



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 27, 2012

Ms. Becky Petty  
Attorney  
Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2012-15402A

Dear Ms. Petty:

This office issued Open Records Letter No. 2012-15402 (2012) on September 27, 2012. In that ruling we determined Air Liquide Large Industries U.S. LP's ("Air Liquide") had not submitted comments to this office explaining why its information should not be released. Thus, we had no basis to withhold Air Liquide's information and ordered it released. Air Liquide has now submitted comments to this office explaining why its information should not be released. Where this office determines an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of this chapter). Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on September 27, 2012. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID # 473868 (TCEQ PIR No. 12.07.10.12).

The Texas Commission on Environmental Quality (the "commission") received a request for information related to the Air Liquide Large Industries U.S. LP's ("Air Liquide") La Porte SMR Plan. You state you have released some information to the requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Air Liquide.

Accordingly, you notified Air Liquide of the request for information and of its right to submit arguments to this office as to why its submitted information should not be released. *See id.* § 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 Air Liquide. 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 Air Liquide marked the some of 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 this information constitutes a trade secret. Air Liquide argues some of its submitted information consists of trade secrets protected by section 552.110(a) of the Government Code. Because section 552.110(a) also protects trade secrets from disclosure, we will consider Air Liquide’s arguments under section 382.041 together with Air Liquide’s arguments under section 552.110.

Section 552.110 of the Government Code 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 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).

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 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.<sup>2</sup> *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).

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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)*.

Air Liquide argues some of its submitted information, which Air Liquide states relates to confidential process unit information, consists of trade secret information under section 552.110(a). Based on Air Liquide's arguments and our review of the submitted information, we conclude Air Liquide has established the information we have marked constitutes trade secrets. Accordingly, the commission must generally withhold the marked 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.<sup>3</sup> However, 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). 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. *Id.* Thus, to the extent any of the marked information constitutes emission 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.

Upon review, we find Air Liquide has failed to show how the remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, none of this information may be withheld under section 552.110(a) of the Government Code. Further, we find Air Liquide has not demonstrated the remaining information would cause the company substantial competitive injury. Accordingly, the commission may not withhold the remaining information under section 552.110(b) of the Government Code.

We note a portion of the remaining information is subject to section 552.137 of the Government Code, which 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>4</sup> Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the commission must withhold these e-mail addresses under section 552.137 of the Government Code unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b).

In summary, the commission must generally withhold the marked 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. To the extent any of the

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<sup>3</sup>As our ruling is dispositive, we need not address Air Liquide's remaining argument against disclosure of this information.

<sup>4</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. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

marked information constitutes emission 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 the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b) of the Government Code. The commission must release the remaining information.

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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/tch

Ref: ID# 473868

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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