



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2013

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

OR2013-16781

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# 500476 (TCEQ PIR No. 13-12891-PIR).

The Texas Commission on Environmental Quality (the "commission") received a request for information regarding environmental citations and/or violations assessed against ECS Refining Terrell. You inform us you have released some of the requested information to the requestor. Although you take no position on the public availability of the submitted information, you state the release of the submitted information may implicate the proprietary interests of a third party. Accordingly, you inform us, and provide documentation showing, you notified Tejas Resources, Inc. ("Tejas") 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 Tejas. We have considered the submitted arguments and reviewed the submitted information.

Tejas asserts the submitted information is not responsive to the instant request for information. However, we note a governmental body must make a good-faith effort to relate

a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). Because the commission has submitted the information at issue, which concerns waste activity at ECS Refining Terrell, we find the commission has made a good-faith effort to submit information that is responsive to the request. We will therefore address the submitted arguments regarding the submitted information.

You inform us the commission has inadvertently released some of the submitted information to the public. The Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the commission may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential by law. In this instance, however, the commission has not taken any position regarding the public availability of the information at issue, but rather has determined Tejas's interests may be implicated. When a third party's proprietary interests are at issue, section 552.305(d) of the Government Code requires a governmental body to notify the third party of its right to submit comments to this office explaining why its information should be withheld from disclosure. *See* Gov't Code § 552.305(d). Tejas claims section 552.110 of the Government Code for the submitted information. Because section 552.110 makes information confidential, we will consider Tejas's arguments under this section for the submitted information.

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of 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 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted 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 that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *Open Records Decision No. 402 (1983)*.

Section 552.110(b) of the Government Code protects "[c]ommercial 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(b). This exception to disclosure 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. *Id.*; *see also 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, that release of requested information would cause that party substantial competitive harm).

Upon review, we find Tejas has established a *prima facie* case that some of the company's information, which we have marked, constitutes trade secrets. Therefore, the commission

¹The 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 Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

must withhold the information we have marked pursuant to section 552.110(a) of the Government Code.² However, we find Tejas has failed to demonstrate how any portion of its remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for the remaining information. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Therefore, the commission may not withhold any of Tejas's remaining information pursuant to section 552.110(a) of the Government Code.

Further, upon review, we find Tejas has not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the commission may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the commission must withhold the information we have marked under section 552.110(a) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/tch

²As our ruling is dispositive, we need not address Tejas's remaining argument against disclosure of this information.

Ref: ID# 500476

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)