



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2005

Mr. Duncan C. Norton
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Texas Commission on Environmental Quality
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Mr. Paul C. Sarahan
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OR2005-02496

Dear Mr. Norton and 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# 219650.

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to the Aluminum Company of America Rockdale Plant ("Alcoa"). The General Counsel and the Litigation Division of the commission submitted separate responsive documents that each wishes to withhold from disclosure. The General Counsel and Litigation Division both state that some of the requested information has been released or made available to the requestor, but the General Counsel asserts that the information it submitted is excepted under sections 552.101, 552.107, and 552.111 of the Government Code, and the Litigation Division asserts that the information it submitted is excepted under sections 552.107 and 552.111 of the Government Code. The Litigation Division also claims that some of the information it submitted may be excepted from disclosure under section 552.110 of the Government Code, but makes no arguments regarding this exception. Pursuant to section 552.305(d) of the Government Code, the commission notified Alcoa of the commission's receipt of the request for information and of Alcoa's right to submit arguments to this office as to why the information at issue should not be released to the requestor. *See Gov't Code § 552.305(d); see also 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). Alcoa has responded to the notice and argues that the information at issue is excepted under sections 552.101 and 552.110 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

Initially, we note that some of the information submitted by the Litigation Division in Attachment G may have been the subject of previous requests for information, in response to which this office issued Open Record Letter Nos. 2001-4856 (2001) and 2001-5376 (2001). With regard to information in Exhibit G of the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, the commission must continue to rely on those rulings as previous determinations and withhold or release this information in accordance with Open Record Letter Nos. 2001-4856 (2001) and 2001-5376 (2001). *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent this information was not the subject of either prior rulings, we address your arguments.

Next, we note that the information submitted by the Litigation Division consists of a completed investigation by the commission of Alcoa that, the Litigation Division informs us, "ultimately resulted in an agreed settlement between the State of Texas, the United States, and Alcoa." Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is either excepted under section 552.108 of the Government Code or expressly confidential under other law. Although the Litigation Division asserts that this information may be withheld under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not other law that makes information confidential for the purposes of section 552.022. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work-product privilege under section 552.111 is not other law for purposes of section 552.022), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, this information may not be withheld on the basis of section 552.107 or 552.111. However, the Texas Supreme Court has held that the Texas Rules of Evidence

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

and Texas Rules of Civil Procedure are 'other law' within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision Nos. 677 (2002), 676 (2002). Accordingly, we will address whether the information is excepted under these rules or section 552.101 or 552.110 of the Government Code.

Rule 503(b)(1) of the Texas Rules of Evidence provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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).

In order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must do the following: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero*

Energy Corp., 973 S.W.2d 453, 4527 (Tex. App.–Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

The Litigation Division asserts that the documents it submitted in Attachments E, F, J, and K include confidential communications between attorneys for and employees of the commission made for the purpose of rendering professional legal advice. Based on these representations and our review of the information at issue, we agree that the information submitted by the Litigation Division we have marked consists of privileged attorney-client communications that the commission may withhold under Rule 503.² But we find the Litigation Division has not established that the remaining information it submitted consists of privileged attorney-client communications; therefore, it may not withhold that information under Rule 503.

For the purpose of section 552.022, information is confidential under Rule 192.5 of the Texas Rules of Civil Procedure only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation when the governmental body received the request for information and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) 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 (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank 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 second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege

²Because Rule 503 is dispositive, we do not address the other arguments for exception pertaining to this information.

enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The Litigation Division informs us that some of the remaining information at issue in Attachments H, I, and J consists of notes of attorneys for the commission regarding enforcement actions against Alcoa, and that these notes “consist of or tend to reveal the attorney’s mental processes, conclusions, and legal theories.” Based on these representations and our review of the information at issue, we conclude that the commission may withhold the privileged attorney work product we have marked under Texas Rule of Civil Procedure 192.5. But we find the Litigation Division has not established that the remaining information it submitted consists of privileged attorney work product; therefore, it may not withhold that information under Rule 192.5.

The General Counsel asserts that the information it submitted is excepted under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming 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. 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. 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. *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 a 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. 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. *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).

The General Counsel asserts that the information it submitted consists of confidential communications that were prepared by the general counsel of the commission in the course of his duties to provide legal advice to the Commissioners and that contain confidential legal advice. Based on these representations and our review of the information at issue, we agree that the information submitted by the General Counsel consists of privileged attorney-client communications that the commission may withhold under section 552.107 of the Government Code.³

Finally, the Litigation Division and Alcoa state that the information not subject to Open Record Letter No. 2001-4856 (2001) or 2001-5376 (2001) in Attachment G is excepted under section 552.101 in conjunction with section 382.041 of the Health and Safety Code, as well as section 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 section encompasses information protected by statute. Section 382.041(a) of the Health and Safety Code provides in part, with exceptions that do not appear to apply here, 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." In Open Records Decision No. 652 (1997), this office concluded that section 382.041 of the Health and Safety Code protects information submitted to the commission if a *prima facie* case is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and if the information was identified as confidential by the submitting party when it was submitted to the commission.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 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

³Because we are able to resolve this under section 552.107, we do not need address the other arguments for exception of this information.

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); *see also Huffines*, 314 S.W.2d at 776. 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial 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." Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing Alcoa's arguments and the submitted information, we conclude that Alcoa has demonstrated that disclosure of most of the remaining information in Attachment G

⁴The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (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).

would cause it substantial competitive harm. Accordingly, the commission must withhold this information, which we have marked, under section 552.110(b).⁵ However, we find that Alcoa has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. We also find that Alcoa has not established that any of this information consists of trade secret information. Thus, the commission may not withhold the remaining information at issue under section 552.101 or 552.110.

We note, however, that the documents at issue may contain information relating to emissions. 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 this particular information contains 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 to the requestor in accordance with federal law.

To conclude, to the extent the information in Exhibit G is identical to the information previously requested and ruled upon by this office in Open Record Letter Nos. 2001-4856 (2001) and 2001-5376 (2001), the commission must continue to rely on these rulings as previous determinations and withhold or release this information in accordance with them. The commission may withhold the information submitted by the Litigation Division that we have marked under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. It may also withhold the information submitted by the General Counsel under section 552.107 of the Government Code. To the extent that the information in Exhibit G contains 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 to the requestor in accordance with federal law. To the extent this information is not subject to release under federal law, the commission must withhold the information in Exhibit G we have marked under section 552.110(b). It must release the remaining information at issue.

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

⁵Because we are able to resolve this under section 552.110(b), we do not need address the other arguments for exception of this information.

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).

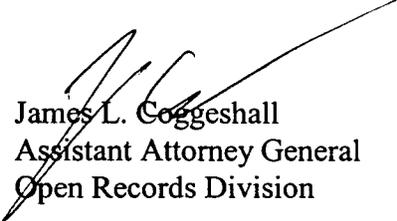
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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,



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Open Records Division

JLC/seg

Ref: ID# 219650

Enc. Submitted documents

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