



June 5, 2001

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

OR2001-2328

Dear Ms. Hoffman:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 147999.

The Texas Natural Resource Conservation Commission (“TNRCC”) received a request for “Eastman Chemical Company Texas Operation’s application for Voluntary Emission Reduction Permit No. 47007 and compliance file.” TNRCC believes that some of the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You submitted representative samples of 14 categories of responsive information that Eastman Chemical Company (“Eastman”) submitted to TNRCC. You also notified Eastman of the request for information and of Eastman’s right to submit arguments as to why the requested information should be withheld from disclosure. *See Gov’t Code § 552.305; 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 to disclosure under Public Information Act in certain circumstances).* Eastman submitted comments, as did TNRCC. We have considered the parties’ comments and have reviewed the submitted information.¹

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 exception protects information that is made confidential under another statute. Section 382.041 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

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes TNRCC to withhold any responsive information that is substantially different from the submitted information. *See Gov’t Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).*

processes or methods of manufacture or production that is identified as confidential when submitted.” Health & Safety Code § 382.041(a). This office has concluded that section 382.041 of the Health and Safety Code protects information that is submitted to TNRCC if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential in submitting it to TRNCC. See Open Records Decision No. 652 (1997).

Section 552.110 of the Government Code protects the proprietary 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 specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. See Gov’t Code § 552.110(a), (b). Under section 757 of the Restatement of Torts, 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), cert. denied, 358 U.S. 898 (1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

The following six factors are relevant to the determination of whether information qualifies as a trade secret under section 757 of the Restatement of Torts:

- (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 has submitted representative samples of fourteen categories of information that Eastman designated as being confidential in submitting the information to TNRCC. These categories are (1) Air Emissions Calculations Methods (Attachment "A"); (2) BACT/GACT Analysis (Attachment "B"); (3) Air Emissions Calculations (Attachment "C"); (4) Project Emissions Reduction Credits and Analysis (Attachment "D"); (5) Material Balance - TNRCC Table No. 2 (Attachment "E"); (6) Confidential Process Description (Attachment "F"); (7) Process Flow Diagrams (Attachment "G"); (8) Tanks - TNRCC Table No. 7 (Attachment "H"); (9) Flare - TNRCC Table No. 8 (Attachment "I"); (10) Fabric Filters - TNRCC Table No. 11 (Attachment "J"); (11) Scrubbers or Wet Washers - TNRCC Table No. 13 (Attachment "K"); (12) Reciprocating Engine - TNRCC Table No. 29 (Attachment "L"); (13) General Plant Layout (Attachment "M"); and Plot Plans (Attachment "N").

TNRCC asserts that only Attachments "A," "C," "E," "G" and "I" contain information that TRNCC considers to be confidential for purposes of section 382.041 of the Health and Safety Code. Nevertheless, TRNCC acknowledges that Eastman is entitled to demonstrate whether the requested information should be withheld from disclosure. *See* Open Records Decision Nos. 652 at 2 (1997) (stating that if TNRCC takes no position under Gov't Code § 552.305, or has determined that requested information is not protected under Health & Safety Code § 382.041, attorney general will issue a decision based on a review of the information at issue and on any other information provided to this office by TRNCC or third parties), 575 at 3 (1990) (stating that if disclosure of the information at issue might result in injury to a third party's property or privacy interests, or if any substantiation previously submitted by the party does not clearly resolve its claim as a matter of law, better practice is to request an attorney general decision under statutory predecessor to section 552.305).

Eastman is not in complete agreement with TNRCC's position. According to Eastman, it appears that the information in Attachments "A," "B," "D," "J," "K," and "M" was inadvertently labeled as being confidential in Eastman's Voluntary Emission Reduction Program ("VERP") application to TNRCC. Eastman does not contest the release of those attachments to its VERP application. Eastman also argues, however, that Attachments "C," "E," "F," "G," and "I," pages 55, 57, 61, 63, 65, 73, and 89 through 93 in Attachment "H," and pages 3 through 9 in Attachment "N" constitute trade secrets under section 757 of the Restatement of Torts.² TNRCC submits no evidence that rebuts Eastman's position as a matter of law. *Cf.* Open Records Decision No. 552 at 5 (1990) (stating that if the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to requested information, attorney general will accept a private person's claim for exception as valid under statutory predecessor to section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits arguments that rebut the claim as a matter of law). Upon consideration of Eastman's arguments and examination of the information that Eastman claims must be withheld from the requestor, we find that Eastman has made a *prima facie* case that the information at issue is excepted from disclosure under section 552.110(a) of the Government Code. Therefore, TNRCC must withhold Attachments "C," "E," "F," "G," and "I," pages 55, 57, 61, 63, 65, 73, and 89 through 93 in Attachment "H," and pages 3 through 9 in Attachment "N" under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. The rest of the requested information must be released.³

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).

²Eastman also states that if it is determined that Attachment "C" is protected from disclosure, Eastman has no objection to the release of Attachment "L."

³As we are able to make this determination, we need not address Eastman's arguments under sections 552.101 and 552.110(b).

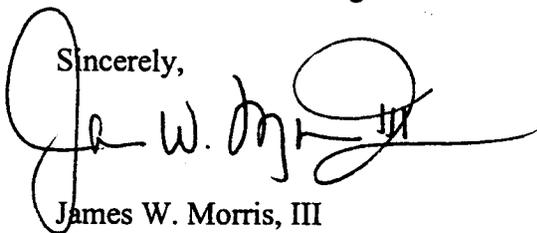
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 147999

Encl: Submitted documents

cc: Ms. Kelly Haragan
Staff Attorney
Public Citizen
2812 Hemphill Park
Austin, Texas 78705
(w/o enclosures)

Mr. David A. Golden
Senior Counsel, Legal Department
Eastman Chemical Company
P.O. Box 511
Kingsport, Tennessee 37662-5075
(w/o enclosures)