



September 13, 1999

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

OR99-2543

Dear Mr. Sarahan:

You ask us to reconsider Open Records Letter No. 99-1654 (1999). Your request for reconsideration was assigned ID# 127231.

The Texas Natural Resource Conservation Commission (the "commission") received requests for documents relating to ASARCO and its subsidiary, Encycle Texas, Incorporated ("Encycle"). In Open Records Letter No. 99-1654, we concluded that certain of the requested documents were excepted from disclosure under sections 552.103, 552.107, 552.110, and 552.111 of the Government Code. You now ask for clarification regarding the commission's submission of sample documents and the application of section 552.103. On behalf of Encycle, you also ask us to reconsider whether several documents are excepted from disclosure under the trade secret prong of section 552.110.

You explain that the commission, in conjunction with its original request for an open records ruling, submitted to this office a "representative sample" of the documents it sought to withhold from disclosure. Open Records Letter No. 99-1654 did not state that the ruling applied to the submitted sample documents as well as substantially similar documents. Assuming that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole, the commission may rely on both this ruling and Open Records Letter No. 99-1654 to withhold substantially similar documents from disclosure. *See* Open Records Decision Nos. 499 (1988), 497 (1988). These open records rulings do not reach, and therefore do 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.

You ask for clarification regarding the following language from Open Records Letter No. 99-1645:

We note, however, that when the opposing party in the litigation has seen or had access to any of the information in these records, there is

no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

ORL 99-1645 at 2. You ask whether this portion of the ruling “appl[ies] to all documents, including documents created to facilitate settlement negotiations.” In your original request for a ruling, you argued that section 552.103 should apply to documents exchanged between the parties to the settlement negotiations. You note the disclosure of documents created to facilitate settlement negotiations “would hamper negotiation processes.” For these reasons, we conclude that section 552.103 excepts from disclosure documents relating to the settlement negotiations, even if those documents have been exchanged between the parties to the settlement negotiations. *See* Open Records Letter No. 96-2447 (1996).¹

Finally, you ask us to reconsider whether the documents referenced in footnote 1 of Open Records Letter No. 99-1654 are excepted from disclosure under section 552.110. When Encycle submitted its original arguments against disclosure, Encycle was not aware that the documents referenced in footnote 1 were at issue. Encycle has now submitted section 552.110 arguments against the disclosure of those documents. Because a third party’s proprietary interests are compelling, we will consider Encycle’s new arguments under section 552.110. *See* Open Records Decision Nos. 552 (1990), 150 (1977) (third party interests are generally compelling and overcome presumption that information is public).

Section 552.110 protects the property interests of third parties 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. 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

¹We note that Senate Bill 1851, which is effective September 1, 1999, deletes the phrase “settlement negotiations” from section 552.103. S.B. 1851, 76th Leg., R.S. (1999).

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 at 5 (1990).² After examining Encycle’s arguments and the submitted documents, we conclude that Encycle has established that all of the submitted documents must be withheld from disclosure under section 552.110 as trade secrets. Open Records Letter No. 99-1654 is overruled to the extent it conflicts with this ruling.

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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ljp

Ref: ID# 127231

²The 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 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Encl. Submitted documents

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