ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2011

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

OR2011-09367

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# 422314.

The Texas Commission on Environmental Quality (the "commission") received a request for records pertaining to Eastman Chemical Company ("Eastman"). You claim the requested information may be excepted from disclosure under sections 552.101 and 552.110 of the Government Code, but take no position on the applicability of these exceptions. However, you indicate the release of the information at issue may implicate the proprietary interests of Eastman. Accordingly, you inform us, and provide documentation showing, pursuant to section 552.305 of the Government Code, the commission has notified Eastman of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining 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 have received arguments from Eastman. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it does not consist of records pertaining to Eastman.

This ruling does not address the public availability of non-responsive information, and the commission need not release such information in response to the request.

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 encompasses information made confidential by other statutes, including 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 commission states Eastman marked the submitted documents as confidential when it provided them to the commission. Thus, the submitted information is confidential under section 382.041 to the extent this information constitutes a trade secret. Eastman argues its submitted information is confidential under section 552.110. Because section 552.110(a) also protects trade secrets from disclosure, we will consider the submitted arguments under section 382.041 together with Eastman's arguments under section 552.110(a).

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to 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." Gov't Code § 552.110(a)-(b).

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 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 the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.[1] Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude section 552.110(a) is applicable unless the party claiming this exception has shown the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* 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.*; 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, we find Eastman has made a *prima facie* case that some of its information, which we have marked, constitutes trade secret information. Thus, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code and section 552.110(a) of the Government Code. However, we determine that Eastman has failed to demonstrate that any of the remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for its information. Accordingly, the commission may not withhold any portion of the remaining information under section 552.110(a).

Upon review, we find Eastman has established that release of a portion of its remaining information, which we have marked, would cause the company substantial competitive injury. Therefore, the commission must withhold the marked information under

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[1]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).

section 552.110(b) of the Government Code. Although Eastman generally claims the remaining information is also protected under section 552.110 of the Government Code, it has not made any specific arguments to withhold the remaining information. Accordingly, the commission must withhold the information we have marked under section 552.110(b) of the Government Code.

We note 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. *See* 42 U.S.C. § 7414(c). Therefore, to the extent the submitted information we have marked contains 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.

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code and section 552.110(a) of the Government Code. The commission must withhold the information we have marked under section 552.110(b) of the Government Code. To the extent the submitted 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 any such information in accordance with federal law. 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, 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,

Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 422314

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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(w/o enclosures)