



May 15, 2001

Ms. Margaret Hoffman  
Director  
Environmental Law Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78753

OR2001-1999

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# 147254.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for information relating to International Paper in Jefferson, Texas, and records relating to Lodi Drilling & Service Company, Ridgling Well Salvage, S.H. Killingsworth, Killingsworth Oil Company, C.L. McKnight and/or David McKnight. Of this requested information, you state that TNRCC only located records concerning International Paper. You indicate that you have provided some of the responsive information to the requestor. You claim that the remaining requested information, which was marked "confidential" by the submitting party and which you have submitted to this office as "Attachment E," is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Because the information in Attachment E may involve the proprietary or property interests of a third party, International Paper, you have notified International Paper of the request by a letter dated March 13, 2001, in compliance with section 552.305 of the Government Code.<sup>1</sup> To date, International Paper has not submitted any written comments or arguments to this office for withholding the requested information. We will therefore address the arguments raised by TNRCC.

Initially, with regard to the information requested which you assert could not be located, Chapter 552 of the Government Code does not require a governmental body to make

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<sup>1</sup>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).

available information which did not exist at the time the request was received. Open Records Decision No. 362 (1983); *see* Open Records Decision No. 452 (1986) (document not within chapter 552's purview if it does not exist when governmental body receives a request for it). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision No. 605 (1992), 572 (1990), 416 (1984). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 at 8 (1990).

We will next address your raised exceptions. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 382.041(a) of the Health and Safety Code 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 asserts that the information in Attachment E was marked as confidential when it was submitted to TNRCC. TNRCC 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 Health and Safety Code require identical analyses, we address both assertions by determining whether the information at issue contains or consists of trade secrets.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>2</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

You state that "[t]he information which International Paper has marked confidential does relate to processes and methods of manufacture or production, and is the type of information which is consistently marked confidential by applicants for air quality permits. As to the other factors, the company would be better able to evaluate." As you have not established that the submitted information constitutes a trade secret for purposes of protection under section 552.110, and as we have no arguments before us from International Paper, we conclude that the information submitted in Attachment E is not excepted from disclosure under section 552.110(a) or under section 552.101 in conjunction with section 382.041 of the Health and Safety Code. Therefore, the submitted information 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

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<sup>2</sup>The 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 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 [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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 147254

Encl. Submitted documents

cc: Ms. Caroline LeMire  
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(w/o enclosures)