



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2011

Mr. Les Trobman
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

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

OR2011-04376

Dear Mr. Martinez and Mr. Trobman:

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# 413000 (PIR# 11.01.06.10).

The Texas Commission on Environmental Quality (the "commission") received a request for fourteen categories of information related to cement and cement plants in Midlothian, ozone non-attainment areas, the North Texas Clean Air Steering Committee, the Agency for Toxic Substances and Disease Registry, and the Texas Department of State Health Services health consultation for Midlothian for a specified time period. The commission's Office of the General Counsel (the "OGC") and its Environmental Law Division (the "division") have submitted separate briefs, as well as separate documents, that each seeks to withhold. The OGC and the division state they have released some of the requested information to the requestor. The OGC claims that the information it has submitted is excepted from disclosure

under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code.¹ The division claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. The division also states that release of some of the information it has submitted may implicate the proprietary interests of Ash Grove Texas, L.P. ("Ash Grove"); Holcim Texas Limited Partnership ("Holcim"); and Texas Industries, Inc. ("TXI"). Accordingly, the division notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. See Gov't Code § 552.305; 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 in certain circumstances). We received arguments from Ash Grove and TXI. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

We first address the OGC's arguments against disclosure. The OGC claims the information it has submitted as Exhibit B is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 ORD 676 at 6-7. 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 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 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). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at

¹We note although the OGC raises section 552.101 of the Government Code, it has not provided any arguments to support this exception. Therefore, we assume the OGC has withdrawn its claim that this section applies to the information it submitted.

²We 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.

issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, 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 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 OGC states the information it has submitted as Exhibit B consists of confidential communications between the General Counsel and commissioners and their administrative assistants. The OGC explains the communications were made for the purpose of rendering professional legal services to the commission. The OGC has identified the parties to the communications. The OGC states the communications at issue were intended to be and have remained confidential. Based on these representations and our review, we find the commission may withhold the information submitted by the OGC as Exhibit B under section 552.107 of the Government Code.³

The OGC claims the information it has submitted as Exhibit C is excepted from disclosure under 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.” Gov’t Code § 552.111. This section encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, 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). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.*; *see also City of Garland v. Dallas Morning*

³As our ruling for this information is dispositive, we need not address the OGC’s remaining arguments against its disclosure.

News, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). However, a governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a policymaking document that 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. *See* Open Records Decision No. 559 at 2 (1990). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

The OGC states Exhibits C1-C4 contain notes made by one of the commissioner's executive assistants that are used to report back to the commissioner and provide advice and recommendation on agency policy. The OGC also states that Exhibits C5-C7 are draft documents that have been circulated to internal senior commission personnel related to agency policy on air quality and air permitting matters. Upon review, we agree the notes the OGC has marked in Exhibits C1-C3 and the entirety of Exhibit C4 consist of advice, opinions, or recommendations regarding policymaking matters and may be withheld under section 552.111 of the Government Code. Further, we find the drafts the OGC has submitted as Exhibits C5-C7 constitute drafts of policymaking documents that are internal to the commission. However, the OGC does not inform us whether the commission intends to release these documents in their final form. Therefore, to the extent the draft documents will be released to the public in their final form, the commission may withhold them in their entirety under section 552.111 of the Government Code. To the extent these draft documents will not be released in their final form, they may not be withheld in their entirety under section 552.111. In that instance, we have marked the portions of the draft documents that consist of advice, opinion, or recommendation regarding policy matters of the commission. Based on the OGC's representations and our review, the commission may withhold this information under section 552.111 of the Government Code. However, we find the remaining information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. The OGC does not

explain how the remaining administrative and factual information consists of the advice, opinion, or recommendation of the commission related to its policy. Thus, the OGC has failed to demonstrate that this remaining information is protected by the deliberative process privilege, and it may not be withheld under section 552.111 of the Government Code.

The OGC raises section 552.137 of the Government Code for portions of the information it has submitted as Exhibit D. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The OGC states the e-mail addresses it has marked are confidential under section 552.137(a) of the Government Code. However, we have marked some of the e-mail addresses for release because they are government or institutional e-mail addresses and not excepted from disclosure under section 552.137. *See id.* § 552.137(a) (section 552.137(a) not applicable to institutional e-mail address, internet website address, or e-mail address a governmental body provides for use of its officials or employees). Therefore, with the exception of the e-mail addresses we have marked for release, the commission must withhold the e-mail addresses the OGC has marked under section 552.137 in Exhibit D, unless the commission receives consent for their release.

We now address the division's arguments against disclosure of the information it has submitted. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision No. 515 at 3 (1988). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. However, the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 at 1-2 (1978).

The division seeks to withhold some of the information it has submitted as Attachment 4 under the informer's privilege. The division states the information at issue identifies complainants who reported possible violations of section 101.4 of chapter 30 of the Texas Administrative Code. We understand the commission has the authority to enforce this law.

The division explains that violations of this law carry administrative and civil penalties. Upon review, we find the information we have marked identifies the complainants. Thus, the commission may withhold the information we have marked in Attachment 4 under section 552.101 in conjunction with the common-law informer's privilege.

The division raises section 552.101 of the Government Code for the information it has submitted as Attachment 5. Section 552.101 also encompasses information protected by other statutes, such as section 382.041 of the Health and Safety Code, which provides in 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 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 division states Ash Grove, Holcim, and TXI marked their submitted documents as confidential when they provided them to the commission.⁴ Thus, the submitted information is confidential under section 382.041 to the extent this information constitutes a trade secret. As of the date of this letter, Holcim has not submitted comments to this office asserting any of its information constitutes a trade secret. *See* Gov't Code § 552.305(d)(2)(B) (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 information relating to that party should be withheld from public disclosure). Therefore, we have no basis to conclude any of Holcim's submitted information constitutes a trade secret. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (party must establish *prima facie* case information is trade secret), 542 at 3 (1990). Consequently, the commission may not withhold any of Holcim's submitted information under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. Moreover, because Holcim has failed to submit any arguments to our office, we have no basis to conclude release of any portion of its information would cause the company substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that

⁴We 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).

party substantial competitive harm). Consequently, the commission may not withhold any of Holcim's submitted information based on proprietary interests it may have in its information. As no other exceptions to disclosure have been raised for Holcim's information, it must be released. However, because Ash Grove and TXI assert their information constitutes trade secrets and 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 Ash Grove and TXI's arguments under section 552.110(a).

Section 552.110(a) of the Government Code protects trade secrets obtained from a person that are privileged or confidential by statute or judicial decision. Gov't Code § 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 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 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* ORD 552 at 5. 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.⁵ Open Records Decision No. 402 (1983).

Ash Grove argues its submitted information, which consists of emission rate calculations input data, constitutes trade secrets under section 552.110(a). TXI argues its submitted information, which consists of emissions estimates and process flow diagrams, constitutes trade secrets under section 552.110(a). Based on Ash Grove's and TXI's arguments and our review of their submitted information, we conclude Ash Grove and TXI have established the information they seek to withhold 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.⁶ We note, however, 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). 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 any of the information we have marked 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.

The division argues the information it has submitted as Attachments 6, 7, 8, and 9 is excepted under section 552.107 of the Government Code. As explained above, section 552.107(1) protects information that comes within the attorney-client privilege. The division states the information at issue consists of communications between commission staff attorneys and technical staff made for the purpose of facilitating the rendition of professional legal services. The division states the communications at issue were intended to be and have remained confidential. Based on these representations and our review, we find the

⁵The 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).

⁶As our ruling is dispositive, we need not address Ash Grove's remaining argument against disclosure.

commission may withhold the information submitted by the division as Attachments 6, 7, 8, and 9 under section 552.107 of the Government Code.⁷

The division raises section 552.137 of the Government Code for a portion of the information it has submitted as Attachment 10. The commission must withhold the e-mail addresses we have marked in Attachment 10, unless the commission receives consent for their release.

In summary, the commission may withhold the information the OGC has submitted as Exhibit B and the information the division has submitted as Attachments 6, 7, 8, and 9 under section 552.107(1) of the Government Code. The commission may withhold the information the OGC has marked in Exhibits C1-C3 and the entirety of Exhibit C4 under section 552.111 of the Government Code. To the extent the draft documents submitted by the OGC as Exhibits C5-C7 will be released to the public in their final form, the commission may withhold them in their entirety under section 552.111 of the Government Code. To the extent these draft documents will not be released in their final form, the commission may withhold the information we have marked within these documents under section 552.111 of the Government Code. The commission must generally withhold the information we have marked in Attachment 5, submitted by the division, 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, to the extent any of the information we have marked in Attachment 5 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. With the exception of the e-mail addresses we have marked for release in Exhibit D, the commission must withhold the marked e-mail addresses in Exhibit D and Attachment 10 under section 552.137 of the Government Code, unless the commission receives consent for their release.⁸ The remaining information must be released.

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.

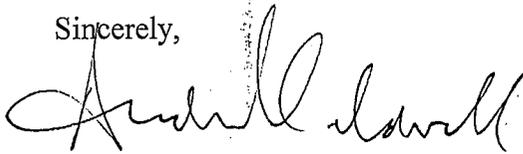
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php.

⁷As our ruling for this information is dispositive, we need not address the division's remaining arguments against its disclosure.

⁸We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in cursive script, appearing to read "Andrea L. Caldwell".

Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 413000

Enc. Submitted documents

c: Requestor
(w/o enclosures)