



February 29, 2000

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

OR2000-0786

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# 132656.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information and documents pertaining to the Texas Fuel and Asphalt Company. You assert that public information will be made available to the requestor. However, you claim that portions of the information are excepted from disclosure under sections 552.101 in conjunction with section 382.041(a) of the Health and Safety Code and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of information submitted by the commission and the information submitted by Texas Fuel and Asphalt Company.¹

Section 552.101 of the Government Code requires withholding, *inter alia*, information made confidential by statute. Section 382.041(a) of the Health and Safety Code provides in part, with exceptions which do not appear to apply here, that "a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." 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. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on

¹The information submitted by Texas Fuel and Asphalt Company encompasses the representative samples provided by the commission with the exception of one document.

specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

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:

- 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.

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

Pursuant to section 552.305(d) of the Government Code, if release of a person's proprietary information may be subject to exception under section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under section 552.301 must make a good faith attempt to notify that person of the request for the attorney general decision. Texas Fuel and Asphalt Company responded to the commission's notification and submitted documents which are marked confidential and argues that the submitted information contains trade secrets of the company. Specifically, Texas Fuel and Asphalt Company argues that documents 1-52 are trade secrets and discusses the six factors. With regard to documents 53-57, Texas Fuel and Asphalt Company admits that information relating to the amount of emissions is not a trade secret, but asserts that other information in the documents constitutes trade secrets. Further, in documents 58-60, Texas Fuel and Asphalt Company argues that information in the General Permit Information area of the documents are trade secrets.

After examining all of the arguments and the submitted documents, we conclude that Texas Fuel and Asphalt Company has presented a *prima facie* case that the submitted information, excluding the amount of emissions, contains trade secrets which are confidential under section 552.101 in conjunction with section 382.041 of the Health and Safety Code and section 552.110 of the Government Code. We have marked the emissions information which must be released. We note that the commission submitted an emissions/inspection fee report in Attachment B which Texas Fuel and Asphalt did not address. Having reviewed the document, we conclude that the emissions/inspection fee report does not contain trade secrets and must be released. However, the remaining information must be withheld.

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.

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

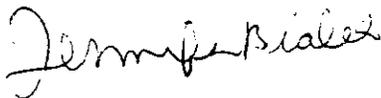
filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not 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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/ch

Ref: ID# 132656

Encl. Marked documents

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