



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 10, 2006

Mr. Robert Martinez
Acting Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

OR2006-02433

Dear Mr. Martinez:

You ask 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# 243821.

The Texas Commission on Environmental Quality (the "TCEQ") received a request for information pertaining to Dow Chemical's ("Dow") applications for permits in Freeport, Texas. You claim that portions of the submitted information may be excepted from disclosure under sections 552.101 and 552.110 of the Government Code, but take no position as to whether this information is excepted under either exception. However, pursuant to section 552.305 of the Government Code, you notified Dow, an interested third party, of the request and of their opportunity to submit comments to this office. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). This office has received comments from Dow. The TCEQ has submitted the requested information for our review. We have considered Dow's comments and reviewed the submitted information.

Initially, we must address the TCEQ's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See Gov't Code § 552.301(a), (b)*. The TCEQ received the request on December 15, 2005. Accordingly, the deadline for the TCEQ to request a ruling from this office was December 29, 2005. However, your request for a ruling from this office was postmarked on January 2, 2006. *See Gov't Code § 552.308* (describing rules for calculating

submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). You do not inform us that the TCEQ was closed for any of the business days between December 15 and December 29, 2005. Thus, the TCEQ failed to comply with the procedural requirements of section 552.301.

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 section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because the third party interest at issue here can provide a compelling reason overcome the presumption of openness, we will address the submitted arguments.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Dow argues that the information highlighted in gray is excepted from disclosure under section 552.101 as confidential information because of "homeland security issues." Dow does not assert any specified statute or provide any arguments to support its assertion. Consequently, Dow may not withhold any of the submitted information under section 552.101 of the Government Code.

Dow argues that portions of the submitted information are excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the TCEQ does not seek to withhold any information pursuant to section 552.104, the TCEQ may not withhold any of the information at issue pursuant to section 552.104 of the Government Code. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).

Dow also argues that portions of the submitted information are excepted under subsections 552.110(a) and (b) of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110(a), (b).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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). 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 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, 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 Dow's brief and the information at issue, we find that Dow has established a prima facie case that most of the information highlighted in blue, yellow, and green is protected as trade secret information. Moreover, we have received no arguments that would rebut this case as a matter of law. However, we find that the TCEQ has not demonstrated that the information highlighted in gray meets the definition of a trade secret for the purposes of section 552.110(a). We therefore conclude that, with the exception of the tank numbers and the responses to the category, "Manufacturer & Model No.," on pages B-134 through B-138, the TCEQ must withhold the information highlighted in blue, yellow, and green pursuant to section 552.110(a) of the Government Code.

Section 552.110(b) protects "[c]ommercial 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[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Dow states that the information highlighted in pink consists of its "direct fixed costs to manufacture the Versene chelating agents and micronutrients" at its chemical manufacturing plant. Dow argues that this information "will allow a competitor to understand [Dow's] costs and enable them to set their prices to compete more effectively with [Dow]." After reviewing the arguments and submitted information, we conclude that Dow has made a specific factual or evidentiary showing as required by section 552.110(b) that the release of most of the information highlighted in pink would likely cause it substantial competitive harm. With the exception of Note 3 on page D-3, the information highlighted in pink must be withheld under section 552.110(b) of the Government Code.

We note, however, that the some of the information Dow seeks to withhold relates to emissions. Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. 42 U.S.C. § 7414(c). Section 7414 states:

(c) Availability of records, reports, and information to public; disclosure of trade secrets

Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such record, report, or information may

be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

42 U.S.C. § 7414(c). Thus, to the extent that the highlighted information constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the TCEQ must release that information in accordance with the federal law.

In summary, with the exception of the tank numbers and the responses to the category, "Manufacturer & Model No.," on pages B-134 through B-138, the TCEQ must withhold the information highlighted in blue, yellow, and green pursuant to section 552.110(a) of the Government Code. With the exception of Note 3 on page D-3, the TCEQ must withhold the information highlighted in pink pursuant to section 552.110(b) of the Government Code. To the extent that the highlighted information constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the TCEQ must release that information in accordance with the federal law. The remaining information must be released to the requestor. The TCEQ should confer with Dow for information that must be withheld in accordance with Dow's color-coded highlights.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

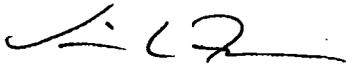
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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 Office of the Attorney General 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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/er

Ref: ID# 243821

Enc. Submitted documents

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