



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

October 5, 2012

Ms. Elizabeth West  
Senior Attorney  
Contracts, Employment Law and Ethics  
General Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2012-15946

Dear Mr. West:

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# 467523 (TCEQ PIR# 12.07.23.05).

The Texas Commission on Environmental Quality (the "commission") received a request for information regarding the use of a Railserve Leaf gen set locomotive by five specified companies. You state you have released or will release some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You further claim release of the submitted information may implicate the proprietary interests of Progress Rail Services ("Progress") and Savage Industrial Rail Services, Inc. ("Savage"). Accordingly, you notified these third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have considered the claimed exception 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).

You inform us Progress and Savage marked the submitted information as confidential when the companies provided this information 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. However, as of the date of this letter, neither Progress nor Savage has submitted arguments to this office explaining how any of the submitted information constitutes a trade secret. *See* Gov’t Code § 552.305(d)(2)(B). Therefore, we have no basis to conclude any of this information constitutes a trade secret. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Consequently, the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. Furthermore, because Progress and Savage have failed to submit any arguments to our office, we have no basis to conclude release of any portion of this information would cause the companies substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm). Accordingly, the commission may not withhold any of the submitted information based on proprietary interests Progress or Savage may have in this information. As no other exceptions to disclosure have been raised, the commission must release the submitted information.

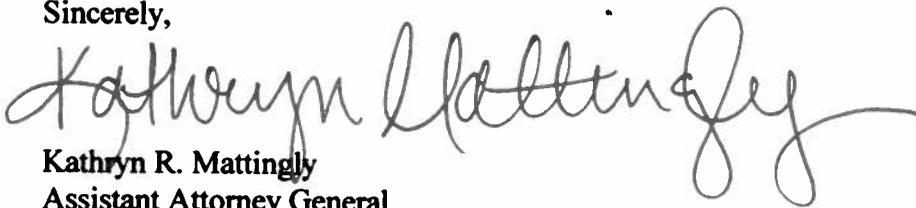
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<sup>1</sup>We note information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 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).

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,



Kathryn R. Mattingly  
Assistant Attorney General  
Open Records Division

KRM/bhf

Ref: ID# 467523

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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(w/o enclosures)

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