



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 18, 1998

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

OR98-1219

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# 114872.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for various records pertaining to the following companies:

- Georgia Pacific
- Murco Wall Products (Fort Worth, Texas)
- Murco Wall Products (Houston, Texas)
- Murco Wall Products (Weslaco, Texas)
- US Gypsum (Dallas, Texas)
- US Gypsum (Galena Park, Texas)

The request asked for "any permits, emissions, violations, enforcements, equipment, and inspections involving the above in the areas of air, water, solid waste, and toxic substances from January 1, 1993 to the present." Your correspondence indicates you have made most of the information readily available to the requestor at various locations, however, you assert that portions of the requested information is subject to exception under sections 552.101 and 552.110 of the Government Code.<sup>1</sup>

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<sup>1</sup>We note that although you initially raised exceptions under sections 552.107 and 552.111, you subsequently withdrew those exceptions.

We now address whether the technical materials that U.S. Gypsum 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.<sup>2</sup> 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).

You requested a decision from this office pursuant to section 552.305 of the Government Code with regard to these materials, and we notified each of the companies involved, i.e. Georgia Pacific, Murco Wall Products and U.S. Gypsum, 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.

In this instance, we observe that Georgia Pacific, in its March 4, 1998, correspondence to this office, indicates that it raises no objection to the release of the materials it has submitted to the commission. Additionally, we note that Murco Wall Products of Fort Worth, Houston, and Weslaco, did not respond to the invitation to object to the release of their documents. 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.

However, we did received a response from U.S. Gypsum and consequently examine their arguments pursuant to section 552.110 of the Government Code. Section 552.110 of the Government Code excepts from required public disclosure "[a] trade secret or

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<sup>2</sup>These 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.

commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” U.S. Gypsum contends that its filings constitute both “trade secrets” and confidential “commercial or financial information” under section 552.110.

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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . 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). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret. 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 evidence of each of the factors necessary to establish a trade secret claim is not made, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). In this instance, U.S. Gypsum has not substantively argued how the six factors apply to its filings. Because U.S. Gypsum did not make a prima facie case for exemption, we conclude that the information regarding U.S. Gypsum may be not be withheld from the public as trade secrets under section 552.110 of the Government Code.

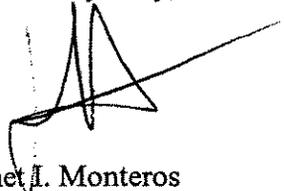
Nor has the commission or U.S. Gypsum shown that the submitted information comes within the commercial or financial aspect of section 552.110. A “mere conclusory assertion of a possibility of commercial harm” is insufficient to show that the applicability of section 552.110. Open Records Decision No. 639 (1996) at 4. “To prove substantial competitive harm,” as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755

F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), “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.” In this situation, section 552.110 has not been shown to be applicable to the information at issue.

We also note that section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” 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 1) a trade secret, and 2) if the information was identified as confidential by the submitting party when it was submitted to the commission. Open Records Decision No. 652 (1997). The commission has shown that U.S. Gypsum identified certain records as confidential at the time it submitted them to the commission. However, neither the commission nor U.S. Gypsum has demonstrated that the information in these records constitutes a trade secret protected from disclosure by section 382.041 of the Health and Safety Code. Open Records Decision No. 652 (1997) at 4 (definition of trade secrets contained in Restatement of Torts and adopted by Texas Supreme Court for use in common-law trade secret actions is appropriate standard in determining if information is “relating to the secret processes or methods of manufacture or production” under section 382.041). Therefore, the commission may not withhold the information under section 552.110 of the Government Code or under section 382.041 of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

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 'Janet I. Monteros', with a long horizontal line extending to the right.

Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/glg

Ref.: ID# 114872

Enclosures: Marked documents

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