



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2010

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

OR2010-13787

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# 392980 (PIR No. 10.06.18.11).

The Texas Commission on Environmental Quality (the "commission") received a request for seven categories of information pertaining to the commission and five named entities. You state the commission made some of the requested information available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. You also state that the release of the submitted information may implicate the proprietary interests of a third party. Accordingly, you state, and provide documentation showing, you notified Houston Products Processing, Inc. ("HPP") of the request for information and of its 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 a representative of HPP. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that HPP seeks to withhold from public disclosure certain customer information that the commission did not submit. This ruling does not address information

that was not submitted by the commission and is limited to the information submitted as responsive by the commission. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Therefore, we do not address HPP's argument against disclosure of this information.

HPP asserts some of its information was submitted with the expectation of confidentiality and the commission should withhold this information as confidential. 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 submitted information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The commission and HPP both assert that portions of the submitted information are excepted under 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 made confidential by other statutes, including section 382.041 of the Health and Safety Code, which provides in 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 when submitting it to the commission. *See* Open Records Decision No. 652 (1997). The commission states that HPP marked the submitted documents as confidential when it provided them to the commission.¹ Thus, the information at issue is confidential under section 382.041 to the extent that this information constitutes a trade secret. Because section 552.110(a) of the Government Code also protects trade secrets from disclosure, we will consider the submitted arguments under section 382.041 together with the arguments under section 552.110(a).

¹We again note that information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976).

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret 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.” Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the

²The 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 others 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Based on HPP’s representations and our review of the information at issue, we agree that HPP has established a *prima facie* case that the information we have marked constitutes trade secrets. Accordingly, the commission must generally withhold the information we have marked under section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code. We note, however, that, 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). Thus, to the extent that any of the marked information constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release such information in accordance with federal law.³ Additionally, we find that HPP has failed to establish how any of its remaining information constitutes a trade secret under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b. Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Next, HPP asserts that its remaining information is excepted from disclosure under section 552.110(b). However, we find HPP has made only conclusory or generalized allegations or failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to its interests. *See* ORD 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, we determine that no portion of the remaining information is excepted from disclosure under section 552.110(b) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code

³As our ruling is dispositive for this information, we need not address the commission’s or HPP’s remaining arguments against its disclosure.

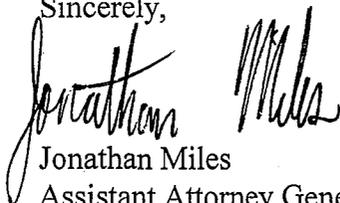
§ 552.137(a)-(c). The e-mail address in the remaining information is not of a type specifically excluded by section 552.137(c). Accordingly, the commission must withhold the e-mail address we have marked unless the owner of the e-mail address has affirmatively consented to its disclosure.⁴

In summary, the commission must withhold the information we have marked under section 382.041 of the Health & Safety Code and section 552.110(a) 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. The commission must withhold the e-mail address we have marked under section 552.137 of the Government Code. The remaining submitted information must be released to the requestor.

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, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

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⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 392280

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)