



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 9, 2012

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

OR2012-10512

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# 458406 (PIR No. 12.04.19.16).

The Texas Commission on Environmental Quality ("TCEQ") received a request for "all emails between TCEQ and any lawyer or non-lawyer [of two named law firms] within the last 60 days, that mention or refer to the Texas Low-Level Radioactive Waste Disposal Compact Facility." You state you have released some information. Although you raise no exceptions to disclosure of the submitted information, you believe release of this information may implicate the proprietary interests of Waste Control Specialists, L.L.C. ("WCS"). Accordingly, you provide documentation showing you have notified WCS of the request and its right to submit arguments to this office. *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 the Act in certain circumstances). We have received comments from an attorney for WCS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it was created after TCEQ received the instant request. This ruling does not address the public availability of any information that is not

responsive to the request and TCEQ is not required to release non-responsive information in response to the request.

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.<sup>1</sup> Accordingly, we will address WCS's claims for the information at issue under section 552.110 of the Government Code.

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

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<sup>1</sup>We 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).

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.<sup>2</sup> *See Open Records Decision No. 552 at 5 (1990)*. 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 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).

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 WCS has demonstrated that a portion of the information at issue consists of commercial or financial information, disclosure of which would cause the company substantial competitive harm. Accordingly, TCEQ must withhold the information we have marked under section 552.110(b). We also conclude WCS has neither established that the remaining

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<sup>2</sup>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 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)*.

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 552.137 of the Government Code for portions of the remaining information. Section 552.137 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 affirmatively consents to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 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 affirmatively consent to their public disclosure.

In summary, TCEQ must withhold (1) the information we have marked under section 552.110(b) of the Government Code; and (2) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their public disclosure. The rest of the responsive 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](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 Opperman  
Assistant Attorney General  
Open Records Division

SO/som

Ref: ID# 458406

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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