



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2004

Ms. Stephanie Bergeron
Division Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2004-2349

Dear Ms. Bergeron:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198160.

The Texas Commission on Environmental Quality (the "TCEQ") received a request for information relating to air quality permit applications filed by NORIT Americas, Inc. ("NORIT"). The request specifically asks for process flow diagrams for facilities covered by permit numbers 56497 and 56552; detailed emissions calculations for each facility; material balance calculations for Kilns 2, 3, and 4; the thermal oxidizer and high-efficiency scrubber proposal submitted for pollution control under the K-Plant permit; Appendix C to the K-Plant application; Appendix D to the grandfathered Kilns 2, 3, and 4; and Appendix F to the grandfathered Kilns 2, 3, and 4. You state that release of the requested information may implicate the proprietary interests of NORIT, although you make no arguments and take no position as to whether the information is excepted from disclosure. You inform this office that you have notified NORIT of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 (the "Act") in certain circumstances). This office has received a response from counsel for NORIT objecting to the release of the information. We have reviewed the submitted information.

As a preliminary matter, we must address TCEQ's obligations under section 552.301 of the Government Code. Sections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Public Information Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.

You state TCEQ received the present request for information on January 5, 2004. Accordingly, you were required to submit your request for a decision from this office no later than January 20, 2004. We are unable to determine the date you submitted your request from the information provided, but we note that we received your request for a decision on January 22, 2004. We determine that TCEQ failed to comply with the procedural requirements of section 552.301(b) of the Government Code. *See* Gov't Code § 552.308(b) (state agency can meet the ten-day requirement if: 1) if the request is sent to the attorney general by first class mail, and the request bears post office cancellation mark indicating time within ten-day period or the governmental body furnishes satisfactory proof that the request was deposited in the mail within that period; or 2) if the request is sent by interagency mail and the agency provides evidence sufficient to establish that the request was deposited in interagency mail within that period).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). The interests of a third party may constitute a compelling reason to withhold the information in this instance. *See* Open Records Decision No. 630 (1994) (presumption of openness can be overcome by a showing that the information is made confidential by another source of law or affects third party interests). Accordingly, we will address the arguments submitted by NORIT.

NORIT contends that the majority of the information at issue is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Section 382.041 of the Health and Safety Code provides in relevant part that "a member, employee, or agent of [TCEQ] may not disclose information submitted to [TCEQ] relating

to secret processes or methods of manufacture or production that is identified as confidential when submitted.” Health & Safety Code § 382.041(a). This office has concluded that section 382.041 protects information that is submitted to TCEQ if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts, and if the submitting party identified the information as being confidential upon its submission to TCEQ. *See* Open Records Decision No. 652 (1997). TCEQ and NORIT inform us that the information at issue was designated as being confidential when it was submitted to the commission. Thus, we next consider the company’s claim that the information at issue is protected as a trade secret.

NORIT contends that the information in the permit applications that the company seeks to withhold is excepted from disclosure under sections 552.110(a) and 552.110(b) of the Government Code. Section 552.110(a) excepts trade secrets from disclosure. Section 552.110(b) excepts commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a), (b). 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); *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 subject to the Act is exempted 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, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Upon review of NORIT's arguments and the submitted information, we find that NORIT has made a *prima facie* case that the information NORIT seeks to withhold is protected as trade secret information. Moreover, we have received no arguments that would rebut this case as a matter of law. We therefore conclude that TCEQ must withhold the information at issue pursuant to section 552.110(a) of the Government Code.¹ Based on this finding, we do not reach NORIT's arguments under section 552.110(b) 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 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.*

¹ We note that NORIT does not seek to withhold portions of the information at issue that contain emissions data that must be made available to the public pursuant to the federal Clean Air Act. *See* 42 U.S.C. § 7414(c).

§ 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 Dep't of Pub. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 198160

Enc: Submitted documents

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