



This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2012

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

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2012-00631

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# 442716 (ORR# 11.10.26.07).

The Texas Commission on Environmental Quality (the "commission") received a request for specified information pertaining to National Oilwell Varco, Inc. ("NOV"). You state the commission has made some of the requested information available to the requestor. You do not take a position as to whether the submitted information is excepted from disclosure under the Act. However, in correspondence to this office NOV asserts some of its information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 at 3 (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 considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We assume the "representative sample" of records 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 that submitted to this office.

Initially, we note NOV has submitted information to this office it asserts is excepted from release under the Act. However, the commission did not submit this information for our review. This ruling does not address information beyond what the commission has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the commission submitted as responsive to the request for information. *See id.*

Next, NOV indicates the information at issue may not be released because it is subject to confidentiality agreements between NOV and its suppliers. However, we note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

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 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 states NOV marked the submitted documents as confidential when it provided them to the commission. Thus, the submitted information is confidential under section 382.041 to the extent this information constitutes a trade secret. NOV argues its submitted information is confidential under section 552.110. Because section 552.110(a) also protects trade secrets from disclosure, we will consider the submitted arguments under section 382.041 together with NOV's arguments under section 552.110(a).

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive

harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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 single or ephemeral events 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 Huffines*, 314 S.W.2d at 776. 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.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person’s claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the

²The following are the six factors that the Restatement gives 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

NOV seeks to withhold “specific product formula of coatings, solvents, and thinner products that NOV procures from outside vendors and uses in its coatings operations at Galena Park and West Little York.” However, having considered NOV’s arguments and reviewed the information at issue, we find NOV has not shown any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov’t Code § 552.110(a). We also find NOV has made only conclusory allegations that release of the information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See id.* § 552.110(b). Therefore, the commission may not withhold any of the information pursuant to section 552.110.

The submitted information contains e-mail addresses of members of the public. 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).³ *See id.* § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the commission must withhold the e-mail addresses we have marked under section 552.137.⁴ The commission must release the remaining information to the requestor.

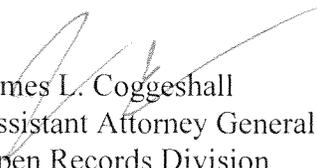
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

⁴This office 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 opinion.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 442716

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Gerald J. Pels
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Houston, Texas 77002
(w/o enclosures)

JAN 28 2015

At 1:44 PM M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-12-000360

NATIONAL OILWELL VARCO LP	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
VS.	§	
	§	
THE HONORABLE KEN PAXTON,	§	
Attorney General of Texas, RICHARD A.	§	TRAVIS COUNTY, TEXAS
HYDE, in his official capacity as Executive	§	
Director of the Texas Commission on	§	
Environmental Quality, and TEXAS	§	
COMMISSION ON ENVIRONMENTAL	§	
QUALITY,	§	
<i>Defendants.</i>	§	261st JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Plaintiff National Oilwell Varco LP (NOV) challenged the 2012 Attorney General Open Records Letter Ruling OR2012-00631 (the AG Ruling) issued by the Honorable Greg Abbott as the then Attorney General of Texas, who has now been succeeded by and substituted as a Defendant in this lawsuit by the Honorable Ken Paxton as the current Attorney General of Texas (the Attorney General). NOV sought the withholding of certain information held by Defendant Richard A. Hyde, in his official capacity as Executive Director of the Texas Commission on Environmental Quality (Hyde), and Defendant Texas Commission on Environmental Quality (TCEQ). NOV, the Attorney General, Hyde, and TCEQ (collectively the Parties) have settled all matters in controversy between them concerning the AG Ruling, and the Parties agree to the entry and filing of this Agreed Final Judgment to resolve this lawsuit.

Texas Government Code section 552.325(d) requires that the Court allow the requestor of information a reasonable period of time to intervene after receiving notice of a proposed settlement. The Attorney General has represented to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice by letter delivered via certified mail, return receipt requested (the Notice Letter) to requestor Mr. Jim Tarr c/o Karen MacDonald (the Requestor) on December 16, 2014, which provided reasonable notice of both the entry of this Agreed Final Judgment and the Parties' Settlement Agreement. A copy of the Notice Letter without enclosures and the corresponding certified mail receipt are attached to this Agreed Final Judgment, and the Court hereby takes judicial notice of that proof of notice to the Requestor.

The Notice Letter informed the Requestor of and included a copy of the Parties' Settlement Agreement, which provides among other provisions that the TCEQ must withhold portions of the information at issue in this lawsuit and previously addressed by the AG Ruling. Specifically, pursuant to the Agreed Protective Order previously entered in this Lawsuit, NOV's attorney emailed Defendants' attorneys a set of documents on November 14, 2014 which were bates labeled "NOV/TCEQ Settlement Documents" pages "- 001 -" to "- 045 -" (the Emailed Documents). The Emailed Documents consist of (i) information redacted with black mark-outs (the Excepted Information) and (ii) information that is not redacted with black mark-outs (the Remaining Information). As a result, the Requestor has received notice that, pursuant to the Settlement Agreement, the TCEQ will withhold the Excepted Information and release the Remaining Information.

The Notice Letter also informed the Requestor of his right to intervene in this lawsuit to contest the withholding of the Excepted Information that is the subject of the Settlement Agreement and this lawsuit. However, the Requestor has informed the Attorney General that he does not intend to intervene in this lawsuit.

After considering the agreement of the parties and applicable law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate.

THEREFORE, the Parties agree and the Court ADJUDGES, ORDERS, AND DECLARES the following:

1. The Attorney General has provided the Requestor with timely, proper, and reasonable notice of this Agreed Final Judgment and the Parties' Settlement Agreement in accordance with Texas Government Code section 552.325(c) and (d).

2. In accordance with the PIA and under the facts presented, the Excepted Information is confidential and is not subject to disclosure under the PIA pursuant to Tex. Gov't Code section 552.110(a). As a result, the TCEQ must withhold the Excepted Information and shall not release the Excepted Information to the Requestor. In addition, the Excepted Information shall not be released by Hyde or the Attorney General.

3. The TCEQ must release the Remaining Information to the Requestor.

4. The Parties shall bear their own attorneys' fees, and all costs are hereby taxed against the party incurring the same. The bond previously posted by NOV in this lawsuit is hereby released.

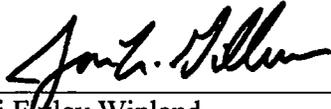
5. This Agreed Final Judgment fully and finally disposes of all claims of all Parties in this lawsuit and is a final judgment. All relief not expressly granted herein is hereby denied.

SIGNED this 28th day of January, 2015.



JUDGE PRESIDING

AGREED AS TO FORM AND SUBSTANCE:



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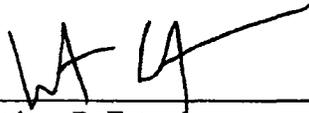
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TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY AND
RICHARD A. HYDE, IN HIS OFFICIAL
CAPACITY AS EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

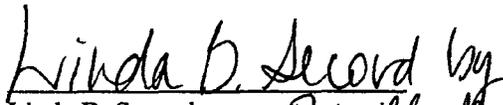
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*Priscilla M. Habenak
Att. by permission*

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RICHARD A. HYDE, IN HIS OFFICIAL
CAPACITY AS EXECUTIVE DIRECTOR
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ENVIRONMENTAL QUALITY**