



April 1, 1999

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

OR99-0888

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# 123200.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information relating to a proposed commission rule regarding cleaner burning gasoline. You seek to withhold portions of the requested information under sections 552.107, 552.110, and 552.111 of the Government Code.

Section 552.107(1) protects information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege.

We have reviewed the information for which you claim the protection of section 552.107, and, except as indicated, agree that you may withhold the information you have marked under section 552.107. Please note, however, that any information contained in the records at issue that has already been disclosed to the public, either in public meetings or in some other manner, may not be withheld under the attorney-client privilege. Open Records Decision No. 412 (1984).

Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972).

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 (1993). If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). Also, drafts of documents *intended for release* may be withheld under 552.111. Open Records Decision No. 559 (1990).

We have reviewed the information for which you claim the protection of section 552.111. Except as indicated, we agree that you may withhold the information you have marked under those provisions.

You advised that a portion of the requested information may implicate third party proprietary interests so as to be subject to the section 552.110 exception. Pursuant to section 552.305, we have notified the third party in question, Purvin & Gertz, which has submitted arguments that a portion of the information at issue constitutes trade secrets protected by section 552.110.

Section 552.110 excepts from required public disclosure

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

We address only the trade secret branch of section 552.110. 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . 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) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

There are six factors to be assessed in determining whether information qualifies as 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 this information; and

- 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 No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990).

Having reviewed Purvin & Gertz arguments, it is our opinion that they have not demonstrated that the information at issue constitutes trade secrets within the ambit of the protection of section 552.110. Therefore, except for portions of the information which were incorporated into commission documents and which we have found to be protected by section 552.111, per the previous discussion, the information for which section 552.110 protection was claimed must be released.¹

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.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 123200

Enclosures: Submitted documents

¹We note you also included a copy of the Purvin & Gertz information *in toto* in the packet in which you marked information for which you were claiming the protection of section 552.111. However, you did not mark any portions of the Purvin & Gertz information for which you were claiming section 552.111 protection. *See* Gov't Code § 552.301(b)(4) (governmental body claiming exception must label specific portions of information for which exception is claimed).

cc: Mr. Jim Mathews
Mathews & Freeland
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(w/o enclosures)