



March 22, 2001

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

OR2001-1122

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# 145206.

The Texas Natural Resources Conservation Commission ("TNRCC") received a request for six enumerated categories of information, from 1979 to 1987, pertaining to a specified facility in Beaumont. You state that information which TNRCC "believes to be protected from disclosure" has not been released to the requestor. We thus assume that you have made available to the requestor that responsive information which TNRCC does not believe to be "protected from disclosure." You have submitted for our review attachment "C," which you state comprises a "representative sample" of the responsive information that, you assert, is or may be excepted from public disclosure under sections 552.101 and 552.110 of the Government Code. Because the information represented by attachment "C" may involve the proprietary or property interests of a third party, Dupont Chemical Solutions Enterprise ("Dupont"), you have notified Dupont of the request by a letter dated January 17, 2001 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). Dupont responded to the notice and argues the information at issue comprises trade secrets excepted from disclosure under sections 552.101 and 552.110

of the Government Code. We have considered the asserted exceptions, the submitted arguments, and we have reviewed the submitted representative sample of responsive information.¹

Section 552.101 of the Government Code requires withholding, *inter alia*, information made confidential by statute. TNRCC and DuPont each assert the applicability of 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." *Id.* TNRCC advises all of the information in attachment "C" was marked as confidential when it was submitted to TNRCC. TNRCC and DuPont each also assert 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. 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.

¹ We 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.

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;
- (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 and DuPont each make assertions with respect to the above factors, and this office has received no information to the contrary. Based on the arguments and representations, especially those of DuPont, and our review of the information at issue, we conclude that a *prima facie* demonstration has been made in this instance that the information at issue comprises trade secret information. Accordingly, we conclude the information is excepted from disclosure under section 552.110(a) and under section 552.101 in conjunction with section 382.041 of the Texas Clean Air Act.

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).

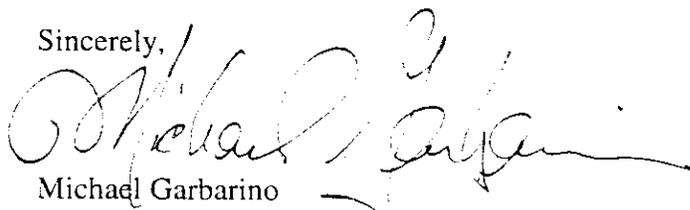
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

MG/seg

Ref: ID# 145206

Encl. Submitted documents

cc: Ms. Roxie Huffman Viator
2728 Western Avenue
Orange, Texas 77630
(w/o enclosures)