



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2011

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

OR2011-07983

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# 419667 (PIR # 11.03.17.01).

The Texas Commission on Environmental Quality (the "commission") received a request for records pertaining to the Alon Big Spring Refinery for a specified period of time.¹ You state the commission has released some of the information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. Additionally, you indicate the requested information may implicate the proprietary interests of Alon USA ("Alon"). Accordingly, you inform us, and provide documentation showing, you have notified Alon of the request and of its right 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 applicability of exception to disclosure under

¹We note the commission sought and received clarification of the request. *See* Gov't Code § 552.222(b) (stating that 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 Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

The commission claims Exhibit F is 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 Alon marked the submitted information in Exhibit F as confidential when the company provided the information to the commission.³ Thus, the submitted information in Exhibit F is confidential under section 382.041 to the extent this information constitutes a trade secret. As of the date of this letter, Alon 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 Alon's submitted information in Exhibit F 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. Consequently, the commission may not withhold any of the submitted information in Exhibit F under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. Moreover, because Alon 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

²We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

³We 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).

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 in Exhibit F based on proprietary interests Alon may have in this information. As you raise no further exceptions to disclosure, this information must be released to the requestor.

Section 552.101 also encompasses the common-law informer's privilege which has long been recognized by Texas courts. *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. However, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Roviaro v. United States*, 353 U.S. 53, 60 (1957).

You state the submitted information in Exhibit E is related to a complaint of alleged violations of section 101.4 of title 30 of the Texas Administrative Code and Chapter 382 of the Texas Health and Safety Code, also known as the Texas Clean Air Act. You explain that the commission has authority to enforce these environmental laws under Texas Water Code sections 5.103 and 7.102. You further state that there are administrative and civil penalties for a violation of those code sections. See Water Code §§ 7.051, .102. Based on your representations and our review of the information in Exhibit E, we conclude that the commission may withhold the complainant's identifying information we have marked under section 552.101 of the Government Code in conjunction with the informer's privilege.⁴ However, you have failed to demonstrate the remaining portions of information you have marked in Exhibit E identifies or tends to identify an individual who reported a violation to the commission and this information may not be withheld on that basis.

Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

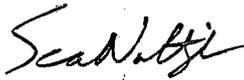
withheld under this exception. *See id.* § 552.137(c). We note the remaining portions of information you have marked in Exhibit E are not e-mail addresses. Accordingly, the commission may not withhold the remaining portions of information you have marked in Exhibit E under section 552.137 of the Government Code.

In summary, the commission may withhold the complainant's identifying information we have marked in Exhibit E under section 552.101 of the Government Code in conjunction with the informer's privilege. The remaining 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bs

Ref: ID# 419667

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jeremy Miller
Environmental Manager
Alon Big Spring Refinery
200 Refinery Road
Big Spring, Texas 79720
(w/o enclosure)