



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2006

Mr. Derek Seal
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Ms. Mary R. Risner
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OR2006-03878

Dear Mr. Seal and Ms. Risner:

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# 246730.

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to any investigations or incidents that occurred at the Formosa Plant that resulted in penalties and/or fines during a specified time period.¹ The commission's General Counsel and Litigation Division each submitted a separate set of responsive documents. Both the General Counsel and the Litigation Division have released some responsive documents to the requestor. The General Counsel claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.107, and 552.111 of

¹We note that the requestor clarified her request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see also Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

the Government Code.² The Litigation Division claims that the information it has submitted may be excepted from disclosure under section 552.101 or 552.110 of the Government Code.³ Pursuant to section 552.305(d) of the Government Code, the commission notified Formosa Plastics Corporation (“Formosa”) of the commission’s receipt of the request for information and of Formosa’s right to submit arguments to this office as to why the information at issue should not be released to the requestor. *See* Gov’t Code § 552.305(d); *see also* 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). Formosa has responded to the notice and argues its information at issue is excepted under section 552.110 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.⁴ We have also reviewed comments submitted by the requestor. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we will address the documents and arguments submitted by the General Counsel. The General Counsel asserts that this information is excepted from disclosure under section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client

²We note the General Counsel raised section 552.103, but makes no arguments in support of this exception, and therefore it is waived. *See* Gov’t Code §§ 552.301(e)(1)(A), .302; Open Records Decision No. 665 at 2 n.5 (2000).

³We note the Litigation Division has withdrawn its claim that information it has submitted is excepted under sections 552.101, 552.107 and 552.111. We also note the Litigation Division raised section 552.103, but makes no arguments in support of this exception, and therefore it is waived. *See* Gov’t Code §§ 552.301(e)(1)(A), .302; Open Records Decision No. 665 at 2 n.5 (2000).

⁴We 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.

privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the General Counsel is the commission’s chief legal officer and adviser, and that the General Counsel and Assistant General Counsels regularly provide the Commissioners legal advice and assistance with regard to all items set on the commission’s public meeting agendas or raised in pending litigation. You also state that the Commissioners are the clients of the General Counsel. You state that the submitted information was prepared by the General Counsel in furtherance of the rendition of professional legal services to the Commissioners, and this information has been maintained as confidential. Based on your representations and our review of the information submitted by the General Counsel, we conclude the General Counsel may withhold this information under section 552.107 of the Government Code.⁵

Next, the Litigation Division submitted to this office a copy of the information it believes to be responsive to the request for information. Formosa claims that some of this information is outside the scope of the request because it pertains to investigations that did not result in penalties or fines. We have reviewed the submitted records, but we are unable to determine whether these records pertain to investigations that did not result in penalties or fines. To the extent the submitted records pertain to investigations that did result in penalties or fines, they are responsive to this request and we will address the submitted arguments. To the

⁵As our ruling on this information is dispositive, we do not address the General Counsel’s remaining arguments.

extent the submitted records pertain to investigations that did not result in penalties or fines, they are not responsive to this request and we do not address such information in this ruling.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception protects information that another statute makes confidential. The Litigation Division believes that the information it submitted may be confidential under section 382.041 of the Health and Safety Code. Section 382.041 provides in relevant part 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.” Health & Safety Code § 382.041(a). This office has concluded that section 382.041 protects information that is submitted to the commission 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 in submitting it to the commission. *See* Open Records Decision No. 652 (1997).

Section 552.110 of the Government Code protects the proprietary interests of private persons 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.

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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁶ *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Upon review, we find that Formosa has made a *prima facie* case that most of the information it has designated meets the definition of a trade secret and has demonstrated the factors necessary to establish a trade secret claim. Moreover, we have received no arguments that would rebut this case as a matter of law. We therefore conclude that the commission must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, we find that Formosa has not established that the remaining information at issue consists of trade secret information. We also find that Formosa has made only conclusory allegations that release of this information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, the commission may not withhold the remaining information at issue under section 552.101 or 552.110.

Finally, 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. *See* 42 U.S.C. § 7414(c). Thus, to the extent that the documents contain any information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information in accordance with federal law.

⁶The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (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 Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

To conclude, the commission may withhold the information submitted by the General Counsel under section 552.107 of the Government Code. To the extent that the information submitted by the Litigation Division contains information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information to the requestor in accordance with federal law. To the extent this information is not subject to release under federal law, the commission must withhold the information we have marked under section 552.110(a). It must release the remaining information submitted by the Litigation Division.

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).

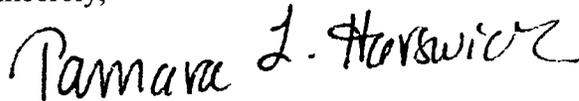
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

Handwritten signature of Tamara L. Harswick in black ink.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 246730

Enc. Submitted documents

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