



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2009

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

OR2009-00807

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# 332604.

The Texas Commission on Environmental Quality (the "commission") received a request for several categories of information pertaining to Whitmore Manufacturing Company ("Whitmore"). You state that you are releasing some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also assert that release of the submitted information would implicate the proprietary interests of Whitmore. Accordingly, you have notified Whitmore 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 comments from Whitmore. 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." This exception protects information that another statute makes confidential. Gov't Code § 552.101. The commission and Whitmore 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.¹ Thus, we next consider Whitmore's claim that the information at issue 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). 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.

¹We note that information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110).

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.

In this instance, Whitmore generally asserts that its information is subject to section 552.110. We find that Whitmore has failed to explain how this information meets the definition of a trade secret, and that a *prima facie* case has not been established that any portion of the submitted information constitutes a trade secret under the definition set forth in the Restatement of Torts. We also find that Whitmore has made only conclusory allegations that

release of the submitted information would cause substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Accordingly, we conclude that the commission may not withhold any portion of the submitted information under either section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code or section 552.110 of the Government Code. As no other exceptions are claimed, the submitted information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 332604

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Mr. Randy Huff
Whitmore Manufacturing Company
P.O. Box 9300
Rockwall, Texas 75087
(w/o enclosures)