



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2008

Mr. Robert Martinez
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2008-00978

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 300071.

The Texas Commission on Environmental Quality (the "commission") received a request for five specified categories of information pertaining to the "Propylene Oxide/Styrene Monomer (POSM) plant operated by Lyondell Chemical Company, formerly Arco Chemical Company, in Channelview, Texas[.]" You state that you have provided some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also indicate that releasing the submitted information may implicate the proprietary interests of Lyondell Chemical Company ("Lyondell"). Accordingly, you have notified Lyondell of the request and of its opportunity to submit arguments to this office. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have received arguments from Lyondell. We have also received comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception protects information that another statute makes confidential. The commission and Lyondell claim that the submitted information is confidential under section 552.101 in conjunction with section 382.041 of the Health and Safety Code.

Section 382.041 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 in submitting it to the commission. *See* Open Records Decision No. 652 (1997). The commission informs us that the submitted information was designated as being confidential when it was submitted to the commission. Thus, we next consider Lyondell’s claim that the submitted information is protected under section 552.110.

Section 552.110 of the Government Code protects the proprietary interests of private persons 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. 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.), cert. denied, 358 U.S. 898 (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 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). 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. The six factors to be assessed in determining whether information qualifies as a trade secret are:

(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 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. ORD 552. 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).

Section 552.110(b) protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661.

Upon review, we conclude that Lyondell has established a *prima facie* case that most of the submitted information constitutes a trade secret. Moreover, we have received no arguments that would rebut their claims as a matter of law. However, Lyondell has not shown that any of the remaining information, which consists of information pertaining to the company’s background, permit application history, and statements pertaining to the company meeting regulatory requirements, meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, sections 552.101 and 552.110(a) are not applicable to any of the remaining information, which we have marked for release. We also find that Lyondell has made only conclusory allegations that release of the remaining information at issue would cause substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, the commission may not withhold the remaining information, which we have marked for release, under sections 552.101 or 552.110(b).

We note that a portion of the submitted information appears to consist of emission data. Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. *See* 42 U.S.C. § 7414(c). Therefore, to the extent that the submitted documents contain any information that constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release any such information in accordance with federal law.

Next, we note that some of the information within the documents we have marked for release is subject to section 552.130 of the Government Code.¹ Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the commission must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

We also note that some of the information within the documents we have marked for release is subject to section 552.136 of the Government Code, which provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. The commission must, therefore, withhold the account numbers we have marked under section 552.136 of the Government Code.

Finally, we note that some of the remaining information within the documents we have marked for release is subject to section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *Id.* § 552.137(a), (b). Thus, unless the individuals at issue affirmatively consented to the release of their e-mail addresses, the commission must withhold the private e-mail addresses we have marked pursuant to section 552.137 of the Government Code.

The requestor asserts that he has a special right of access to the information made confidential by section 382.041 of the Health and Safety Code under section 552.023 of the Government Code. This section provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a). Thus, information that relates to a person may not be withheld from that person, or his or her authorized representative, on the basis of that person's right to privacy. *See also* Gov't Code § 552.023(b); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body for information concerning

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

himself). A requestor does not have a right of access under section 552.023, however, if the requested information is protected from public disclosure by a law that is not based exclusively on the requestor's own privacy interests. *See* Gov't Code § 552.023(b) (governmental body may assert as grounds for denial of access to information other provisions of Act or other law not intended to protect person's privacy interests). Because section 382.041 of the Health and Safety Code is not based solely on an individual's privacy interests, the requestor does not have a right of access to information made confidential by section 382.041.

In summary, with the exception of the documents we have marked for release, the commission must withhold the submitted information under section 552.110 of the Government Code. The commission must, however, release any information that constitutes emissions data under section 7414(c) of title 42 of the United States Code. Within the documents we have marked for release, the commission must withhold the Texas motor vehicle record information we have marked under section 552.130, the account numbers we have marked under section 552.136, and the e-mail addresses we have marked pursuant to section 552.137.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

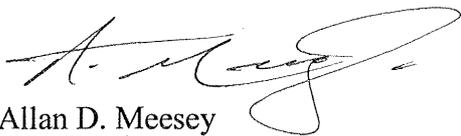
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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 Office of the Attorney General 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,



Allan D. Meesey
Assistant Attorney General
Open Records Division

ADM/eeg

Ref: ID# 300071

Enc. Submitted documents

c: Mr. Robert B. Gilmore
Kirkland & Ellis, L.L.P.
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(w/o enclosures)

Mr. George T. Shipley
Lyondell Chemical Company
Shipley, Snell, Montgomery, L.L.P.
4600 First City Tower
1001 Fannin
Houston, Texas 77002
(w/o enclosures)