



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 31, 1998

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

OR98-0842

Dear Mr. Riley:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113954.

The Texas Natural Resource Conservation Commission ("the TNRCC") received a request for information about Laidlaw Environmental Services ("Laidlaw")¹ in Houston and Deer Park. The requestor specifically asks for the hazardous waste management permitting and enforcement records concerning these two facilities. You indicate that the TNRCC has provided the requestor with some information that is responsive. However, you assert that other responsive information is excepted from disclosure pursuant to sections 552.103, 552.107, 552.110, and 552.111 of the Government Code. You submitted representative samples of the records to this office for review, marked to show the exceptions asserted.²

You marked the documents in Attachment D as protected from disclosure pursuant to section 552.103(a). To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex.

¹Laidlaw was formerly Rollins Environmental Services, Inc. ("Rollins"). The documents and letters submitted to this office concern both Laidlaw and Rollins. For purposes of this ruling, we consider all of the documents at issue to be Laidlaw's records.

²We 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You have shown that litigation is reasonably anticipated. We have reviewed the documents submitted as Attachment D and agree that they are related to anticipated litigation.

Most of the documents submitted in Attachment D may be withheld from disclosure pursuant to section 552.103(a).³ However, Attachment D also contains correspondence and records from and to the opposing party to the anticipated litigation. You state that these records, which include information about settlement offers, are "directly related to the settlement of this action, and public disclosure could jeopardize the resolution of the enforcement action against Laidlaw." However, generally once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the documents in Attachment D that the opposing party to the anticipated litigation has seen or had access to must be disclosed.⁴

You also assert that Laidlaw's records, labeled as Attachment E, are protected from disclosure under section 552.110 of the Government Code. Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." You state that all of the documents at issue are marked confidential. You indicate that one of the documents is confidential as provided by title 30, section 305.46 of the Texas Administrative Code.⁵

We note initially that information is not protected from disclosure simply because the submitted records are designated as confidential. Open Records Decision No. 479 (1987). Nor can a governmental body close access to information by enacting a rule that designates the information as confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The regulation that you rely upon provides that if an applicant identifies information as confidential when it is submitted, then "trade secrets and similar interests which give a person the right to preserve confidentiality of commercial information" can provide a basis for confidentiality. 30 TAC 305.46(a) - (c). 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 TNRCC if a *prima facie* case is established that the information is a trade secret under the definition set

³The applicability of section 552.103(a) also ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

⁴We note that the documents for which you also asserted section 552.107(1) and 552.111 protection are excepted from disclosure pursuant to section 552.103(a). You asserted only section 552.103(a) for the documents that were submitted by or to the opposing party. We also note that you did an extremely good job in marking the submitted documents and in explaining which exceptions are asserted for each document.

⁵Your letter actually referred to 31 TAC 305.46, but you appear to be relying upon 30 TAC 305.46. Thus, we address your argument under 30 TAC 305.46.

forth in the Restatement of Torts⁶, and if the information was identified as confidential by the submitting party when provided to TNRCC. You do not assert that section 382.041 or Open Records Decision No. 652 (1997) is applicable to the records at issue. We will, however, address your concern that the information at issue may be confidential under section 552.110.

Section 552.110 provides an exception for “[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” As provided by section 552.305 of the Open Records Act, this office provided Laidlaw the opportunity to submit reasons as to why the records at issue should be withheld pursuant to section 552.110. You submitted to this office a letter from Laidlaw asserting that some of the documents at issue are confidential.⁷ That letter states release of the information would: (1) cause harm through monetary loss to the company, (2) likely cause loss of current competitive advantage, and (3) likely aid competitors. The letter also asserts that “[s]teps have been taken to protect such information through secrecy agreements.”

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. RESTATEMENT OF TORTS § 757 cmt. b (1939).⁸ This office has held that

⁶According 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. . . . 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).

⁷We note that the letter is from Rollins to the Texas Water Commission and is dated October 20, 1986. The documents discussed in the 1986 letter are apparently the same documents at issue in this request.

⁸The 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.

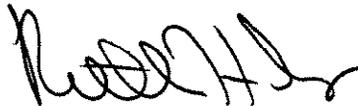
if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

Laidlaw has not established the applicability of either prong of section 552.110 to the records at issue. *See* Open Records Decision No. 363 (1983) (third party has duty to establish how and why exception protects particular information). Thus, this office has no basis on which to conclude that section 552.110 is applicable. The records in Attachment E must be disclosed.

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 any questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 113954

Enclosures: Submitted documents

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