



May 17, 1999

Ms. Margaret Hoffman, Director
Environmental Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR99-1346

Dear Ms. Hoffman:

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# 124219.

The Texas Natural Resource Conservation Commission (the "commission") received a request for specific information relating to grandfathered pollution, plants or facilities. Although you have released the public information in your files, you claim that portions of the remaining documents are excepted from disclosure under sections 552.106, 552.107, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information at issue.

Initially, you argue that much of the submitted information is excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Furthermore, in Open Records Decision 559 (1990), this office concluded that a preliminary draft of a document that is intended for public release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such could be withheld pursuant to the statutory predecessor to section 552.111. Thus, section 552.111 also excepts draft documents to the extent that the draft documents

pertain to the policymaking function of the governmental body. We agree that most of the information you have marked may be withheld pursuant to section 552.111 of the Government Code. We have tabbed the information that must be released.

You next argue that portions of the submitted documents may be withheld under section 552.106. Section 552.106 protects drafts and working papers involved in the preparation and enactment of proposed legislation. Open Records Decision No. 429 (1985). The purpose of the exception is similar to that of section 552.111: to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body and to thereby protect the internal “deliberative” or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material; rather, it excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. Section 552.106 applies only to drafts and working papers prepared by persons with some official responsibility to prepare them for the legislative body. *Id.* We have reviewed the information you seek to withhold under section 552.106. We agree that the information relates to the “legislative process” and may be withheld.

You also argue that some of the marked information may withheld under section 552.107(1). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We conclude that the information at issue contains attorney advice or opinion. Therefore, the commission may withhold this information from public disclosure pursuant to section 552.107(1).

Finally, the commission asserts that some of the requested documents are confidential under section 552.110 of the Government Code. Since the property rights of third parties may be implicated by the release of the requested information, this office notified Central and South West Services, Lyondell-Citgo Refining Company (“LCR”), and Exxon Company USA (“Exxon”) about the request. *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) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

LCR responded to our notification by arguing that its proposed reduction materials, which were marked confidential, constitute a trade secret of the company. Section 552.110 protects the property interests of private parties 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 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 information was identified as confidential by the submitting party when it was submitted to the commission.

According to the Restatement of Torts, section 757, a “trade secret”

may consist of 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 a single or ephemeral event 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. [Emphasis added].

RESTATEMENT OF TORTS § 757 cmt. b (1939)¹; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). After examining all the arguments and the submitted documents, we conclude that LCR has established that its confidential information must be withheld.

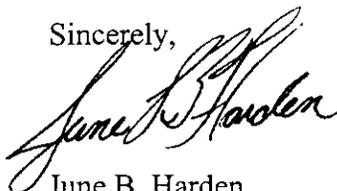
¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company’s] business; (3) the extent of 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.

We next address whether the proposed reduction materials of Exxon and Central and South West Services are excepted from disclosure as commercial or financial information. 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 for commercial and financial information. 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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

The information at issue relates to the permitting of grandfathered facilities owned by Exxon and Central and South West Services. You state that it is critical that the commission "be able to receive this sort of information from companies in order to properly assess company proposals for permits." We understand from your statement that disclosure of the information will impair the commission's ability to obtain this type of information in the future. Based on your assertion, we conclude that the commission may withhold the proposed reduction materials of Exxon and Central and South West Services under section 552.110.

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.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 124219

encl. Submitted documents

cc: Mr. Peter Altman
SEED Coalition
401 West 29th Street
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(w/o enclosures)