



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 26, 1998

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

OR98-2056

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# 117629.

The Texas Natural Resource Conservation Commission (the "TNRCC") received a request for information regarding Hoechst Celanese Corporation ("Celanese") which includes access to all documents that the TNRCC possesses regarding all Celanese Corporation facilities in Texas.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.107, 552.110 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

You assert that the information regarding Celanese, and its processes is excepted from disclosure by section 552.110 of the Government Code. You have also indicated that Celanese identified some of the documents as confidential at the time that it submitted the documents to the TNRCC. Because the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified Celanese of its

¹You inform this office that you have made available to the requestor the portions of the requested documents you believe to be public information

²We will not consider section 552.103 and 552.107 as you do not establish how sections 552.103 and 552.107 apply under the instant facts. If a governmental body does not establish how and why an exception applies to the requested information then this office has no basis upon which to pronounce it protected. Open Records Decision No. 363 (1983).

opportunity to claim that the information Celanese submitted to the commission is excepted from required public disclosure. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990). Celanese responded to our notification by asserting that the requested information is a confidential trade secret and, therefore, excepted from required public disclosure under section 552.110 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from disclosure two 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 its brief to this office, Celanese claims that the submitted documents can be categorized as six types of information and that "all six groups of information are confidential," and excepted from required public disclosure as trade secrets.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp v Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 US 898 (1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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) (emphasis added). 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).³ This office has held that if a governmental

³The 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]

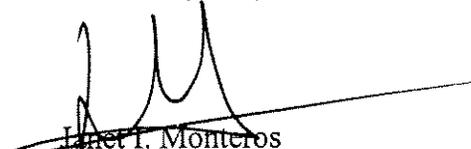
body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

We have considered Celanese's trade secret arguments and reviewed the submitted records. We agree that most of the information, specifically, Attachments 2 through 7 of the request, which we have marked, must be withheld pursuant to the trade secret prong of section 552.110.

Section 552.111 excepts from disclosure inter-agency or intra-agency communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. *See Texas Department of Public Safety v Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). Section 552.111 excepts from required public disclosure preliminary drafts of documents related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). However, section 552.111 does not except from disclosure purely factual information. We have examined the document contained within Attachment 1. We have marked the portion of the document which must be withheld under section 552.111 and you must release the remaining portion as it contains factual information.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

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).

JIM/nc

Ref: ID# 117629

Enclosures: Submitted documents

cc: Mr. David Van Os
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(w/o enclosures)