

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 18, 2007

Mr. Robert Martinez  
Director, Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2007-13678

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# 292122.

The Texas Commission on Environmental Quality (the "commission") received a request for all applications filed with the commission, the air quality permits issued, and all other information regarding air quality, solid and hazardous waste, wastewater, and storm water issues at the Sabine River facility during the years 2006 and 2007. The requestor also seeks all information related to enforcement actions at this facility. You state that you have released a portion of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.110, and 552.137 of the Government Code. You also state that releasing portions of the submitted information may implicate the interests of Invista, S.á.r.l., LLC ("Invista"). Accordingly, you have notified Invista of the request and of its opportunity to submit arguments to this office. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See id.* § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception protects information that another statute makes confidential. The commission and Invista claim that the submitted information is confidential under section 552.101 in conjunction with 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). The commission informs us that the submitted information was designated as being confidential when it was submitted to the commission. Thus, we next consider Invista’s claim that the information at issue is protected under section 552.110.

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. The six factors to be assessed in determining whether information qualifies as a trade secret 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.

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. ORD 552. 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).

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. *Id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661.

Upon review, we conclude that Invista has established a *prima facie* case that most of the submitted information constitutes a trade secret. Moreover, we have received no arguments that would rebut their claims as a matter of law. However, Invista has not shown that any of the remaining information, which consists of information pertaining to the company’s background, financial statements, and statements pertaining to the company meeting regulatory requirements, meets the definition of a trade secret or demonstrated the necessary

factors to establish a trade secret claim. Thus, sections 552.101 and 552.110(a) are not applicable to any of the remaining information, which we have marked for release.

We also note, that a portion of Attachment 3 appears to consist of emission data. 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). However, we are unable to determine if any of the submitted information consists of emission records. Thus, to the extent that the submitted documents contain any information that constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release any such information in accordance with federal law.

Invista also asserts that Attachment 3A is confidential under section 552.110(b). Invista explains that as part of the required permit application process, Invista is required to file its financial statements with the commission. Invista explains that the company is privately-held, and that its financial information is not otherwise publicly available. Invista argues that release of its financial information in Attachment 3A would allow its competitors to ascertain its cash flow position and undermine its ability to expand operations, obtain new customers, and negotiate with third parties. Based on these representations and our review, we conclude that release of portions of Attachment 3A would cause Invista substantial competitive injury. However, some of the information in Attachment 3A consists of non-financial background information and information pertaining to the company's officers and directors. Invista has failed to establish that release of this information would cause substantial competitive harm for purposes of section 552.110(b). *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Thus, with the exception of the information we have marked for release, the commission must withhold Attachment 3A under section 552.110(b).

Section 552.107(1) of the Government Code protects information coming 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. 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. 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. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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. *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).

In this case, the commission asserts that Attachment 4 consists of communications and a record documenting communications made for the purpose of facilitating the rendition of professional legal services. You state the communications were between clients, client representatives, lawyers, and lawyer representatives identified by the commission, and you assert that they were intended to be kept confidential. Finally, the commission indicates that the communications have remained confidential. Thus, you may withhold Attachment 4 under section 552.107(1) of the Government Code.

We note that the submitted information contains bank account and routing numbers. Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). The commission must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

The remaining information also contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov’t Code § 552.137 (b). You do not inform us that the owners of the e-mail addresses have affirmatively consented to release. Therefore, the commission must withhold the e-mail addresses we have marked under section 552.137.

In summary, with the exception of the information we have marked for release, the commission must withhold Attachment 3 under section 552.110(a) of the Government Code. The commission must also withhold the information we have marked in Attachment 5 under section 552.110. The commission, however, must release any information that constitutes emissions data under section 7414(c) of title 42 of the United States Code. The commission

must withhold Attachment 3A under section 552.110(b). The commission may withhold Attachment 4 under section 552.107 of the Government Code. The commission must withhold the bank account and routing numbers we have marked under section 552.136, and the e-mail addresses we have marked under section 552.137. The remaining information must be released.

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,

A handwritten signature in black ink, appearing to read "Justin D. Gordon". The signature is fluid and cursive, with the first name "Justin" being the most prominent.

Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/jh

Ref: ID# 292122

Enc. Submitted documents

c: Ms. Georgia Canfield  
Winstead, P.C.  
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(w/o enclosures)

Ms. Susan Denmon Gusky  
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Austin, Texas 78746-7568  
(w/o enclosures)

MAY 01 2003

At 8:42am  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-07-003735

INVISTA, S.a'.r.l.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS ATTORNEY GENERAL GREG	§	
ABBOTT,	§	
Defendant.	§	261 <sup>ST</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff INVISTA, S.a'.r.l. (INVISTA) and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Georgia Canfield, was sent reasonable notice of this setting and of the parties' agreement that the Texas Commission on Environmental Quality must withhold some of the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Some of the information at issue, specifically, the information marked by the Attorney General in red, on pages 4, 5, 7, 8, 9, 13, 38, and 39 of Attachment 3A of TCEQ's request for a

ruling, is excepted from disclosure by Tex. Gov't Code § 552.110(b).

2. TCEQ must withhold from the requestor the information described in Paragraph 1 of this Judgment.

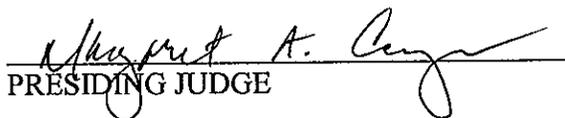
3. INVISTA no longer contests the disclosure of the remaining information at issue in this lawsuit. TCEQ must release to the requestor all information pertaining to INVISTA that is responsive to Ms. Canfield's request for information and that is not excepted from disclosure by Letter Ruling 2007-13678 or by Paragraph 1 of this Judgment.

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 1 day of May, 2008.

  
PRESIDING JUDGE

APPROVED:

  
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