



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 7, 2017

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

OR2017-15104

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# 665046 (ORR# 17-32978).

The Texas Commission on Environmental Quality (the "commission") received a request for all documents related to Akzo Nobel Surface Chemistry, L.L.C. ("Akzo Nobel"). The commission states it is withholding access device numbers pursuant to section 552.136(c) of the Government Code.¹ The commission further states it is withholding certain information pursuant to Open Records Decision No. 684 (2009).² The commission states it is releasing some of the requested information. The commission claims some of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. Additionally, the commission states release of some of the submitted information may implicate the proprietary interests of Akzo Nobel. Accordingly, the commission states, and provides documentation showing, it notified Akzo

¹Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

Nobel of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Akzo Nobel. We have reviewed the submitted arguments and the submitted representative sample of information.³

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the commission received the instant request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the request and the commission is not required to release such information in response to this request.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed reports that are subject to section 552.022(a)(1). The commission must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* The commission seeks to withhold the information subject to section 552.022(a)(1) under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the commission may not withhold the

³We assume 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 those records contain substantially different types of information than that submitted to this office.

information subject to section 552.022, which we have marked, under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The commission argues the information submitted as Exhibit D is confidential under section 552.101 in conjunction with section 418.178 of the Government Code. Section 418.178 was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act and provides as follows:

(a) In this section, “explosive weapon” has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Id. § 418.178. The fact that information may be related to biological toxins does not make such information *per se* confidential under section 418.178. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting section 418.178 must adequately explain how the responsive records fall within the scope of that provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The commission argues Exhibit D is confidential under section 418.178(b) because it reveals information regarding a specific facility that stores hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. We understand the location of threshold quantities of hazardous substances and extremely hazardous substances at certain facilities must be reported under the Tier Two Chemical Reporting Program. Typically, only that information which would reveal the location of these hazardous

chemicals is protected under section 418.178(b). However, in this instance, the requestor seeks the Tier Two reports for the specified facility. Thus, because the location of the facility at issue is already known to this requestor, withholding only that information which would indicate the location of the hazardous chemicals would not effectuate the purpose of section 418.178 and would, in fact, result in the release of confidential information.

We recognize the public's legitimate interest in obtaining information concerning hazardous substances stored in Texas communities. However, we must follow the plain language of section 418.178 which, through its unconditional mandate of confidentiality, does not allow us to take into account the public interest that exists in the release of this information. Thus, we conclude Exhibit D is confidential under section 418.178 of the Government Code, and the commission must withhold it under section 552.101 of the Government Code.⁴ However, as stated above, this ruling does not impact the legal right of citizens to access a facility's existing workplace chemical list directly from any facility covered under chapter 505 or chapter 506 of the Health and Safety Code.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984,

⁴As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is "reasonably likely to result").

The commission informs us the commission has received numerous complaints against the Blue Ridge Landfill (the "landfill") and its enforcement division has issued a Notice of Enforcement against the landfill to initiate formal enforcement proceedings. The commission further informs us the enforcement action is currently pending. The commission states should the enforcement process fail, the matter will be forwarded to the commission's litigation division, a petition will be filed, and then the matter will be forwarded to the State Office of Administrative Hearings for a contested hearing. Therefore, based on the commission's representations and our review of the submitted information, we conclude litigation was reasonably anticipated on the date the commission received this request for information. Furthermore, we find the information in Attachments F and L is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the commission may withhold Attachments F and L pursuant to section 552.103 of the Government Code.⁵

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending or anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

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. The commission raises section 552.101 in conjunction with the common-law informer's privilege, which Texas courts have long recognized. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects

⁵As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, witnesses who provide information in the course of an investigation but do not make a report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). We note the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2.

The commission states portions of the information submitted as Exhibit E, G, J, and K, which the commission marked, identify complainants who reported possible violations of chapter 382 of the Health and Safety Code and chapters 5 and 7 of the Water Code. The commission explains it is charged with investigating potential violations of environmental laws in Texas, which include air quality and nuisance odors. *See* Health & Safety Code §§ 382.002, .017; Water Code §§ 5.013, 7.002. The commission also explains violations of the laws at issue are punishable by administrative and civil penalties. *See* Water Code §§ 7.051, .102. Upon review, we find the commission has demonstrated the applicability of the common-law informer's privilege to most of the information it marked. However, some of the information the commission marked does not identify an individual who reported a violation of law to the commission for purposes of the informer's privilege. This information, which we have marked for release, may not be withheld under section 552.101 in conjunction with the common-law informer's privilege. Thus, with the exception of the information we marked for release, the commission may withhold the types of information it marked in Attachments E, G, J, and K under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

The commission claims the deliberative process privilege of section 552.111 of the Government Code for the remaining information submitted as Attachments G, H, I, J, and K. The commission states the information at issue contains communications among employees of the commission's enforcement division and communications between the commission and outside parties, including the United States Environmental Protection Agency, the City of Houston, and the City of Pearland. The commission informs us it shares a privity of interest or common deliberative process with these third parties with respect to the communications at issue. The commission also states the information at issue contains drafts of policymaking documents that will be made available to the public in their final forms. Thus, the commission states the information at issue consists of advice, opinions, and recommendations of the commission pertaining to its policymaking functions.

Based on these representations and our review of the information at issue, we find the commission has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the commission. Thus, the commission may withhold the information we marked within Attachments G, H, I, J, and K under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue was received from individuals with whom the commission has not demonstrated it shares a privity of interest or common deliberative process, is general administrative and purely factual information, or does not pertain to policymaking. Thus, we find the commission has not shown the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the commission. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

Akzo Nobel states its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code* § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of 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 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) of the Government Code 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* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized

⁶The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

allegations, that release of requested information would cause that party substantial competitive harm).

Akzo Nobel argues its information consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Akzo Nobel has demonstrated portions of the information at issue, which we have marked, constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold the information we marked within Attachment M under section 552.110(b) of the Government Code. However, we find Akzo Nobel has failed to demonstrate the release of any of its remaining information would result in substantial harm to its competitive position. *See* Open Records Decision No. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the commission may not withhold any of Akzo Nobel's remaining information under section 552.110(b) of the Government Code.

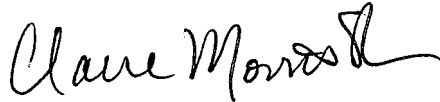
Akzo Nobel asserts its remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Akzo Nobel has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Akzo Nobel has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, the commission may not withhold any of Akzo Nobel's remaining information under section 552.110(a).

In summary, the commission must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The commission may withhold Attachments F and L pursuant to section 552.103 of the Government Code. With the exception of the information we marked for release, the commission may withhold the types of information it marked in Attachments E, G, J, and K under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The commission may withhold the information we marked within Attachments G, H, I, J, and K under section 552.111 of the Government Code. The commission must withhold the information we marked within Attachment M under section 552.110(b) of the Government Code. The commission must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 665046

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)