



August 27, 2001

Mr. Paul Sarahan
Director
Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2001-3772

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151180.

The Texas Natural Resource Conservation Commission ("TNRCC") received two requests for information relating to the Tyler Pipe Industries Foundry in Tyler, Texas. You inform this office that TNRCC has released some of the information that is responsive to these requests. TNRCC claims exceptions to the disclosure of other information that is responsive to both requests under sections 552.103, 552.107, and 552.111 of the Government Code. You also raise sections 552.101 and 552.110 of the Government Code with respect to responsive information concerning a private entity, Tyler Pipe Company ("Tyler Pipe"). You notified Tyler Pipe of the request for information and of its right to submit arguments to this office as to why information that implicates the proprietary interests of Tyler Pipe should not be released.¹ We have considered the exceptions raised by TNRCC and have reviewed the information you submitted.² We also have reviewed the arguments that were submitted on behalf of Tyler Pipe.

We first consider your claim under section 552.103 of the Government Code with regard to the information submitted as Exhibits C and D. Section 552.103, the "litigation exception," provides in relevant part:

¹See Gov't Code § 552.305(d); 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 Gov't Code ch. 552 in certain circumstances).

²This letter ruling assumes that the submitted representative samples of information are 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).

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish that section 552.103 is applicable to the information at issue. The governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both parts of the test must be met in order for information to be withheld under this exception. *Id.* A contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, constitutes "litigation" for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to APA).

You inform this office that TNRCC has an enforcement action pending against the present owner of the Tyler Pipe Industries Foundry. You indicate that the information submitted as Exhibits C and D relates to the enforcement action. Based on your representations and our review of the information at issue, we find that Exhibits C and D relate to litigation to which TNRCC was a party when these requests for this information were received. We therefore conclude that the information in Exhibits C and D may be withheld from disclosure at this time under section 552.103.

In reaching this conclusion, we assume that TNRCC does not seek to withhold any information that the opposing party to the litigation has seen or to which it has had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to the litigation has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). The applicability of section 552.103 ends once the related

litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). As we are able to make this determination under section 552.103 with respect to the information in Exhibits C and D, we need not address TNRCC's claims under sections 552.107 and 552.111.

Next, we address your claim regarding the information submitted as Exhibit E under sections 552.101 and 552.110 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. 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 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 TNRCC. 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).

You indicate that the documents contained in Exhibit E were designated as being confidential when they were submitted to TNRCC.³ Tyler Pipe asserts that responsive information concerning raw materials, products, processes, operations, and architectural information constitutes a trade secret of Tyler Pipe. We have received no arguments to the contrary. Having considered Tyler Pipe's arguments and examined the documents in Exhibit E, we find that a *prima facie* case has been made that some of these documents contain trade secret information. Therefore, TNRCC must withhold these documents, which we have marked accordingly, under section 552.101 of the Government Code in

³Tyler Pipe's letter brief lists eight items of "Confidential Information Provided by TNRCC to Tyler Pipe." Section 552.301(e)(1)(D) of the Government Code requires, however, that we consider only the documents submitted by the TNRCC. These documents are titled, respectively, "1992 Air Emissions Inventory" (three pages); "1992 TACB Attainment Area Emissions Inventory Questionnaire" (March 6, 1993) (Account Information Section 1); "Speciated Stack Emissions" (two pages); "1998 Annual Investigation"; "South Plant Daily Downtime 2-6-97"; "1997 Raw Sand Report"; "Shipment Report for Roff, OK" (two pages); and "Confidential Appendices" ("Confidential Appendix C") ("Confidential Emissions Data") (five pages).

conjunction with section 382.041 of the Health and Safety Code. The remaining information in Exhibit E has not been demonstrated to be a trade secret under section 757 of the Restatement of Torts or to be excepted from disclosure under section 552.110(b) of the Government Code. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm).

In summary, TNRCC may withhold Exhibits C and D in their entireties at this time under section 552.103 of the Government Code. TNRCC must withhold the marked information in Exhibit E under section 552.101 in conjunction with section 382.041 of the Health and Safety Code. The remaining information in Exhibit E must be released.

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).

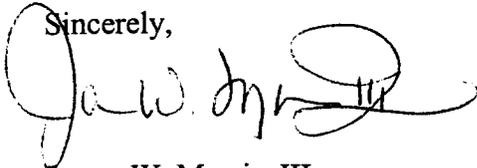
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



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

JWM/sdk

Ref: ID# 151180

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