



November 22, 2000

Mr. John Deering
Environmental Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2000-4513

Dear Mr. Deering:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141694.

The Texas Natural Resource Conservation Commission (the "TNRCC") received a request for all documents, information, communications, and any other information pertaining to GB Biosciences Corporation, ISK Magnetics, Inc., ISK Biosciences Corporation, ISK Biotech Corporation, Zeneca or any similar form of name in connection with the Greens Bayou Plant in the possession of the Financial Assurance Section of the TNRCC. You state that you have made the public documents available to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

You assert that a portion of the documents in Attachment C are excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. You claim that sections 361.037 and 361.085 of the Health and Safety Code protect information submitted to the TNRCC that was identified as confidential by the submitting party when the information was submitted to the TNRCC. Section 361.037, which pertains to access to hazardous waste records, provides as follows:

¹In 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.

(a) Authorized agents or employees of [TNRCC] have access to and may examine and copy during regular business hours any records pertaining to hazardous waste management and control.

(b) Except as provided by this subsection, records copied under Subsection (a) are public records. If the owner of the records shows to the satisfaction of the executive director that the records would divulge trade secrets if made public, [TNRCC] shall consider the copied records confidential.

(c) Subsection (b) does not require [TNRCC] to consider the composition or characteristics of solid waste being processed, stored, disposed of, or otherwise handled to be held confidential.

Health & Safety Code § 361.037. Section 361.085(a) of the Health and Safety Code, which pertains to financial disclosure information, provides the following:

Before a permit may be issued, amended, transferred, extended, or renewed for a hazardous waste management facility, the [TNRCC] shall require as a part of each application information it deems necessary to demonstrate that an applicant has sufficient financial resources to operate the facility in a safe manner and in compliance with the permit and all applicable rules, including how an applicant intends to obtain financing for construction of the facility, and to close the facility in accordance with applicable rules. That information may include balance sheets, financial statements, and disclosure of relevant information regarding investors and stockholders, or information required by Title 40, Code of Federal Regulations, Part 264, Subpart H. *If the information would be considered confidential under applicable law, the [TNRCC] shall protect the information accordingly. . . .*

Health & Safety Code § 361.085(a) (emphasis added).

In Open Records Decision No. 652 (1997), this office interpreted the applicability of section 382.041 of the Health and Safety Code which contains language similar to section 361.037 of the Health and Safety Code. In interpreting the language of

section 382.041, this office found that the TNRCC must seek a decision from this office to withhold information from disclosure in accordance with the Public Information Act. *See* Open Records Decision No. 652 (1997). Therefore, if the information was identified as confidential when it was submitted to TNRCC, this office will permit withholding the information to the extent a *prima facie* case is made that the information is a “trade secret.” *Id.* With regard to section 361.085(a) of the Health and Safety Code, we find that this section merely provides that the TNRCC must ask this office for a decision in order to withhold confidential information, such as trade secrets. Thus, we conclude that the responsive information may be withheld to the extent a *prima facie* case is made that the information contains trade secrets under section 552.110 of the Government Code.

You state that you have informed GB Sciences of the request for information and that GB Sciences may submit arguments to this office against disclosure of its information. *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) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). As of the date of this letter, we have not received any arguments from GB Sciences. However, TNRCC argues that the information at issue constitutes trade secrets.

Section 552.110(a) of the Government Code excepts from disclosure a “trade secret.” A “trade secret”

may consist of 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). *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). However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

Upon careful review of the arguments submitted by TNRCC and the information at issue, we find that there has been no demonstration that the information contains trade secrets. Thus, none of the financial assurance information in Attachment C is excepted from disclosure under sections 552.101 or 552.110 and must be released.

You also assert that portions of the information in Attachment C are excepted by section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure 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. *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). 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). However, an agency's policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel

as to policy issues. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.–Houston [14th Dist.] 1996, writ denied) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy); Open Records Decision No. 615 at 5-6 (1993). In addition, 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 at 4-5 (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 under section 552.111. Open Records Decision No. 313 (1982).

You explain that the documents reflect a policy discussion concerning the acceptability of various financial assurance documents under Texas law. Further, you state that in the intra-agency communications, TNRCC staff persons are reviewing or formulating agency policy and procedures in the context of the facts presented. After reviewing the submitted documents, we conclude that portions of the communications contain advice, opinion, or recommendation on policy matters that may be withheld under section 552.111. We have marked the information that you may withhold. However, the remaining information is purely factual and may not be withheld under section 552.111.

In conclusion, you must release the submitted financial assurance information. You may withhold the marked information under section 552.111, but you must release the remaining information which is not excepted by section 552.111.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 141694

Encl: Submitted documents

cc: Ms. Lori Warner
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(w/o enclosures)