



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2008

Mr. Hunter Burkhalter
Kemp Smith, L.L.P.
816 Congress Avenue, Suite 1150
Austin, Texas 78701-2443

OR2008-12995

Dear Mr. Burkhalter:

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# 322522.

The Medina County Groundwater Conservation District (the "district"), which you represent, received a request for copies of all well reports, logs, and correspondence regarding the Hills of Castle Rock, BP Real Estate Investments, Ltd., and BP 1766 San Antonio, Ltd. You state the submitted information may be confidential and thus excepted from disclosure under section 552.101 of the Government Code. You also state the information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, you notified BP 1766 San Antonio, Ltd. and Post Oak Development of Texas ("Post Oak Development") of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *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 the applicability of exception to disclose under Act in certain circumstances). An attorney for BP Real Estate Investments, Ltd. and BP 1766 San Antonio, Ltd. (collectively "BP") has submitted comments to our office, in which BP claims the requested information is excepted from disclosure under sections 552.103, 552.110, and

552.113 of the Government Code.¹ We have also received comments submitted by the requestor's attorney. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the requestor's assertion that the district has previously allowed him to review some of the requested information. The requestor argues because the district has previously released information relevant to the present request, the district may not now treat the requested information as confidential. Section 552.007 of the Government Code generally prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. *See id.* § 552.007. Section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See id.*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision Nos. 490 (1988), 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Thus, regardless of whether the district previously released any of the information at issue in this request, we must address whether the submitted information is made confidential by law and must now be withheld pursuant to 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 other statutes make confidential. You ask whether the requested information is subject to the non-disclosure provision in section 1901.251(c) of the Occupations Code. Section 1901.251 provides:

(a) Each driller who drills, deepens, or otherwise alters a water well in this state shall make and keep a legible and accurate well log in accordance with rules adopted by the [Texas Commission of Licensing and Regulation (the "commission")] and on forms prescribed by the executive director [of the Texas Department of Licensing and Regulation (the "department")]. The well log shall be recorded at the time of drilling, deepening, or otherwise altering the well and must contain:

- (1) the depth, thickness, and character of the strata penetrated;
- (2) the location of water-bearing strata;

¹We note BP also raises section 552.101 of the Government Code in conjunction with sections 552.103, 552.110, and 552.113. This office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990).

(3) the depth, size, and character of casing installed; and

(4) any other information required by rules adopted by the commission.

(b) Not later than the 60th day after the date of the completion or cessation of drilling, deepening, or otherwise altering the well, the driller shall deliver or send by certified mail a copy of the well log to:

(1) the department;

(2) the Texas Natural Resource Conservation Commission;
and

(3) the owner of the well or the person for whom the well was drilled.

(c) If the department receives, by certified mail, a written request from the owner of the well or from the person for whom the well was drilled that the well log be made confidential, the department shall protect the contents of the well log as confidential and not a matter of public record.

Occ. Code § 1901.251. The department has also adopted a rule requiring every well driller to submit a copy of the well report to the local groundwater conservation district. *See* 16 T.A.C. § 76.700(1). Similar to the department's rule, section 36.111 of the Water Code, which governs the powers and duties of groundwater conservation districts, provides a district may adopt rules requiring well owners to submit a well report. You inform us this district adopted Rule 6.47, which requires the driller of any well within the district to keep and maintain, for at least three years, an accurate driller's log for each well, a copy of which must be filed with the district within 60 days of the date the well is completed. Medina County Groundwater Conservation District Rules § 6.47 (2007). You suggest section 1901.251 indicates a "legislative intent that well reports be kept confidential when the requirements [of the section] are complied with." We note and you acknowledge, however, that although section 1901.251 does provide a procedure for the protection of information contained in a well log, the statute's confidentiality mandate is directed at the department only. *See* Occ. Code § 1901.251(c) ("the *department* shall protect the contents of the well log as confidential" (emphasis added)). In this instance, the information at issue is held by the district. We note the language of a confidentiality provision controls the scope of its protection. *See* Open Records Decision No. 649 at 3 (1996); *see also* Gov't Code § 552.001 (Act shall be liberally construed in favor of granting a request for information); *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 679 (Tex. 1995) (concluding to determine whether certain tax information is confidential by statute, court must "giv[e] a narrow reading to the Tax Code's confidentiality provisions and a liberal reading to the [Act]"); Open Records Decision No. 658 at 4 (1998). Although the Legislature and the department

recognize that local groundwater conservation districts may have copies of these well reports as both section 36.111 of the Water Code and section 76.700(1) of title 16 the Texas Administrative Code expressly reference the local districts, section 1905.251 of the Occupations Code only proscribes release of the well log by the department. Thus, we find section 1901.251 only applies to the department. We therefore conclude the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 1901.251 of the Occupations Code.²

Next, we note 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 requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, Post Oak Development has not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of this company, and the district may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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). However, we will consider BP's arguments against disclosure of its information.

BP argues that its information is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) 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.* § 552.110(b); *see also* *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 at 5-6 (1999).

BP informs us it is the owner of the water wells at issue in the present request. BP states prior to drilling the wells, it incurred substantial expenses in compiling geological and geophysical data, obtaining expert analyses, and exploring the potential of underground water resources. BP explains it shared this information with the district for the purpose of enabling the district to properly evaluate the project and make determinations as to the viability of groundwater sources in the area. BP asserts release of the requested well logs and reports

²In light of this conclusion, we need not address your request for guidance on how the district can properly comply with the non-disclosure obligation of section 1901.25, except to note this type of inquiry is outside the scope of the ruling process under the Act. *See* Gov't Code ch. 552 (discussing, among other things, the attorney general's role in the open records ruling process).

would permit competitors to design and execute competing developments at significantly less cost than that to BP and neighboring landowners to BP's wells could increase the prospects for sale of their properties to competing developers, thereby resulting in substantial competitive harm to BP. Based on these arguments, we conclude BP has demonstrated the submitted information pertaining to BP is protected by section 552.110(b).³ Accordingly, the district must withhold BP's information on that basis. The remaining submitted information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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

³Based on this conclusion, we need not address BP's remaining arguments against disclosure for its information.

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 Office of the Attorney General 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. 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,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 322522

Enc. Submitted documents

c: Mr. Richard Lowerre
Lowerre, Frederick, Perales, Allmon & Rockwell
Attorneys at Law
707 Rio Grande, Suite 200
Austin, Texas 78701
(w/o enclosures)

Mr. Randy Johnson
San Geronimo Valley Alliance
c/o Richard Lowerre
707 Rio Grande, Suite 200
Austin, Texas 78701
(w/o enclosures)

Mr. Greg Glendenning
Post Oak Development of Texas
603 Navarro Street, Suite M-2
San Antonio, Texas 78205
(w/o enclosures)

Mr. Andrew N. Barrett
Barrett & Smith, P.L.L.C.
505 West 14th Street
Austin, Texas 78701
(w/o enclosures)

Mr. Shaul Baruch
BP 1766 San Antonio, Ltd.
5953 Dallas Parkway, Suite 200B
Plano, Texas 75098
(w/o enclosures)