ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2009

Mr. Robert Martinez
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2009-03524

Dear Mr. Martinez:

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# 337424 (PRI No. 08.12.19.04).

The Texas Commission on Environmental Quality (the "commission") received a request for Material Balance Tables associated with permit applications submitted by seventeen specified chemical production facilities. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code.[1] You also assert that release of the submitted information would implicate the proprietary interests of third

[1]We note that although you raise section 552.110 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that section 552.110 applies to the submitted information.

parties.[2] Accordingly, you have notified the interested third parties of the request and of their opportunity to submit arguments to this office. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have received comments from the notified third parties. We have also received comments from additional interested third parties.[3] *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, by letter dated January 26, 2009, you informed this office that the submitted information pertaining to INVISTA, which we have marked, is not responsive to the present request for information. In addition, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to the specified facilities or their Material Balance Tables. The commission need not release nonresponsive information in response to this request and this ruling will not address that information.

Next, we note that by letter dated February 6, 2009, DuPont has informed this office that it does not object to the release of its responsive information. Further, by facsimile dated February 12, 2009, FHR Longview has informed this office that it does not object to release of its responsive information. Therefore, this information must be released to the requestor.

Eastman, Exxon, and INEOS assert their information is confidential because they marked the information as "confidential" before submitting it to the commission. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [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 of statutory predecessor to section 552.110 of the Government Code). Consequently, unless the responsive information

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[2]The commission notified: Chevron Phillips Chemical Company, L.P. ("Chevron"); The Dow Chemical Company ("Dow"); EI DuPont De Nemours and Company ("DuPont"); Eastman Chemical Company ("Eastman"); Equistar Chemicals, L.P. ("Equistar"); ExxonMobil Refining and Supply Company ("Exxon"); Flint Hills Resources, L.P. Port Arthur Facility ("FHR PA"); Formosa Plastics Corporation ("Formosa"); INEOS USA, L.L.C. f/k/a Innovene USA, L.L.C. ("INEOS"); INVISTA S.à.r.l. ("INVISTA"); Lyondell Chemical Company ("Lyondell"); and Sabina Petrochemicals, L.L.C. ("Sabina").

[3]BASF FINA Petrochemicals, L.P. ("BASF") and Flint Hills Resources, L.P. Longview Facility ("FHR Longview") both assert a proprietary interest in the submitted information.

comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Dow asserts that its information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the commission does not seek to withhold any information pursuant to this exception, the commission may not withhold any of the information at issue pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

INEOS argues that if the commission releases the responsive information "the [commission's] ability to collect similar information in the future would be impaired." In advancing this argument, INEOS appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). *See also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only BASF's, Chevron's, Dow's, Eastman's, Equistar's, Exxon's, FHR PA's, Formosa's, INEOS's, Lyondell's, and Sabina's interests in the information at issue.

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. This exception protects information that another statute makes confidential. The commission, BASF, Chevron, Dow, Eastman, Equistar, Exxon, FHR PA, Formosa, INEOS, Lyondell, and Sabina claim that the submitted information is confidential under section 552.101 in conjunction with section 382.041 of the Health and Safety Code.

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). The commission informs us that the submitted information was designated as being confidential when it was submitted to the commission. Thus, we next consider BASF's, Chevron's, Eastman's, Equistar's, Exxon's, Formosa's, INEOS's, Lyondell's, and Sabina's claims that the information at issue is protected under section 552.110(a) as trade secret information.

Section 552.110 of the Government Code protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) 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. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d763 (Tex.), cert. denied, 358 U.S. 898 (1958); *see also* Open Records Decision No.552 at 2 (1990). Under section 757 of the Restatement of Torts, 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). 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. The six factors to be assessed in determining whether information qualifies as a trade secret are:

> (1) the extent to which the information is known outside of [the company's] business;
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> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (4) the value of the information to [the company] and to [its] competitors;
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> (5) the amount of effort or money expended by [the company] in developing this information; and
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> (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 subject to the Act 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. ORD 552. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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).

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.; see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661.

BASF, Chevron, Eastman, Equistar, Exxon, Formosa, INEOS, Lyondell, and Sabina each claim their information is excepted from disclosure under sections 552.110(a). Upon review, we conclude that BASF, Chevron, Eastman, Equistar, Exxon, Formosa, INEOS, Lyondell, and Sabina have each established a *prima facie* case that the submitted Table 2 Material Balance Tables of each company constitute a trade secret. Moreover, we have received no arguments that would rebut their claims as a matter of law. Accordingly, the Table 2 Materials Balance Tables of these companies must be withheld pursuant to

section 552.110(a) of the Government Code and section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. However, BASF, Chevron, Eastman, Equistar, Exxon, Formosa, INEOS, Lyondell, and Sabina have not shown that any of their remaining information, which consists of a cover sheet detailing information pertaining to each company's background, permit application history, and statements pertaining to each company's meeting regulatory requirements, meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, sections 552.101 and 552.110(a) are not applicable to any of the remaining responsive information.

We understand Dow and FHR PA to claim their Table 2 Material Balance Tables are subject to section 552.110(b). Upon review, we find Dow and FHR PA have demonstrated that release of their Table 2 Material Balance Tables would cause them specific competitive harm. Thus, the commission must withhold Dow's and FHR PA's Table 2 Material Balance Tables under section 552.110(b) of the Government Code. However, we also find that BASF, Chevron, Dow, Eastman, Equistar, Exxon, Formosa, FHR PA, INEOS, Lyondell, and Sabina have made only conclusory allegations that release of their remaining information at issue, which consists of the cover sheets detailed above, would cause substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. Thus, the commission may not withhold the remaining responsive information under section 552.110(b).

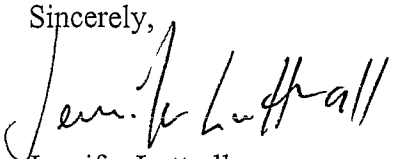
We note that a portion of the responsive information appears to consist of emission data. Under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. *See* 42 U.S.C. § 7414(c). Therefore, to the extent that the submitted documents contain any information that constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release any such information in accordance with federal law.

In summary, the commission must withhold the Table 2 Material Balance Tables belonging to BASF, Chevron, Eastman, Equistar, Exxon, Formosa, INEOS, Lyondell, and Sabina under section 552.110(a) of the Government Code and section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. The commission must also withhold Dow's and FHR PA's Table 2 Material Balance Tables under section 552.110(b) of the Government Code. However, to the extent the documents being withheld contain any information that constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release any such information in accordance with federal law. As no further exceptions to disclosure have been raised for the remaining responsive information, it must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



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