



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 10, 2004

Ms. Stephanie Bergeron  
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Mr. Duncan C. Norton  
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OR2004-6761

Dear Ms. Bergeron & Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206854.

The Texas Commission on Environmental Quality (the "commission") received a request for "all confidential documents" relating to the following corporate facilities further specified by location: Amoco Chemical Company Chocolate Bayou Plant ("Amoco"); Equistar Chemicals ("Equistar"); Grasso Production Management ("Grasso"); Gulf Chemical and Metallurgical ("Gulf Chemical"); Chocolate Bayou Chemical Plant Company ("Chocolate Bayou"); BASF Corporation, Chemicals Division ("BASF"); Formosa Plastics Corporation ("Formosa"); Phillips' Sweeny Complex ("Sweeny"); Shintech, General Motors Corporation ("General Motors"); Dow Chemical Company ("Dow"); Oxy Vinyl, Deer Park; Oxy Vinyl, Pasadena (collectively "Oxy Vinyl"); E.I. du Pont de Nemours and Company ("Dupont"); and Rhone-Poulenc. Subsequent to her initial request, the requestor withdrew her request for "confidential documents" relating to Amoco, Equistar, Gulf Chemical, BASF, Chocolate Bayou, Sweeny, Shintech, Dow, Oxy Vinyl, and Rhone-Poulenc. Accordingly, this ruling only addresses the information requested of Grasso, Formosa, General Motors, and Dupont,

and any information related solely to Amoco, Equistar, Gulf Chemical, BASF, Chocolate Bayou, Sweeny, Shintech, Dow, Oxy Vinyl, or Rhone-Poulenc is not responsive to this request and need not be released.

The commission's Environmental Law Division and the General Counsel each submitted a separate set of responsive documents that it wishes to withhold from disclosure. The General Counsel states that it does not have documents related to some of the companies listed in the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). The General Counsel claims that the information it has submitted as responsive to the request is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. The Environmental Law Division claims that the information it has submitted as responsive is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. Additionally, the Environmental Law Division has notified each of the above listed facilities of this request and of their right to submit arguments to this office pursuant to 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received correspondence from attorneys for Formosa and Dupont. We have considered all claimed exceptions and reviewed the submitted information.

Initially, we note that 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 requested information relating to that party should be withheld from disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, neither Grasso nor General Motors has submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Thus, we have no basis for concluding that either Grasso or General Motors has a protected proprietary interest in any of the submitted information. *See, e.g., Gov't Code* § 551.110(b) (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); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, none of the submitted information relating to Grasso or General Motors may be withheld based on their proprietary interests.

Next, we will address the documents and arguments submitted by the General Counsel. The General Counsel asserts that the submitted information is excepted from disclosure under section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental

body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the General Counsel is the commission’s chief legal officer and adviser, and that the General Counsel and Assistant General Counsels regularly provide the Commissioners legal advice and assistance with regard to all items set on the commission’s public meeting agendas. You also state that the Commissioners are the clients of the General Counsel. You state that the submitted information “contains the General Counsel’s discussions of relevant legal issues and/or the related essential facts necessary for the Commissioners’ deliberations and decisions on the requested permits or authorizations, agreed orders, or emergency orders, and [the General Counsel’s] office’s legal advice with regard to such issues.” Based on your representations and our review of the information

submitted by the General Counsel, we conclude the General Counsel may withhold this information under section 552.107 of the Government Code.<sup>1</sup>

We now turn to the documents and arguments submitted by the Environmental Law Division. The Environmental Law Division also asserts that some of the information it has submitted is excepted from disclosure under section 552.107 of the Government Code. Specifically, the Environmental Law Division states that the documents it has marked with blue tabs constitute attorney-client privileged communications excepted pursuant to section 552.107(1). The Environmental Law Division has identified the parties to the communications and explained that each communication was made for the purpose of facilitating the rendition of legal services to the client. Furthermore, the Environmental Law Division explains that the privilege has been maintained. Based on these representations and our review of the submitted documents, we conclude the Environmental Law Division may withhold the information it has marked with blue tabs under section 552.107(1) of the Government Code.<sup>2</sup>

Next, the Environmental Law Division argues that the documents marked with orange tabs are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in part as follows:

(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 to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is

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<sup>1</sup>As our ruling on this information is dispositive, we do not address the General Counsel's remaining arguments.

<sup>2</sup>As our ruling on this issue is dispositive, we need not address any other arguments you raise relating to these documents.

pending or reasonably anticipated on the date the governmental body receives the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You state that the submitted materials marked by orange tabs are documents that are related to the current enforcement actions between Equistar, Chocolate Bayou, BASF, Formosa, DuPont, and Shintech (collectively, the “respondents”) and the commission. You further state that the commission’s Enforcement Division referred these enforcement actions, alleging violations against the respondents, to the commission’s Litigation Division to initiate litigation through a contested case hearing at the State Office of Administrative Hearings. Based on your representations and our review of this information, we conclude that the commission has demonstrated that litigation was pending on the date it received the request for information. Furthermore, we find that the documents marked with orange tabs are related to the pending litigation for purposes of section 552.103. Accordingly, we conclude that these documents are excepted from disclosure at this time under section 552.103.<sup>3</sup>

In reaching this conclusion under section 552.103, we assume that the opposing party to the litigation has not seen or had access to these documents. 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 that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to the pending 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). Furthermore, 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).

Next, the Environmental Law Division asserts that the information it has marked with green tabs is excepted from disclosure under section 552.111 of the Government Code as attorney work product. In order to be considered “work product,” the material must have been made or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; Open Records Decision No. 677 at 4 (2002). In order

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<sup>3</sup>As our ruling on this issue is dispositive, we need not address any other arguments you raise relating to these documents.

for this office to conclude that material was made or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The Environmental Law Division states that the documents it seeks to withhold as attorney work product are related to enforcement actions between the respondents and the commission. The Environmental Law Division further states that members of the commission’s Enforcement Division and the Enforcement Attorneys created the notes and drafts at issue, and that these documents exhibit the Enforcement staff members’ and Enforcement Attorneys’ thought processes about the litigation proceedings against the respondents. Finally, the Environmental Law Division states that the staff members and Enforcement Attorneys created the green-tabbed documents to prepare themselves and their cases for on-going litigation. After considering your arguments, this office concludes that the marked attorney work product is excepted from disclosure under section 552.111 of the Government Code.<sup>4</sup>

Finally, the Environmental Law Division claims that the documents it has marked with red tabs are excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

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<sup>4</sup>As our ruling on this issue is dispositive, we need not address any other arguments you raise relating to these documents.

An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no writ); Open Records Decision No. 615 at 4-5.

We have reviewed the information the Environmental Law Division seeks to withhold solely pursuant to section 552.111 as interagency memoranda, and have marked the information that consists of advice, recommendations, and opinions reflecting the policymaking processes of the commission. The commission may withhold the marked information under section 552.111 of the Government Code. The remaining information you seek to withhold under section 552.111 as interagency memoranda does not consist of advice, recommendations, or opinions reflecting the policymaking processes of the commission, and thus may not be withheld under that exception.

We now turn to the arguments submitted to this office by Dupont and Formosa. Both Dupont and Formosa assert that the information related to them is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. Section 382.041 of the Health and Safety Code provides in relevant part that "a member, employee, or agent of the commission may not disclose information submitted to the commission 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 protects information that is submitted to the commission 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 upon its submission to the commission. *See* Open Records Decision No. 652 (1997). Both Dupont and Formosa indicate that the request for "confidential documents" implicates information that was designated as being confidential when it was submitted to the commission. Dupont, however, does not argue that any of its information constitutes a trade secret. Therefore, you may not withhold any of Dupont's information under section 552.101 in conjunction with section 382.041. Accordingly, we consider Formosa's claim that its information at issue is protected as a trade secret.

Formosa contends that portions of the information are excepted from disclosure under sections 552.110(a) and 552.110(b) of the Government Code. Section 552.110(a) excepts trade secrets from disclosure. Section 552.110(b) excepts commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). 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); *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). This office must accept a claim that information subject to the Public Information Act (the "Act") is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision

No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Formosa asserts that the requested information includes material balances, the identity of unique chemicals used in Formosa's processes, and proprietary information about the design of Formosa's ethylene glycol and vinyl chloride plants. Upon review of Formosa's arguments, we find that Formosa has made a *prima facie* case that the information Formosa seeks to withhold is protected as trade secret information. Moreover, we have received no arguments that would rebut this case as a matter of law. We therefore conclude that the commission must withhold the information related to Formosa that was marked confidential when submitted to the commission and that constitutes a trade secret pursuant to section 552.110(a) of the Government Code.<sup>5</sup> Based on this finding, we do not reach Formosa's arguments under section 552.110(b) of the Government Code.

In summary, we conclude the commission may withhold the information submitted by the General Counsel under section 552.107 of the Government Code. The commission may also withhold the information it has marked with blue tabs under section 552.107, the information it has marked with orange tabs under section 552.103, the information it has marked with green tabs under section 552.111 as attorney work product, and the red-tabbed information that we have marked under section 552.111 as interagency memoranda. The commission must also withhold the information related to Formosa that was marked confidential when submitted to the commission and that constitutes a trade secret pursuant to section 552.110(a) of the Government Code. The remaining responsive information 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

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<sup>5</sup>Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualify as trade secret information. *See* 42 U.S.C. § 7414(c). Thus, to the extent that the documents contain any information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information in accordance with the federal law.

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,

A handwritten signature in black ink, appearing to read 'Sarah I. Swanson', with a long horizontal line extending to the right.

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/sdk

Ref: ID# 206854

Enc. Submitted documents

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