



February 15, 2000

Mr. George D. Cato
Supervising Attorney
Office of the General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2000-0529

Dear Mr. Cato:

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# 133806.

The Texas Department of Health (the department) received a request for information regarding a proposed radioactive waste storage site in Ward County. You advise us that most of the requested information has been provided to the requestor, but that the financial data and decommissioning plans of Envirocare of Texas, Inc. (Envirocare), may be considered by Envirocare to be proprietary information protected by section 552.110 of the act. You notified Envirocare of the request pursuant to section 552.305 of the act. Envirocare responded to the notice, through its attorneys, by submitting arguments to this office that portions of the requested information are protected under section 552.110. Envirocare's brief states that the requested information, redacted to remove trade secret and commercial or financial information, is being provided to the requestor.

Section 552.110 of the act excepts from disclosure:

- (a) A trade secret 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.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. A “trade secret”:

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

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 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, where no

evidence of the factors necessary to establish a trade secret claim is presented to us, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

The requested information consists of Appendix 9.1-1, Decommissioning, which includes cost data and closure plans which Envirocare asserts are unknown outside the company. Envirocare also emphasizes the value the information would have to competitors, the cost to produce the information, and the limited access employees of Envirocare have to the information. The Vice President and General Counsel of Envirocare states in an affidavit: "Release of this information will provide a roadmap to other companies to develop their own financially viable long term storage facility without the development costs incurred by Envirocare." *Affidavit of Lawrence R. Jacobi, Jr.*, paragraph 8 (December 28, 1999).

We believe that Envirocare has shown that the information at issue may be withheld under the trade secret prong of section 552.110. Envirocare has also presented "specific factual evidence that disclosure of the information would cause substantial competitive harm" to the company such that the information falls within the scope of the commercial or financial information prong of section 552.110. Therefore, the information may be withheld under section 552.110.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/jc

Ref: ID# 133806

Encl. Submitted documents

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