



December 7, 2000

Mr. Chris Gee
Staff Attorney
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2000-4619

Dear Mr. Gee:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code (the "Act"). Your request was assigned ID# 141903.

The Texas Natural Resource Conservation Commission (the "TNRCC") received a request for information related to four specified locations. You indicate that you have provided part of the responsive information to this requestor. However, you have submitted a representative sample of information which you seek to withhold.¹ You contend that a portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also indicate that the interests of a third party, Nalco Chemical ("Nalco") are implicated by the release of a portion of the responsive information. On behalf of Nalco, you raise section 552.110, without taking a position on the application of this section to the responsive information.

You state that the department notified Nalco, the company whose interests are implicated by 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 Act in certain circumstances). Section 552.305(d) of the Act requires a

¹We 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 Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

governmental body to make a good faith effort to notify a party whose proprietary interest may be implicated by the release of the requested information. The third party notice must be sent within ten days of the governmental body's receipt of the request and must include a copy of the written request for information and a statement in the form prescribed by the attorney general.² The notice informs the third party that it may submit to the attorney general, within ten days of receiving the notice, its reasons why the information in question should be withheld. Nalco did not provide any comments to this office in response to this notice.

Because Nalco did not respond to your notice, we have no basis to conclude that this responsive information may be withheld under section 552.110. *See* Open Records Decision Nos. 639 at 4 (1996) (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Section 552.110 will therefore not be addressed further.

We now address those arguments that you raise under section 552.101 of the Government Code. This section 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. A governmental body, or interested third party must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, in order to establish that information is a trade secret. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

You have submitted as Attachment C, information which you relate was identified as confidential when submitted to TNRCC. However, neither TNRCC nor the company which provided this information to TNRCC has asserted any factual allegations in support of a claim that this information constitutes a trade secret. As no *prima facie* case has been presented to establish that the information is a trade secret, it may not be withheld under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety.

²The form can be found in Appendix C of the 2000 Texas Public Information Handbook. The handbook is available online at the Office of the Attorney General's web site at www.oag.state.tx.us.

Section 552.101 also incorporates the “informer’s privilege.” This privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988). Unlike other aspects of section 552.101, the protection of this privilege can be waived. Open Records Decision No. 549 (1990). You contend that the submitted information tracks a complaint, the alleged facts of which, if true, would constitute a violation of law. You claim that “certain sections” in the submitted documents would tend to identify the complainant, and may therefore be withheld under section 552.101 in conjunction with the informer’s privilege. However, you do not identify the portion of the submitted information which you contend is so protected. We conclude that you have not demonstrated that any of the submitted information may be withheld under the informer’s privilege aspect of section 552.101 of the Government Code.

In conclusion, as no exception to disclosure has been demonstrated to apply to the responsive information, it must be released to the requestor.

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).

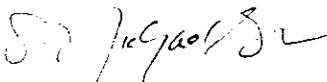
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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 Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 141903

Encl: Submitted documents

cc: Ms. Jennifer Paterson
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(w/o enclosures)