



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 5, 2010

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

OR2010-15138

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# 395697 (PIR No. 10.07.16.04).

The Texas Commission on Environmental Quality (the "commission") received a request for five categories of information pertaining to a specified facility owned by Invista, S.à. r.l. ("Invista"). You state the commission has made some of the requested information available to the requestor. You claim the majority of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of Invista. Thus, pursuant to section 552.305 of the Government Code, you notified Invista of the request and of the company's right to submit arguments to this office as to why its information should not be released. 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 under the Act in certain circumstances). We have received comments from a representative of Invista. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

The commission and Invista claim most of the submitted information, which is labeled as Attachment 3, is subject to section 552.101 of the Government Code. Section 552.101

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<sup>1</sup>We assume 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.

excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information made confidential by other statutes, such as section 382.041 of the Health and Safety Code. Section 382.041 provides “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 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 when submitting it to the commission. *See* Open Records Decision No. 652 (1997). The commission asserts Invista marked the documents at issue as confidential when it provided them to the commission.<sup>2</sup> Thus, the information at issue in Attachment 3 is confidential under section 382.041 to the extent that this information constitutes a trade secret. Because section 552.110(a) of the Government Code also protects trade secrets from disclosure, we will consider the applicability of section 382.041 together with Invista’s arguments under section 552.110(a).

Invista claims the most of the information in Attachment 3 is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret 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.” *See* Gov’t Code § 552.110(a)-(b).

Section 552.110(a) of the Government Code protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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

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<sup>2</sup>We note 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 section 552.110).

differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.<sup>3</sup> *Open Records Decision No. 402 (1983)*.

Section 552.110(b) of the Government Code 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. *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).

Upon review of the submitted arguments, we conclude Invista has made a *prima facie* case demonstrating that the information we have marked constitutes trade secrets. Accordingly, the commission must generally withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code. However, we note that

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<sup>3</sup>The Restatement of Torts lists the following six factors 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)*.

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). As Invista points out, emission data is only subject to the release provision in section 7414(c) of title 42 of the United States Code if it was collected pursuant to subsection (a) of that section. *Id.* Thus, to the extent that any of the marked information constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release such information in accordance with federal law.

However, we find Invista has failed to show how the remaining information at issue in Attachment 3 meets the definition of a trade secret. Accordingly, this information may not be withheld under section 552.110(a). Additionally, Invista has not provided any specific factual or evidentiary showing to indicate release of the remaining information at issue would cause the company substantial competitive injury. *See* ORD 661 at 5-6. We therefore conclude the commission may not withhold any of the remaining information at issue in Attachment 3 under section 552.110(b) of the Government Code.

The commission raises section 552.107 of the Government Code for the information included in Attachment 4. Section 552.107(1) 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 Tex. 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). 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, 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 pet). 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 commission states Attachment 4 consists of a communication between commission attorneys and a commission staff member that was made for the purpose of facilitating the rendition of professional legal services to the commission. The commission also states the confidentiality of the communication has been maintained. Based upon these representations and our review, we conclude the commission may withhold Attachment 4 under section 552.107(1) of the Government Code.<sup>4</sup>

In summary, the commission must withhold the information we have marked in Attachment 3 under section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code. However, to the extent the documents being withheld 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. The commission must withhold Attachment 4 under section 552.107 of the Government Code. The remaining 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](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, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/tp

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<sup>4</sup>As our ruling is dispositive, we need not address the commission's remaining argument against the disclosure of this information.

Ref: ID# 395697

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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