



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 3, 1997

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

OR97-2035

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 109071.

The Texas Natural Resource Conservation Commission (the "commission") received a request for files relating to the lead contamination at the Cadillac Heights neighborhood in Dallas, Texas and for files relating to the Dixie Metals Plant located at 3030 McGowan, Dallas, Texas. You state that the commission has released most of the requested documents. You claim that the submitted documents, Exhibits B and C, are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.110 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Exhibit B is a representative sample of documents from the commission's Cadillac Heights files.¹ You claim that Exhibit B is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111. You note that the documents in Exhibit B were the subject of Open Records Letter No. 97-0313 (1997), issued by this office on February 10, 1997. In Open Records Letter No. 97-0313 (1997), we concluded that the commission reasonably anticipated litigation regarding lead contamination in the Cadillac Heights neighborhood and could withhold documents relating to

¹We 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.

the anticipated litigation from disclosure under section 552.103(a) of the Government Code.² You contend that the commission should be able to continue to withhold Exhibit B from disclosure under section 552.103(a). You state the following:

The issues surrounding the Cadillac Heights neighborhood lead contamination have not been completely resolved Although the companies alleged to be responsible for the contamination signed Agreed Orders . . . the work identified in the Order has not been completed. Until it is, the [commission] must remain prepared to initiate litigation to enforce the terms of the Orders.

Under these circumstances, we agree that the commission may continue to withhold Exhibit B from disclosure under section 552.103(a) in accordance with Open Records Letter No. 97-0313 (1997).³ Because we conclude that the commission may withhold Exhibit B from disclosure under section 552.103(a), we need not address your other arguments against disclosure of Exhibit B at this time.

Exhibit C consists of documents that the Exide Corporation, f/k/a Dixie Metals Company ("Exide"), marked as confidential when it submitted them to the commission. The documents relate to air permitting issues. You state that these documents may be excepted from disclosure under section 382.041 of the Health and Safety Code and section 552.110 of the Government Code. You have marked the sections of these documents that may constitute trade secrets, but you have not advanced trade secret arguments on behalf of Exide. Pursuant to section 552.305 of the Government Code, we notified Exide of the request for information and of its opportunity to claim that Exhibit C is excepted from disclosure. Exide did not respond to our notification. Nevertheless, we will consider the exceptions you have raised on behalf of Exide.

Section 552.101 of the Government Code excepts from disclosure information that is confidential by statutory law. In Open Records Decision No. 652 (1997), this office concluded that

²Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

³In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349(1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 submitting party identified the information as confidential when submitting it 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. 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. 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).⁴

You indicate that Exide identified the documents in Exhibit C as confidential when it submitted them to the commission. However, Exide has not offered any evidence to substantiate the claim that these documents contain trade secrets. We conclude, therefore, that Exhibit C is not excepted from required public disclosure under either section 552.101 or the trade secret prong of section 552.110 of the Government Code. *See* Open Records Decision No. 552 (1990) (trade secret prong of section 552.110 also requires governmental body to establish *prima facie* case that information is trade secret). Accordingly, the commission must release Exhibit C to the requestor.

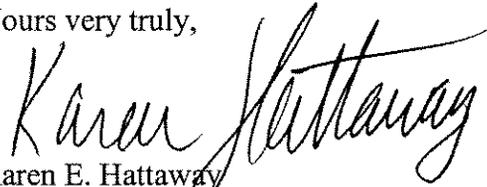
⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and 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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 109071

Enclosures: Submitted documents

cc: Mr. David K. Line
The Line Lawfirm, P.C.
2711 North Haskell, Lock Box 30
2020 Cityplace Center East
Dallas, Texas 75204
(w/o enclosures)

Mr. Ari D. Levine
Assistant General Counsel
Exide Corporation
645 Penn St.
Reading, Pennsylvania 19601
(w/o enclosures)