



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 10, 2012

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

OR2012-14314

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# 464885 (PIR No. 12.06.22.07).

The Texas Commission on Environmental Quality (the "commission") received a request for specified Flaring Root Cause Analysis Reports from a specified time period pertaining to a specified facility. You inform us that the commission has released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. 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.

Initially, BP claims some of the submitted information is not responsive to the instant request. We note a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561

at 8-9 (1990). In this instance, the commission has reviewed its records and determined the submitted information is responsive to the request. Thus, we conclude the commission has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether the submitted information must be released to the requestor.

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 informs us that BP marked the submitted documents as confidential when it provided them to the commission.<sup>1</sup> 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 submitted information, which BP informs us contains its investigation methods for reducing emission events at its petroleum refineries and specific details on the configuration and parameters of the operating units at these refineries. 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).

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<sup>1</sup>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).

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.<sup>2</sup> 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 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).

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, as you acknowledge, under the federal Clean Air Act,

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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 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).

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. Furthermore, we find BP has failed to show how the remaining information meets the definition of a trade secret. Accordingly, none of this information may be withheld under section 552.110(a) of the Government Code.

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).<sup>3</sup> Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked in the remaining information are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137 of the Government Code, unless their owners consent to their release.<sup>4</sup> *See id.* § 552.137(b).

We note that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

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. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners consent to their

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an email address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

release. The commission must release the remaining information; however, any of this information that is protected by copyright may only be released in accordance with copyright law.

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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/bhf

Ref: ID# 464885

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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