



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 25, 2011

Ms. Kathleen C. Decker  
Director, Litigation Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2011-02846

Dear Ms. Decker:

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# 410075 (PIR No. 10.12.02.06).

The Texas Commission on Environmental Quality (the "commission") received a request for all benzene-related reports or documents the commission's regional office 12 has on file pertaining to BP Products North America, Inc. ("BP"), as well as any records regarding the April/May 2010 incident at the BP Texas City refinery.<sup>1</sup> You state the commission has provided some of the requested information to the requestor. You claim the submitted letter and attached maintenance records are excepted from disclosure under section 552.101 of the Government Code. You also state release of this information may implicate the proprietary interests of BP. Thus, pursuant to section 552.305 of the Government Code, you notified BP of the request and of BP's right to submit arguments to this office as to why the submitted information should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have considered the exception you claim and reviewed the submitted information.

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<sup>1</sup>You state, and provide documentation showing, the commission sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

The commission claims the submitted correspondence and maintenance records are subject to section 552.101 of the Government Code, which 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, such as section 382.041 of the Health and Safety Code, which provides "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 section 382.041 protects information that is submitted to the commission if a *prima facie* case is established 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 represents BP marked the submitted documents as confidential when the company provided the information to the commission.<sup>2</sup> Thus, the information at issue is confidential under section 382.041 to the extent this information constitutes a trade secret. BP submitted comments to this office stating it would provide arguments against disclosure of the information at issue at a later date. As of the date of this letter, however, BP has not submitted arguments to this office explaining how any of its information constitutes a trade secret. *See* Gov't Code § 552.305(d)(2)(B) (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). Therefore, we have no basis to conclude any of BP's submitted information constitutes a trade secret. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3 (1990). Consequently, the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. Moreover, because BP has failed to submit any arguments to our office, we have no basis to conclude release of any portion of its information would cause the company substantial competitive harm. *See* Open Records Decision No. 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, release of requested information would cause that party substantial competitive harm). Consequently, the commission may not withhold any of the submitted information based on proprietary

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<sup>2</sup>We note 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). 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); 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).

interests BP may have in this information. As no other exceptions to disclosure have been raised for the submitted 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](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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 410075

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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(w/o enclosures)