



November 19, 1999

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

OR99-3337

Dear Mr. Sarahan:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 129117.

The Texas Natural Resource Conservation Commission (the "commission") received a request for 47 categories of information concerning air policy, air enforcement, and emissions information with specific reference to Texaco Chemical Company's/Huntsman Petrochemical Company's facility in Port Arthur, E.I. du Pont de Nemours & Company, Inc.'s Sabine River Works facility in Orange and Victoria facility in Victoria, and Clark Refining & Marketing, Inc.'s facility in Port Arthur, Texas. You indicate that much of the responsive information will be made available to the requestor. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.108, 552.110, and 552.125 of the Government Code.<sup>1</sup> You explain that you have clarified with the requestor some of the specific documents that are sought. Gov't Code § 552.222; Open Records Decision No. 663 (1999). The requestor has revised his request "to exclude from production in response to our Public Information Action Request Nos. 30 and 31 any information submitted by the regulated community under confidential cover." Consequently, you have withdrawn your request for a decision under

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<sup>1</sup>Although you raise section 552.125, you do not explain how or why any of the submitted information is excepted under this provision. Consequently, we do not address whether any information may be withheld under section 552.125.

section 552.110 for those documents responsive to request Nos. 30 and 31 which were marked confidential by the party who submitted them. You continue to claim section 552.110 for those documents marked confidential that are responsive to request numbers 1-16. You have submitted representative samples of the documents you seek to withhold as enclosures 13-22. We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

You first argue that “the records produced and maintained by the Special Investigation Section of the [commission]” are excepted from disclosure by sections 552.101, 552.103, 552.107, and 552.108 of the Government Code. Although you do not indicate which of the submitted documents falls under this category, you explain that “[t]he items withheld consist of material and testimony provided before a Grand Jury for the United States District Court for the Eastern District of Texas, which subsequently indicted the targets of the investigation. . . . The information which is maintained by the Special Investigations Unit was presented to the Federal Grand Jury and is subject to Rule 6 of the Federal Rules of Criminal Procedure.” You further state that release of this information would interfere with the upcoming prosecution of the case. You have provided this office with a copy of the Superseding Indictment in that case. You have also provided this office with a letter from an Assistant United States Attorney stating that the responsive documents reviewed and prepared by the Special Investigations Unit are directly related to the subject matter of the charges in the Superseding Indictment and the federal criminal investigation.

Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

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<sup>2</sup>In reaching our conclusion here, we 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.

Gov't Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). We find that you have shown the applicability of section 552.108 in this instance. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 (1978); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information may provide compelling reason for nondisclosure). Thus, we conclude that the commission may withhold the responsive Special Investigations Unit information that has been referred or provided to the federal criminal investigators or prosecutors. *See* Open Records Letter Nos. 99- 1150 (1999), 99-0187 (1999).<sup>3</sup>

You next contend that the responsive information on the civil side of the commission, submitted as enclosures 13-22, may be withheld from disclosure. First, you contend that enclosures 13, 14, 15, 16, and 19 are excepted from disclosure by section 552.103. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information, and (2) the information at issue is related to that litigation. Gov't Code 552.103; *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that there is currently an enforcement action pending against the Hunstman Petrochemical Company's facility in Port Arthur which may only be resolved through settlement, administrative hearing, or trial. *See* Open Records Decision No. 588 (1991) (contested case under the Administrative Procedure Act (the "APA"), Gov't Code ch. 2001, is litigation for purposes of section 552.103 of the Government Code). You also specifically argue that the notes relevant to the settlement be withheld under section 552.103. We have reviewed the representative documents for which the commission has asserted section 552.103(a) and agree that they relate to the pending enforcement action. *Texas Legal*

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<sup>3</sup>Because we make a determination under section 552.108 for the Special Investigations Unit information, we need not address your additional claimed exceptions at this time.

*Found.*, 958 S.W.2d at 483. Therefore, the commission may withhold the documents in enclosures 13, 14, 15, 16, and 19 under section 552.103(a). *See* Open Records Letter Nos. 96-1173 (1996), 96-395 (1996).

You next assert that enclosure 17 is protected from disclosure because it contains attorney work product created in anticipation of litigation which has concluded. In Open Records Decision No. 647 (1996), this office found that a governmental body must show that the work product (1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and (2) consists of or tends to reveal the thought processes of an attorney. *Id.* at 5. You state that the documents in enclosure 17 concern anticipated litigation that has concluded. The documents themselves show that the commission was involved in settlement negotiations concerning an enforcement action and reflect the attorney's thought processes for the settlements. However, it appears that some of the documents were either obtained from or provided to the opposing party in the actions. We do not believe that this information may be withheld as attorney work product under section 552.111. Accordingly, the commission may withhold the requested information contained in enclosure 17 under section 552.111 except for those documents which we have marked. To the extent this information was not obtained from or provided to the opposing party, it may be withheld under section 552.111.

You additionally claim that enclosure 18 is protected from disclosure by the attorney-client privilege under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We find that most of the information in enclosure 18 reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. However, some of the submitted information is purely factual and may not be withheld under this exception. We have marked the information that may be withheld.

You claim that the information contained in enclosures 20 and 21 may be withheld under the internal memorandum exception in section 552.111 of the Government Code. You also claim that enclosure 20 is protected from disclosure by section 552.106 of the Government Code. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111

exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. In Open Records Decision No. 559 (1990), this office further concluded that a preliminary draft of a document that is intended for public release in a final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such could be withheld pursuant to the statutory predecessor to section 552.111.

The purpose of section 552.106 is similar to that of section 552.111: to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body and to thereby protect the internal "deliberative" or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material; rather, it excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation.

While most of the submitted documents in enclosures 20 and 21 pertain to the policy functions of the commission, some of the information contained in these documents is purely factual or relates solely to routine personnel or administrative matters. *See Garland v. Dallas Morning News*, 969 S.W.2d 548, 557 (Tex. App.--Dallas 1998, pet. requested) (*citing Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.--Houston [14th Dist.] 1996), *writ denied per curiam*, 41 Tex. Sup. Ct. J. 575 (1998)). In this instance, section 552.106 provides no greater protection for the information submitted as enclosure 20 than that afforded by section 552.111. Consequently, we have marked those portions of the documents that may be withheld from required public disclosure under section 552.111. The remaining information in enclosures 20 and 21 must be released.

Finally, you ask whether the commission must withhold the information submitted as enclosure 22 as confidential trade secret or commercial or financial information under sections 552.101 and 552.110. Section 552.101 of the Government Code requires withholding, *inter alia*, information made confidential by statute. Section 382.041(a) of the Health and Safety Code provides in part, with exceptions which do not appear to apply here, that "a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Open Records Decision No. 652 (1997) ruled, however, that if the commission seeks to withhold information from disclosure under section 382.041, it must seek the decision of this office under the provisions

of chapter 552 of the Government Code, the Texas Public Information Act. If the information was identified as confidential when it was submitted to the commission, this office will permit withholding the information to the extent a *prima facie* case is made that the information is a “trade secret.” *Id.* Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

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).

You advise that the submitted information may be the kind that was found to be public in Attorney General H-539 (1975). That opinion cited, *inter alia*, federal law now at title 42 U.S.C. section 7414(c) for the proposition that emission data submitted to the commission's predecessor, the Texas Air Control Board, is public. You also advise that the submitted information claimed to be protected may meet some of the Restatement's factors, but you express no opinion with regard to the satisfaction of the other factors.

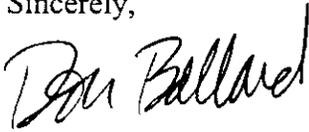
Commercial or financial information may be withheld when it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 145-147, n. 200 (competitive harm prong denied when prospect of injury too remote or when information is too general in nature).

Pursuant to section 552.305(d) of the Government Code, if release of a person's proprietary information may be subject to exception under section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under section 552.301 must make a good faith attempt to notify that person of the request for the attorney general decision. As of the date of this letter, we have received no comments from any third party objecting to the release of the requested information. Having reviewed your arguments and the information for which the protection is claimed, we conclude that no *prima facie* or specific factual evidence has been demonstrated to establish that the requested information in enclosure 22 must be withheld under section 552.101 or 552.110. *See* Open Records Decision Nos. 652 (1997), 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party 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), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Consequently, the information in enclosure 22 must be released.

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,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ljp

Ref.: ID# 129117

Encl: Marked Documents

cc: Mr. Laurence K. Gustafson  
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(w/o enclosures)