruling, we only consider the applicable exceptions for which you have offered support.

protection for these particular records under section 382.041 of the Health and Safety Code.<sup>2</sup> Because the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified Lorax of its opportunity to claim that the information Lorax submitted to the commission is excepted from required public disclosure. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990). Lorax responded to our notification by asserting that the requested information is a confidential trade secret and, therefore, excepted from required public disclosure under sections 552.101 and 552.110 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from 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. In its brief to this office, Lorax claims that "all six groups of information are confidential," thus excepted from required public disclosure as trade secrets.

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.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.

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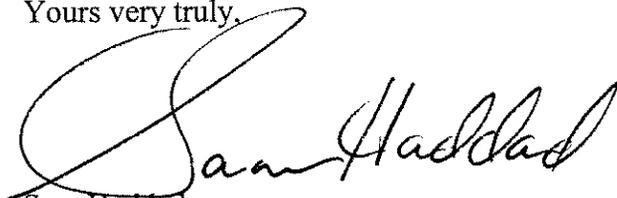
<sup>2</sup>Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information made confidential by specific statutes, *such as*, section 382.041 of the Health and Safety Code.

RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret 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.

We have considered Lorax's trade secret arguments and reviewed the submitted records. We agree that most of the information, specifically categories one through five of the request, which we have marked, must be withheld pursuant to the trade secret prong of section 552.110. However, the information submitted as responsive to category six of the request must be released, because emissions data supplied to the commission is public information. Attorney General Opinion H-539 (1975). The commission must therefore withhold the marked information, and release the remaining submitted information.<sup>4</sup>

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Sam Haddad  
Assistant Attorney General  
Open Records Division

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<sup>3</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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

<sup>4</sup>As we conclude that you must withhold most of the submitted records under section 552.110, except for emission data, we need not consider the application of section 382.041 of the Health and Safety Code.

Ref.: ID# 111602

Enclosures: Marked documents

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