



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2012

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

OR2012-02758

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# 446041 (PIR No. 11.12.01.13).

The Texas Commission on Environmental Quality ("TCEQ") received a request for (1) communications during a specified time period pertaining to a named business entity's financial assurance requirements under two radioactive waste disposal licenses and (2) the named entity's responses to a letter from a named individual.¹ You state some of the requested information has been released. Although you take no position on the public availability of the submitted information, you believe the information at issue may implicate the proprietary interests of U.S. Bank National Association ("U.S. Bank") and Waste Control Specialists LLC ("WCS"). You inform us the interested parties were notified of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released.² We received arguments under sections 552.101, 552.110, and 552.136 of the Government Code from an attorney for WCS. We have considered WCS's arguments and reviewed the submitted information.

¹You inform us the requestor subsequently agreed to exclude three types of records from his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

We initially note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this decision, this office has received no correspondence from U.S. Bank. Therefore, because U.S. Bank has not demonstrated any of the information at issue is proprietary for purposes of the Act, TCEQ may not withhold any of the submitted information on the basis of any interest U.S. Bank may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we consider WCS's arguments under sections 552.101 and 552.110 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 other statutes make confidential. WCS claims section 552.101 in conjunction with section 382.041 of the Health and Safety Code, which provides in part that "a member, employee, or agent of [TCEQ] may not disclose information submitted to [TCEQ] 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 submitted to TCEQ 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 TCEQ. *See Open Records Decision No. 652 (1997)*. TCEQ states, as does WCS, that the submitted information was designated as being confidential when it was provided to TCEQ.³ Accordingly, we will address WCS's claims for the information at issue under section 552.110 of the Government Code.⁴

Section 552.110 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).

³We note information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests confidentiality for the information. *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 did not satisfy requirements of statutory predecessor to Gov't Code § 552.110).

⁴We note WCS's claims may encompass information TCEQ has not submitted to this office. This decision is applicable only to the information TCEQ submitted in requesting the decision. *See Gov't Code § 552.301(e)(1)(D)* (governmental body must submit specific information at issue or representative samples if information is voluminous).

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 an exception under section 552.110(a) as valid 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.⁵ *See* ORD 552 at 5. We cannot conclude section 552.110(a) is applicable, however, 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) 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. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

⁵The 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 other 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).

WCS claims section 552.110 for some of the submitted information. WCS contends the information at issue constitutes trade secrets of the company. WCS also contends release of the information at issue would result in substantial competitive harm to the company. Having considered WCS's arguments and reviewed the information at issue, we conclude TCEQ must withhold the information we have marked under section 552.110(b).⁶ We also conclude WCS has neither established that the remaining information at issue constitutes a trade secret of the company under section 552.110(a) nor made the specific factual or evidentiary showing required by section 552.110(b) that the release of the remaining information would cause WCS substantial competitive harm. Therefore, TCEQ may not withhold any of the remaining information under section 552.110 of the Government Code.

WCS also claims section 552.136 of the Government Code, which provides in part that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked account numbers TCEQ must withhold under section 552.136 of the Government Code.

We note the remaining information at issue includes personal e-mail addresses. Section 552.137 of the Government Code provides 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 or the e-mail address falls within the scope of section 552.137(c).⁷ *Id.* § 552.137(a)-(c). This exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses TCEQ must withhold under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.

In summary, TCEQ must withhold (1) the information we have marked under section 552.110(b) of the Government Code; (2) the account numbers we have marked under section 552.136 of the Government Code; and (3) the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. The rest of the submitted information must be released.

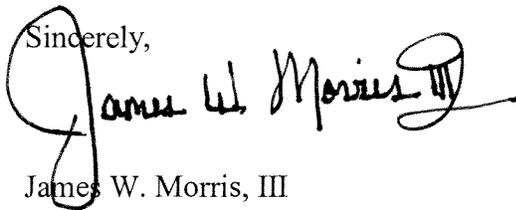
⁶As we are able to make this determination, we need not address WCS's other claim for some of the marked information.

⁷This office will raise section 552.137 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a stylized "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 446041

Enc: Submitted documents

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(w/o enclosures)

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