

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2003

Ms. Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2003-8605

Dear Ms. Bergeron:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191890.

The Texas Commission on Environmental Quality (the "commission") received a request for the Texas Low Emission Diesel Program "Alternative Emission Reduction Plans for . . . Flint Hills [and] Valero." While you indicate that the submitted information may be excepted from disclosure under section 552.110 of the Government Code, the commission takes no position as to whether the requested information is so excepted. Rather, you state, and provide documentation showing, that you notified the interested third parties, Flint Hills Resources, L.P. ("Flint Hills") and Valero Energy Corporation ("Valero"), whose proprietary interests may be implicated by the request of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act ("Act") in certain circumstances). We have considered all exceptions claimed and have reviewed the submitted information.

Initially, we note that the submitted information relating to Flint Hills is the identical information that was the subject of a previous ruling from this office. *See* Open Records Letter No. 2003-7390 (2003). Therefore, as we understand you to assert that the four criteria for a "previous determination" established by this office in Open Records Decision

No. 673 (2001) have been met, the commission may continue to rely on that ruling as a previous determination for purposes of section 552.301 of the Government Code.¹ Accordingly, we need not further address the public nature of the submitted information relating to Flint Hills. *See* Open Records Decision No. 673 (2001). We therefore only address the submitted information relating to Valero in the present ruling.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Valero has not submitted to this office reasons explaining why its information should not be released.² Therefore, Valero has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We therefore conclude that the submitted information pertaining to Valero may not be withheld under section 552.110 and must be released to the requestor.

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

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

²This office received a brief from CITGO Petroleum Corporation ("Citgo"). However, as the request is limited to the "Alternative Emission Reduction Plans for . . . Flint Hills and Valero," we do not address Citgo's arguments.

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 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 191890

Enc. Submitted documents

c: Mr. Scott Fincher
ERG, Inc.
5608 Parkcrest Drive, Suite 100
Austin, Texas 78731-4947
(w/o enclosures)

Mr. Joe Coco
Flint Hills Resources
P.O. Box 2608
Corpus Christi, Texas 78403
(w/o enclosures)

Mr. John Braeutigam
Valero Energy Corporation
P.O. Box 500
San Antonio, Texas 78292-0500
(w/o enclosures)

Mr. Stephen Jeffrey Bednar
Assistant General Counsel
Citgo Petroleum Company
P.O. Box 3758
Tulsa, Oklahoma 74102-3758
(w/o enclosures)

CAUSE NO. GN304702

VALERO ENERGY CORPORATION,
Plaintiff,

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§

IN THE DISTRICT COURT OF

V.

GREG ABBOTT, ATTORNEY GENERAL,
OF TEXAS, AND THE TEXAS
COMMISSION ON ENVIRONMENTAL
QUALITY

Defendants.

TRAVIS COUNTY, TEXAS

250th JUDICIAL DISTRICT

FILED
04 AUG 11 AM 8:40
Marian Rodriguez-Mendoza
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff Valero Energy Corporation, and Defendants, Greg Abbott, Attorney General of Texas, and the Texas Commission on Environmental Quality (TCEQ), 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 ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Scott Fincher, was sent reasonable notice of this setting and of the parties' agreement that the TCEQ must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his 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. The information at issue, specifically, those portions marked by the Attorney General in Valero's cover letter to the TCEQ and the AER Plan, is a trade secret and, therefore, excepted

from disclosure by Tex. Gov't Code § 552.110.

2. The TCEQ shall withhold from the requestor the information at issue.

3. If it has not already done so, the TCEQ shall release to the requestor the following portions of the cover letter and AER Plan:

a. Valero's cover letter: everything before the second sentence in first paragraph and after the eighth paragraph;

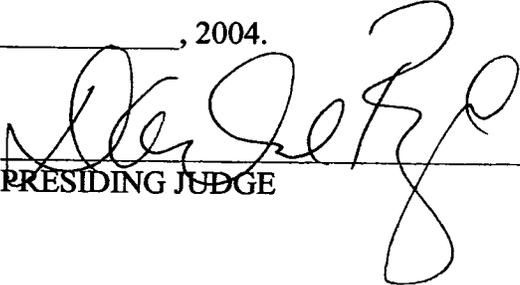
b. AER Plan: section 0.0 Definitions, except for first definition, ¶ 1.1 of section 1.0 Calculation of Market Share, all of section 2.0 TCEQ Emissions Reduction from Texas LED, all of section 4.0 Alternative Emissions Reductions from Early Low Sulfur Diesel and Retrofit; Plan.xls, section 0.0 Definitions, except for first definition, ¶ 1.1 of section 1.0 Calculation of Market Share, all of section 2.0 TCEQ Emissions Reductions from Texas LED, and all of section 4.0 Alternative Emissions Reductions from Low sulfur diesel.

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

5. All relief not expressly granted is denied; and

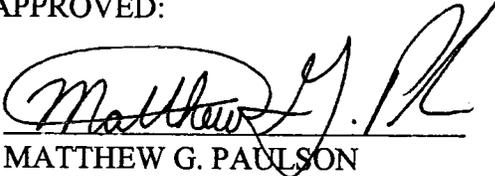
6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the **AUG 11 2004** day of _____, 2004.

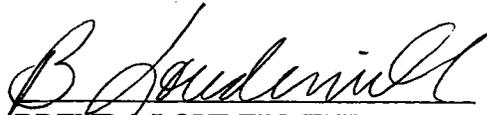


PRESIDING JUDGE

APPROVED:



MATTHEW G. PAULSON
Baker Botts L.L.P.
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701
Telephone: 322-2500
Fax: 322-2501
State Bar No. 24030006
ATTORNEY FOR PLAINTIFF



BRENDA LOUDERMILK
Chief, Open Records Litigation Section
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 475-4292
Fax: (512) 320-0167
State Bar Card No. 12585600
ATTORNEY FOR DEFENDANTS