



February 24, 2000

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

OR2000-0681

Dear Ms. Hoffman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132420.

The Texas Natural Resources Conservation Commission ("TNRCC") received a request for "any information concerning past or present regulatory issues" at a specified property. You have made available to the requestor some of the responsive information. You have submitted for our review attachment "C," which consists of additional responsive information. You assert this information is excepted from public disclosure under sections 552.101 and 552.110 of the Government Code. You also advise the information in attachment "C" may involve the proprietary or property interest of the Port of Houston Authority (the "authority") and Harvest States Coops (the "coop"). You have notified the authority and the coop of the request by a letter dated December 20, 1999 in compliance with section 552.305 of the Government Code. *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 Public Information Act in certain circumstances). We have reviewed the submitted information and considered the asserted exceptions.

Section 552.101 of the Government Code requires withholding, *inter alia*, information made confidential by statute. TNRCC asserts the information is made confidential by section

552.101 in conjunction with the Texas Clean Air Act, specifically section 382.041 of the Health and Safety Code. Section 382.041(a) provides, in relevant part, that “a member, employee, or agent of [TNRCC] may not disclose information submitted to [TNRCC] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.” In interpreting this provision, this office has ruled that if TNRCC seeks to withhold information from disclosure under this provision, TNRCC must seek a decision from this office in accordance with the Public Information Act. Open Records Decision No. 652 (1997). Further, if the information was identified as confidential when it was submitted to TNRCC, this office will permit withholding the information to the extent a *prima facie* case is made that the information is a “trade secret.”¹ *Id.* TNRCC advises all of the information in attachment “C” was marked as confidential when it was submitted to TNRCC. 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 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). *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:

- (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;

¹TNRCC also asserts that the information at issue is excepted from disclosure under the trade secret provision of section 552.110. *See Gov’t Code § 552.110(a)*. Because this provision and section 382.041 of the Texas Clean Air Act required identical analyses, we address both assertions by determining whether the information at issue contains or consists of trade secrets.

- (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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979).

TNRCC makes no specific arguments to support a finding that the information in attachment “C” is a “trade secret” or is otherwise excepted from required public disclosure. The authority advises this office that it has not been able to determine why its documents were marked as “confidential” when they were submitted to TNRCC, and that it has provided the documents to the requestor. The coop did not respond to the notice; therefore, we have no basis to conclude that the information in attachment “C” from the coop is excepted from disclosure. *See* Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party 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); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The information must, therefore, be released to the requestor in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

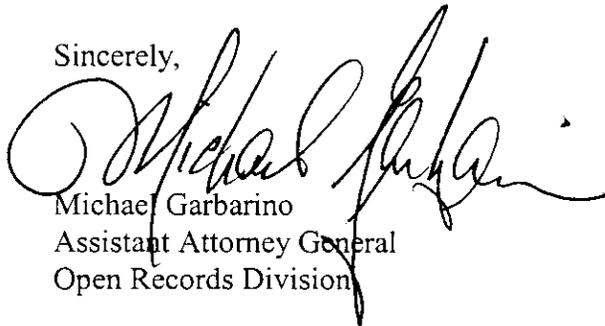
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 132420

Encl. Submitted documents

cc: Ms. Mary Bilicic
Cody Ehlers Group
140 Sherman Street
Fairfield, Connecticut 06430
(w/o enclosures)