



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2010

Ms. Kathleen Decker
Director - Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2010-00575

Dear Ms. Decker:

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# 367036 (PIR No. 09.10.16.12).

The Texas Commission on Environmental Quality ("TCEQ") received a request for correspondence pertaining to Oxbow Calcining LLC f/k/a Great lakes LLC ("Oxbow") and all correspondence pertaining to a specified Agreed Final Judgment. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.¹ You also state that release of this information may implicate the proprietary interests of Oxbow. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, TCEQ has notified Oxbow of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). Pursuant to section 552.305(d), we have received comments from Oxbow objecting to the release of portions of its information. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹Although you initially raised section 552.103 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

²We 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

TCEQ asserts that portions of the submitted information are confidential under section 552.107 of the Government Code, which protects information that comes within the attorney-client privilege. Gov't Code § 552.107. 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)-(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 pet). 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).

TCEQ seeks to withhold the information submitted in Tabs 1 and 2 under section 552.107(1) of the Government Code. You state that the information at issue constitutes privileged attorney-client communications that were made in furtherance of professional legal services. You have identified the parties to the communications. You also state that the communications were intended to be confidential and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we

to the extent that those records contain substantially different types of information than that submitted to this office.

conclude that TCEQ may withhold Tabs 1 and 2 under section 552.107(1) of the Government Code.³

TCEQ and Oxbow both assert that portions of the remaining information are excepted under section 552.101 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 made confidential by other statutes, including section 382.041 of the Health and Safety Code, which provides in 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 when submitting it to TCEQ. *See* Open Records Decision No. 652 (1997). TCEQ states that Oxbow marked the submitted documents as confidential when it provided them to TCEQ.⁴ Thus, the information at issue is confidential under section 382.041 to the extent that this information constitutes a trade secret. Because section 552.110(a) of the Government Code also protects trade secrets from disclosure, we will consider the submitted arguments under section 382.041 together with the arguments under section 552.110(a).

Section 552.110 of the Government Code 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).

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

³As our ruling is dispositive for this information, we need not address your remaining argument against disclosure under section 552.111 of the Government Code.

⁴We 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).

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). 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.⁵ Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Based on Oxbow's representations and our review of the information at issue, we agree that Oxbow has established a *prima facie* case that the information it seeks to withhold in Tabs 3, 4, and 5, which we have marked, constitutes trade secrets. Accordingly, TCEQ must generally withhold the information we have marked under section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code. 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

⁵The 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 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).

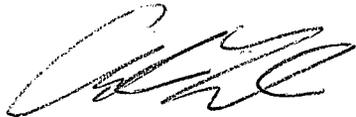
section 7414(c) of title 42 of the United States Code, TCEQ must release such information in accordance with federal law.⁶

In summary, TCEQ may withhold the information in Tabs 1 and 2 under section 552.107 of the Government Code. TCEQ must withhold the information we have marked in Tabs 3, 4, and 5 under section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code. However, to the extent the documents being withheld contain any information that constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, TCEQ must release any such information in accordance with federal law. The remaining submitted information must be released to the requestor.

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, 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, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 367036

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

⁶As our ruling is dispositive for this information, we need not address the department's or Oxbow's remaining arguments against its disclosure.

c: Ms. Patricia Diehl
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(w/o enclosures)