



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 2, 1998

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

OR98-0317

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# 112749.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for various records pertaining to Quantum Chemical Corporation ("Quantum"). You state that the commission has released some of the requested materials to the requestor. You seek to withhold, however, certain inter-office memoranda pursuant to sections 552.107(1) and 552.111 of the Government Code. You have also requested a decision from this office pursuant to section 552.305 of the Government Code with regard to certain technical materials that Quantum submitted to the commission.¹

Section 552.107(1) of the Government Code protects information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." See Open Records

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 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.

Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.*

Among the documents you submitted to this office for review are various "Administrative Penalty Worksheets" that appear to have been prepared by commission staff members for the use of staff attorneys to evaluate the assessment of possible administrative penalties. These documents contain pertinent factual information about the alleged violations, opinions as to the seriousness of the violations, and recommendations as to the penalties to be assessed. Because you have raised the attorney-client privilege with regard to these documents, and the attorney-client privilege is limited to communications with those governmental representatives who fit within the "control group" as discussed by the Texas Supreme Court in *National Tank v. Brotherton*, 851 S.W.2d 193, 197-200 (Tex. 1993), we assume, without deciding, that the individuals who prepared these documents are within the "control group." Given that assumption, we conclude that the "Administrative Penalty Worksheets" come within the attorney-client privilege, and therefore may be withheld in their entirety pursuant to section 552.107(1).

You have not met your burden, however, in demonstrating the applicability of section 552.107(1) to the other documents you submitted to this office, namely the "TNRCC Investigation/Violation Form" and a piece of correspondence from the commission to a representative of Quantum. We, therefore, must determine whether these documents are excepted from public disclosure under the other exception you raise, section 552.111 of the Government Code.

Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 (1993) at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

We have marked one portion of one "Investigation/Violation" form that consists of the type of information protected by section 552.111. The remaining information in these forms is purely factual and must be released. Similarly, the August 12, 1991 correspondence

to Quantum is not the type of information that section 552.111 was intended to protect and therefore must be released to the requestor. *See also* Gov't Code § 552.007 (prohibiting selective disclosure of information to public).

Finally, we address whether the technical materials that Quantum submitted to the commission are excepted from required public disclosure. You contend in your brief to this office that these materials constitute "trade secrets," and thus may be withheld from the public pursuant to section 552.110 of the Government Code. There are six factors to be assessed in determining whether information qualifies as a trade secret.² This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

In this instance, you have only argued that two of the six factors to be considered apply to the information at issue. Because you did not establish that all of the factors apply, and because you requested a decision from this office pursuant to section 552.305 of the Government Code with regard to these materials, we notified representatives of Quantum that we received your request for an open records decision regarding their proposals and related documents. *See* Open Records Decision No. 575 (1990). In our notification, this office requested an explanation as to why any of the information at issue was excepted from public disclosure, with the caveat that unless we received such explanation within a reasonable time this office would instruct the commission to disclose the information.

Quantum has failed to provide this office with any explanation as to why the requested information should not be released. Consequently, we have no basis for applying any exceptions to required public disclosure to this technical information. *See* Open Records Decision No. 552 (1990). Accordingly, the commission must release these materials in their entirety.

²These six factors are

- 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 this information; and
- 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,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is fluid and cursive, with a large initial "S" that loops around the first part of the name.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/RWP/rho

Ref.: ID# 112749

Enclosures: Marked documents

cc: Mr. Geoffrey J. Ritts
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(w/o enclosures)