



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2003

Mr. Paul C. Sarahan
Director
Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2003-5657

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# 185892.

The Texas Commission on Environmental Quality (the "commission") received a written request for the following information regarding three specified manufacturing sites for a specified period of time:

stack test mass emission rate of those regulated air contaminants as identified in the Maximum Allowable Emission Rate Table or those Special Conditions contained in the non-confidential portion of the applicable Air Quality Permit(s). I am also requesting the associated documentation of compliance with the applicable sampling and testing procedures associated with these required stack tests.

You state that the commission has made available a portion of the requested information. You do not contend that the remaining responsive information is excepted from required public disclosure. However, you have notified the interested third parties in this matter of their right to submit arguments to this office as to why any portion of the remaining requested information should not be disclosed. *See* Gov't Code § 552.305 (allowing governmental bodies to rely on third parties having privacy or property interest in

information to submit arguments as to why requested information should be withheld from public).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code* § 552.305(d)(2)(B). This office has timely received arguments from representatives of Owens Corning that certain information contained in the records at issue is excepted from required public disclosure pursuant to section 552.110 of the Government Code.¹

Initially we note that information is not confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any contract between the commission and any third party specifying otherwise.

Section 552.110 protects both "trade secret" information and "commercial or financial" information. *See Gov't Code* § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See 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). 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.² *See id.* This office has held that we must accept a person's claim for exception as valid under the trade secret branch of section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing,

¹Although this office also received correspondence from Johns Manville contending that its information is also excepted from required public disclosure, you have not submitted to this office any of that company's information. Accordingly, we do not consider the arguments submitted by Johns Manville.

²The 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).

not conclusory or generalized allegations, that substantial competitive injury would result from disclosure of the information at issue. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 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).

Owens Corning specifically argues that information revealing “average operating rate of a source during an air emission test,” “airflows during an air emission test,” and “processing temperature during an air emission test” are confidential under section 552.110. However, after reviewing the information you submitted to this office as being responsive to the request and Owens Corning’s arguments, we conclude that Owens Corning has not met its burden of demonstrating the applicability of section 552.110 to any portion of the submitted information. We therefore conclude that the commission must release the submitted information in its entirety.

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).

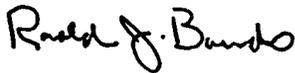
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/RWP/seg

Ref: ID# 185892

Enc: Submitted documents

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