



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 27, 1997

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-1217

Dear Mr. McCalla:

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# 106029.

The Texas Natural Resource Conservation Commission (the "commission") received a request for "any and all documents concerning Champion International Paper Company" in Sheldon, Harris County, Texas, from 1993-1996. The commission has released some of the requested information. However, you explain that certain information in the Champion files may not be excepted from disclosure because it contains trade secrets and other confidential information, and was marked "confidential" when submitted. You are concerned that the documents are excepted from disclosure pursuant to section 382.041 of the Health and Safety Code and under section 552.110 of the Government Code.

Pursuant to section 552.305, we notified Champion of the request. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). Champion responded to our notification by asserting that the requested information is protected under section 552.110 of the Government Code.

In Open Records Decision No. 652 (1997), this office concluded that section 382.041 of the Health and Safety Code protects information submitted to the commission if a prima facie case is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and if the information was identified as confidential by the submitting party when it was submitted to the commission.

According to 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. . . . 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ You have indicated that Champion identified these documents as confidential at the time they submitted them to the commission. In our opinion, however, Champion has failed to establish a prima facie case that these documents are trade secrets. Champion's arguments are largely conclusory and do not discuss any of the above criteria. We therefore conclude that the commission may not withhold the documents under section 382.041 of the Health and Safety Code.²

Champion also argues that the requested information is excepted from disclosure as commercial or financial information under the second prong of section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two

¹There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

- (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 the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.

²We note in this regard that the commission, in its March 10, 1997 request to this office for a decision, stated that "TNRCC staff are reviewing the information marked confidential. Upon completion of that review the TNRCC will provide the Attorney General's Office with a statement indicating whether TNRCC technical staff agree that the subject information may relate to a trade secret." As of the date of this ruling, the only statement this office has received from the commission relating to the trade secret status of the requested information is contained in a March 14, 1997 letter, wherein it is stated, "[t]he highlighted portions of the documents contain information that the TNRCC believes may be the subject of a trade secret. The unmarked information appears to be already in the public domain. Please note that the TNRCC's preliminary screening is only intended to give the Opinion Committee a general indication of which portions of the enclosed documents may contain trade secrets."

types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). Upon review of the arguments submitted by Champion, we conclude Champion has not met its burden under section 552.110 and therefore, the requested information must be released to the requestor.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 106029

Enclosures: Submitted documents

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