



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 14, 2009

Mr. Robert Martinez
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Texas Commission on Environmental Quality
P. O. Box 13087
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OR2009-12939

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# 355050.

The Texas Commission on Environmental Quality (the "commission") received a request for all information regarding Kern Oil and Refining Company ("Kern") and its alternative diesel fuel formulation. You state you have released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. You also state that release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the commission has notified the interested third parties of the request and of their right to submit arguments to this office explaining why their information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general

¹The notified third parties are: Kern; Chevron Products Company ("Chevron"); Northville Products Services ("Northville"); Delek Marketing and Supply, L.P. and Delek Refining, LTD (collectively "Delek"); Flint Hills Resources, L.P. ("Flint Hills"); BNSF Railway Company; Centennial Energy, LLC; CITGO Petroleum Corporation; CL Thomas Inc.; Craft Oil Company; Exxon-Mobil Corporation; Flying J., Inc.; Gulfstream Terminals & Marketing, LLC; JAM Distributing Co.; KM Liquids Terminals, L.P.; Magellan Midstream partners, L.P.; Magellan Terminal Holdings, L.P.; Marine Fuel Service, Inc.; Motiva Enterprises, LLC, Pasadena Terminal; Motiva Enterprises, LLC, Dallas Terminal; Motiva Enterprises, LLC, Fort Worth Terminal; Motiva Enterprises, LLC, Beaumont Terminal; Murphy Oil U.S.A.; Musket Corporation; NuStar Logistics, L.P.; Pilot Travel Centers, LLC; Pride Refining, Inc.; Quick Trip Corporation; SemFuel, L.P.; Spidle and Spidle Inc.; Sunoco Logistics; Tri-Con, Inc.; Truman Arnold Companies; and W.B. McCartney Oil Co. Inc.

reasons why requested information should not be released); *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 in certain circumstances). Pursuant to section 552.305(d), Kern, Chevron, Northville, Delek, and Flint Hills have submitted comments to this office objecting to the release of their information. We have considered the submitted arguments and reviewed the submitted information.²

Initially, we note that a portion of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2006-09154 (2006). Kern filed a lawsuit against the commission and the Office of the Attorney General challenging Open Records Letter No. 2006-09154 over the release of certain documents. A settlement agreement was reached amongst the parties regarding the disposition of certain documents and was adopted by the court in an Agreed Final Judgment. Kern has provided this office with a copy of the Agreed Final Judgment in *Kern Oil & Refining Co. v. Texas Commission on Environmental Quality and Attorney General of Texas, Greg Abbott*, Cause No. D-1-GN-06-003065 (53rd Jud. Dist., Travis County, Tex. May 12, 2008). Thus, we find that, with regard to the information at issue in Open Records Letter No. 2006-09154, the commission must continue to rely on the Agreed Final Judgment to release or withhold the information at issue. To the extent that the submitted information is not subject to the Agreed Final Judgment, we will address the submitted arguments.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only Kern, Chevron, Northville, Delek, and Flint Hills have submitted to this office reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *See* Open Records Decision Nos. 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the commission may not withhold any portion of the submitted information on the basis of any proprietary interests that the remaining third parties may have in this information. We will, however, address the submitted arguments to withhold portions of the submitted information.

²You state that a portion of the submitted information is a representative sample. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We understand the commission, Kern, and Northville to assert that the information at issue is confidential because the documents were marked as "confidential" before they were submitted to the commission. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests 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 overrule or repeal provisions of the Act through an agreement or contract. *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 of the Government Code). Consequently, unless the responsive information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

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 protects information that another statute makes confidential. The commission, Chevron, and Northville claim that the submitted information is confidential under section 552.101 in conjunction with section 382.041 of the Health and Safety Code. Section 382.041 provides in relevant 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 in submitting it to the commission. *See* Open Records Decision No. 652 (1997). The commission informs us that the submitted information was designated as being confidential when it was submitted to the commission. 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 arguments under section 382.041 together with the third party arguments under section 552.110(a).

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. *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. *Hyde*

Corp. v. Huffines, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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* ORD 552 at 5. However, we cannot conclude that 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). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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

³The following are the six factors that the Restatement gives 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).

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).

Kern, Chevron, Northville, and Delek each claim that portions of their information are excepted from disclosure under section 552.110(a). After review of the submitted arguments and the information at issue, we find that Kern has established a *prima facie* case that the information we have marked constitutes trade secrets. Accordingly, the information we have marked must be withheld pursuant to section 552.110(a) of the Government Code and section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code. However, Kern, Chevron, Northville, and Delek have not established that any of the remaining information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, sections 552.101 and 552.110(a) are not applicable to any of the remaining responsive information.

Kern, Chevron, Northville, Delek, and Flint Hills each claim that portions of their information are excepted from disclosure under section 552.110(b). Upon review, we find that Kern and Northville have established that release of some of their information, including the client information Kern has marked, would cause these companies specific competitive harm. Thus, the commission must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find that Kern, Chevron, Northville, Delek, and Flint Hills have made only conclusory allegations that release of their remaining information at issue would cause substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. Thus, the commission may not withhold the remaining responsive information under section 552.110(b).

We note that a portion of the responsive information appears to consist of emission data. 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). Therefore, to the extent that the submitted documents contain any information that constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release any such information in accordance with federal law.

You seek to withhold e-mail addresses contained in the remaining submitted information pursuant to section 552.137 of the Government Code. Section 552.137 of the Government Code states 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 has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Gen. Laws 3124, amended by Act of May 27, 2009, 81st Leg., R.S., ch. 962, § 7, *found at* <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/HB03544F.htm>. The commission does not inform us that it has received consent to release any of the e-mail addresses at issue.

Accordingly, the commission must withhold the e-mail addresses it has marked, as well as the additional e-mail address we have marked, under section 552.137.

In summary, the commission must withhold or release the information at issue in Open Records Letter No. 2006-09154 (2006) in accordance with the Agreed Final Judgment in *Kern Oil & Refining Co. v. Texas Commission on Environmental Quality and Attorney General of Texas, Greg Abbott*, Cause No. D-1-GN-06-003065 (53rd Jud. Dist., Travis County, Tex. May 12, 2008). The commission must withhold the information we have marked under section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code. The commission must also withhold the information we have marked under section 552.110(b) of the Government Code. However, to the extent the documents being withheld contain any information that constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release any such information in accordance with federal law. The commission must also withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining information must be released to the requestor.

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, 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,



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ACL/rl

Ref: ID# 355050

Enc. Submitted documents

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