



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 27, 1995

Mr. Gregory J. Pfeifer  
Legal Services Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR95-993

Dear Mr. Pfeifer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33430.

The Texas Natural Resource Conservation Commission (the "commission") received a request for documents designated by the requestor on a "Sikes Disposal Pits Remedial Action List of Submittals." You state that one of the companies whose documents have been requested designated them as confidential.<sup>1</sup> You therefore conclude that the company may claim that the requested information is excepted from disclosure under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, this office informed the company of the request and of its obligation to claim the exceptions to disclosure it believes apply to the requested information, together with its arguments as to why it believes the claimed exceptions apply. That company informed this office that it was only the custodian of the documents and indicated that another company, IT/Davy Joint Venture ("IT/Davy"), was the originator of the documents. During this same time period, IT/Davy submitted a letter to this office, stating that it did not believe that the request encompassed its documents. However, if the request did encompass its documents, IT/Davy claimed that section 552.110 of the Government Code excepted from disclosure information concerning the operation and maintenance of its Hybrid Thermal Treatment System ("HTTS").

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<sup>1</sup>We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.,* Open Records Decision No. 180 (1977).

This office subsequently sent a letter to IT/Davy pursuant to section 552.305, to which IT/Davy made no reply. You have submitted to this office for review samples of the documents requested.<sup>2</sup> We have considered the exception that you and IT/Davy claimed and have reviewed the sample documents.

Section 552.110 excepts from disclosure trade secrets.<sup>3</sup> The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>4</sup> Whether a claimant makes a prima facie case depends on whether the

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<sup>2</sup>In reaching our conclusion here, we 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.

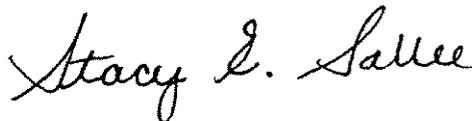
<sup>3</sup>Section 552.110 also excepts from disclosure commercial or financial information that is made confidential by statute or judicial decision. However, that prong of the exception is not claimed here so we need not discuss it.

<sup>4</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures

claimant's arguments as a whole correspond to the criteria for trade secrets detailed in the Restatement of Torts and adopted by the Texas courts. Open Records Decision No. 620 (1993), 552 (1990). Although IV/Davy claims that its HTTS is a trade secret, it makes no argument as to how the information meets the definition of a trade secret or the requirements of the Restatement of Torts. We conclude that IV/Davy has not made a prima facie case that its HTTS information is a trade secret. Therefore, the commission may not withhold this information from disclosure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/ch

Ref.: ID# 33430

Enclosures: Submitted documents

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(footnote continued)

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, *supra*; see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

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