



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 11, 2004

Mr. Paul Sarahan  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2004-8606

Dear Mr. Sarahan:

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# 210538.

The Texas Commission on Environmental Quality (the "commission") received a request for all documents regarding a specified commission account, including confidential documents, from November, 2002 to the present. You state that the commission will release some of the requested information to the requestor. You claim that portions of the remaining requested information are excepted from disclosure under section 552.103 of the Government Code. With respect to the balance of the submitted information, you state that it may be confidential under section 552.101 in conjunction with section 382.041 of the Health and Safety Code or excepted under sections 552.110 and 552.131, but make no arguments and take no position as to whether the information is so excepted from disclosure. You state and provide documentation showing that you have notified Degussa-Huls Corporation ("Degussa-Huls"), a third party 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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered your arguments and have reviewed the submitted information.

We begin by noting that a portion of the submitted information appears to have been the subject of a previous determination of this office, issued as Open Records Letter No. 2003-0096 on January 6, 2003. Therefore, assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the commission may rely on our decision in Open Records Letter No. 2003-0096 with respect to the information requested in this instance that was previously ruled upon in that decision.<sup>1</sup> To the extent that the information requested in this instance was not the subject of this prior ruling, we will address your arguments for the information you have submitted.

Next, 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). However, as of the date of this letter, we have not received arguments for withholding the requested information from Degussa-Huls. Therefore, we have no basis to conclude that the release of any of the submitted information would implicate Degussa-Huls's proprietary interests. *See, e.g.*, Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 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). Accordingly, we conclude that the commission may not withhold any portion of the submitted information on the basis of any proprietary interest that Degussa-Huls may have in the information.

Next, you inform us that a portion of the information at issue was marked as confidential by the permit applicant when submitted to the commission. We note that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540S.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); *see also* Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to 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

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<sup>1</sup>*See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 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); 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 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 ruling was based have not changed since the issuance of the ruling).

of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

You also indicate that the submitted information, or portions thereof, may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. Section 382.041 provides in relevant 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). As we noted above, Degussa-Huls has not submitted comments to this office. Thus, Degussa-Huls has not made a *prima facie* case that any of the information constitutes a trade secret. Consequently, the commission may not withhold any of the submitted information under section 552.101 in conjunction with section 382.041 of the Health and Safety Code.

You further claim that the information submitted as Attachment C is excepted under section 552.103 of the Government 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.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request, 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, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a). Contested cases conducted under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation under section 552.103. See Open Records Decision No. 588 at 7 (1991).

You state that the information at issue pertains to a pending enforcement action initiated by the commission against a facility owned or operated by Degussa-Huls. You state that the enforcement action may be resolved through settlement, administrative hearing, or trial. Based on your representations and our review of the submitted information, we conclude that the commission has demonstrated that litigation is reasonably anticipated. Furthermore, we find that the information in Attachment C is related to the anticipated litigation for purposes of section 552.103.

Thus, you may withhold this information from the requestor under section 552.103. However, we note that if the opposing party in the litigation has seen or had access to any of this information, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the records are precisely the same as those we ruled on in Open Records Letter No. 2003-0096, the commission may rely on Open Records Letter No. 2003-0096 as a previous determination for such records. Thus, the commission must continue to follow Open Records Letter No. 20043-0096 with respect to such information. The commission may withhold Attachment C under section 552.103. All remaining information 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 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,



Cary Grace

Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 210538

Enc. Submitted documents

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