ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 19, 2012

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

OR2012-05605

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# 451086 (PIR No. 12.01.27.15).

The Texas Commission on Environmental Quality (the "commission") received a request for two categories of information pertaining to a specified facility: (1) any documents regarding benzene releases during April 2010 and 2011; and (2) any information regarding benzene, hydrogen sulfide, and dimethyl disulfide releases in November 2011. You inform us that the commission does not have information responsive to category two of the request.[1] You also inform us that the commission has released some of the information responsive to category one of the request. You claim the submitted information is excepted from disclosure under

[1]The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

section 552.101 of the Government Code.[2] You also explain that release of this information may implicate the proprietary interests of BP Products North America, Inc. ("BP"). Accordingly, you notified BP of the request for information and of the company's 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 Act in certain circumstances). We have received comments from a representative of BP. We have considered the submitted arguments and reviewed the submitted information.

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, 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 BP marked the submitted documents as confidential when it provided them to the commission.[3] Thus, the submitted information 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 applicability of section 382.041 together with BP's arguments under section 552.110(a).

BP raises section 552.110 of the Government Code for the portions of its submitted information that consist of information on the configuration of refinery units, including

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[2]Although you raised sections 552.102, 552.103, 552.104, 552.105, 552.107, 552.110, 552.111, and 552.137 of the Government Code as exceptions to disclosure in your initial brief to this office, you did not submit to this office written comments stating the reasons why these sections would except the submitted information; we therefore assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

[3]We 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). 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 Gov't Code § 552.110).

diagrams and photographs of these units. 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).

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.[4] 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

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[4]The 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) 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* 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).

Upon review of BP's arguments, we conclude BP has made a *prima facie* case demonstrating that the information we have marked constitutes trade secrets. Accordingly, the commission must generally withhold this information under section 552.101 of the Government code in conjunction with section 382.041 of the Health and Safety Code and section 552.110(a) of the Government Code. However, we note 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). We note that emission data is only subject to the release provision in section 7414(c) of title 42 of the United States Code if it was collected pursuant to subsection (a) of that section. *See id.* Thus, to the extent any of the marked information constitutes emissions 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.

However, we find BP has failed to show how the remaining information at issue meets the definition of a trade secret. Accordingly, none of this information may be withheld under section 552.110(a) of the Government Code. Additionally, BP has not provided any specific factual or evidentiary showing to indicate release of the remaining information at issue would cause the company substantial competitive injury. *See* ORD 661 at 5-6. Therefore, we conclude the commission may not withhold any of this information under section 552.110(b) of the Government Code.

In summary, the commission must withhold the information we have marked under section 552.101 of the Government code in conjunction with section 382.041 of the Health and Safety Code and section 552.110(a) of the Government Code. However, to the extent any of the marked information constitutes emissions 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. As neither the commission nor BP claim any additional exceptions, the remaining information 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, 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,

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/dls

Ref: ID# 451086

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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