



February 21, 2002

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

OR2002-0834

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158243.

The Texas Natural Resource Conservation Commission (the "commission") received a written request for "all documents relating to an explosion/upset which occurred [sic] at the Ultimar [sic] Diamond Shamrock refinery in Three Rivers Texas (Permit No. 17519) in July 2001 as well as any subsequent explosions/upsets/releases at the facility up to the present date." You state that the commission has made a portion of the requested information available to the requestor. You contend, however, that other requested records, a representative sample of which you submitted to this office, are excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code.¹ Additionally, you have requested a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information is excepted from public disclosure.

We will first address your claims under sections 552.107(1) and 552.111. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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

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 No. 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.

section 552.107(1) excepts from public disclosure only “privileged information,” that is, information that reflects either client confidences 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. Open Records Decision No. 574 at 5 (1990). After reviewing the single document you submitted to this office as Attachment C, we conclude that portions of this record constitute a privileged attorney-client communication. We have marked the portions of this document that the commission may withhold pursuant to section 552.107(1) of the Government Code.

Section 552.111 of the Government Code protects 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 policymaking process. Open Records Decision No. 615 at 5 (1993); *see also Austin v. City of San Antonio*, 630 S.W.2d 391 (Tex. App.--San Antonio 1982, writ ref’d n.r.e.). 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 5 (1993). You have not explained how the single memorandum you submitted as Attachment D relates to a policy matter. Furthermore, after reviewing the memorandum, we conclude that this document consists solely of factual information. Consequently, the commission may not withhold any responsive information pursuant to section 552.111 of the Government Code.

You also suggest that some of the requested information might be excepted from public disclosure pursuant to section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision.” (Emphasis added.) Section 382.041(a) of the Health and Safety Code provides:

Except as provided by Subsection (b), 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.

In Open Records Decision No. 652 (1997), this office determined that the definition of a trade secret contained in the Restatement of Torts and adopted by the Texas Supreme Court for use in common law trade secret actions is the appropriate standard to use when determining if information is “relating to the secret processes or methods of manufacture or production” under section 382.041 of the Health and Safety Code. Accordingly, information is protected under section 382.041 if 1) it is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and 2) the information was identified as confidential by the submitting party when it was submitted to the commission. Because this office also looks to the Restatement of Torts definition of “trade secrets” when making determinations under section 552.110 of the Government Code, we will consider the applicability of these two provisions together.

There are six factors to be assessed in determining whether information qualifies as a trade secret.² 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 at 5 (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).

You do not take a position as to whether any of the submitted information consists of confidential trade secrets. However, you notified Ultramar Diamond Shamrock ("Diamond Shamrock") and UOP, L.L.C. ("UOP") that, pursuant to section 552.305, these third parties may make arguments for withholding the information. Although a representative of Diamond Shamrock has submitted arguments to this office contending that certain of its records are excepted from public disclosure under section 552.110, Diamond Shamrock has not established a *prima facie* case that any of its records constitute trade secret information. Furthermore, as of the date of this letter, UOP had not submitted any arguments to this office in favor of withholding the submitted information. We therefore conclude that none of the requested information may be withheld pursuant to either section 382.041 of the Health and Safety Code or section 552.110 of the Government Code. *See* Gov't Code § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the commission must release the requested information to the requestor in its entirety, except for the information we have marked under section 552.107(1) of the Government Code.

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

²These six factors are

- 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.

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).

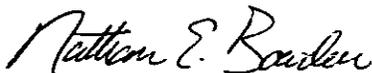
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/RWP/sdk

Ref: ID# 158243

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