ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2012

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

OR2012-07029

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# 453384 (TCEQ PIR No.12.02.23.10).

The Texas Commission on Environmental Quality (the "commission") received a request for a specified air permit application file for Flint Hills Resources Corpus Christi, LLC ("Flint Hills"). You state the commission has provided some of the requested information to the requestor. Although you take no position on the public availability of the remaining information, you state the remaining information may implicate the proprietary interests of a third party. Accordingly, you inform us, and provide documentation showing, you notified Flint Hills of the request and of the company's 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 the Act in certain circumstances). We have received comments from Flint Hills. 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, 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 Flint Hills marked the submitted documents as confidential when it provided them to the commission.[1] Thus, the submitted information is confidential under section 382.041 to the extent this information constitutes a trade secret. Flint Hills argues its submitted information is confidential under section 552.110 of the Government Code. Because section 552.110(a) also protects trade secrets from disclosure, we will consider the submitted arguments under section 382.041 of the Health and Safety Code together with the submitted arguments under section 552.110(a) of the Government Code.

Section 552.110(a) of the Government Code protects trade secrets obtained from a person that are privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception

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[1]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).

as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable 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.[2] Open Records Decision No. 402 (1983).

Flint Hills argues its submitted information, which consists of material balances and associated process flow diagrams for each process unit within one of the company's refineries, constitutes trade secrets under section 552.110(a). Based on the arguments submitted by Flint Hills and our review of the submitted information, we conclude Flint Hills has established the submitted information constitutes trade secrets. Accordingly, the commission must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code.[3] As our ruling is dispositive, we need not address the remaining argument against disclosure.

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.

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[2]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;
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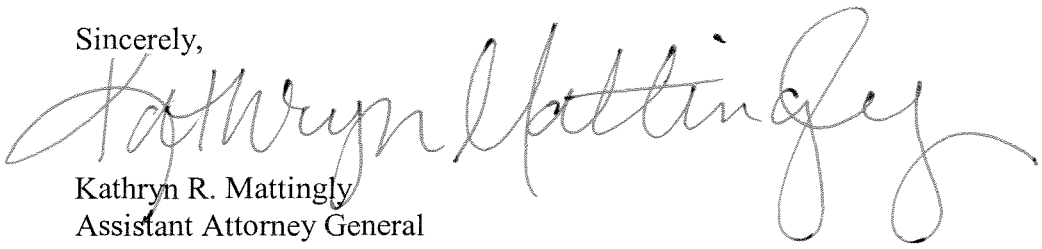
> (4) the value of the information to [the company] and [its] competitors;
>
> (5) the amount of effort or money expended by [the company] in developing the information;
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

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).

[3]Flint Hills acknowledges emission data for purposes of section 7414(c) of title 42 of the United States Code must be released and states the submitted information does not contain or consist of that type of information.

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 453384

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Flint Hills Resources Corpus Christi, LLC
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(w/o enclosures)