



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 18, 2009

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

OR2009-02132

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# 335208 (PIR No. 08.11.24.09).

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to TXI Operations, LP's ("TXI") Midlothian Cement Plant during a specified time period. You state that you have made some of the requested information available to the requestor. You claim that some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Although you take no position with respect to the public availability of the rest of the submitted information, you believe that the remaining information may implicate the interests TXI under sections 552.101 and 552.110 of the Government Code. You notified TXI of this request for information and of its right to submit arguments to this office as to why its information should not be released.<sup>1</sup> We received correspondence from TXI. We have considered all of the submitted arguments and have reviewed the submitted information.<sup>2</sup>

Initially, we note portions of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-04225 (2008). In this ruling, we concluded that except for any emission data that must be released pursuant to section 7414(c) of title 42 of the United States Code, the

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<sup>1</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

<sup>2</sup>To the extent that the commission has submitted representative samples of the information at issue, this letter ruling assumes that the submitted information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

commission must withhold certain information relating to TXI under section 552.110 of the Government Code. With regard to the requested information that is identical to the information previously requested and ruled upon by this office in this prior ruling, we conclude, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the commission must continue to rely on Open Records Letter No. 2008-04225 as a previous determination and withhold or release the identical information in accordance with this ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will address the submitted arguments.

Next, we address the commission's claims under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) 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 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 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).

The commission seeks to withhold the information submitted as Attachment E under section 552.107(1). You state that the information at issue either constitutes or documents privileged attorney-client communications that were made in connection with the rendition of professional legal services to the commission. You have identified the parties to the communications. You also state that the communications were intended to be confidential, and you do not indicate that confidentiality has been waived. Based on your representations and our review of the information at issue, we conclude that the commission may withhold all of the information in Attachment E under section 552.107(1).<sup>3</sup>

We now turn to TXI's claims 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." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. Section 382.041 of the Health and Safety Code provides in 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 states that the submitted documents relating to TXI was marked as being confidential when they were provided to the commission by TXI.<sup>4</sup> Thus, we will consider TXI's claim that some of the information at issue is protected under section 552.110.

Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret 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." Gov't Code § 552.110(a)-(b).

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<sup>3</sup>As our ruling on this information is dispositive, we need not address your remaining argument against disclosure.

<sup>4</sup>We note that information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See Attorney General Opinion JM-672 (1987)*; *Open Records Decision Nos. 541 at 3 (1990)* ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), *203 at 1 (1978)* (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>5</sup> *See* Open Records Decision No. 552 at 5 (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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release

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<sup>5</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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).

of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

TXI contends that some of the information submitted as Attachment D falls within the scope of section 552.110.<sup>6</sup> Based on TXI's representations and our review of the information at issue, we have marked information relating to TXI in Attachment D that the commission must generally withhold under section 552.110. We note, however, that 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 any of the marked information 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.

In summary, the commission may withhold Attachment E under section 552.107 of the Government Code. Except for any emission data that must be released pursuant to section 7414(c) of title 42 of the United States Code, the commission must withhold the marked information relating to TXI under section 552.110 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Paige Savoie  
Assistant Attorney General  
Open Records Division

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<sup>6</sup>We note that TXI has submitted the information that it seeks to have withheld from disclosure. This decision is applicable only to the information that the commission submitted to this office. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must submit information at issue or submit representative samples if information is voluminous).

Ref: ID# 335208

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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