



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2014

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

OR2014-20597

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# 543394 (TCEQ PIR No. 14-18219).

The Texas Commission on Environmental Quality (the "commission") received a request for all complaints, completed commission investigations, completed enforcement actions, including a specified case, the compliance history, notice of violations, notices of enforcements, and any other information regarding Clean Air Act violations related to Pasadena Refining System, Inc. ("Pasadena").¹ You state you have provided some information to the requestor. You claim some of the remaining requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Pasadena. Accordingly, you state and provide documentation showing, you notified Pasadena of the request for information and of its right to submit

¹We note the commission sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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 the Act in certain circumstances). We have received comments from Pasadena. 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 Pasadena marked the submitted documents as confidential when it provided them to the commission.² Thus, the submitted information is confidential under section 382.041 to the extent this information constitutes a trade secret. Pasadena argues some of its submitted information is confidential under section 552.110 of the Government Code. Because section 552.110(a) also protects trade secrets from disclosure, we will consider Pasadena's arguments under section 552.110(a) of the Government Code.

Pasadena claims section 552.110 of the Government Code excepts a portion of its information, which 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* Gov't Code § 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:

²We 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).

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.³ 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 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).

Pasadena argues certain information in Attachment C constitutes trade secrets under section 552.110(a). Upon review, we find Pasadena has made a *prima facie* case that the information at issue meets the definition of a trade secret. Accordingly, the commission must withhold this information, which we have marked in Attachment C, under section 552.101 of the Government Code in conjunction with section 382.041 of the Health

³The 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; *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

and Safety Code and section 552.110(a) of the Government Code.⁴ We note, 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 Pasadena's responsive information we have marked 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.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”).

You inform us the enforcement division is pursuing an enforcement action against Pasadena under Docket No. 2014-0228-MLM-E. You further inform us that settlement negotiations are ongoing, and that the information in Attachment D is being used in the settlement negotiations. You state that should the negotiations fail, the matter will be forwarded to the commission’s litigation division, a petition will be filed, and then the matter will be forwarded to the State Office of Administrative Hearings for a contested hearing. Therefore, based on the commission’s representations and our review of the submitted information, we conclude litigation was reasonably anticipated on the date the commission received this request for information. Furthermore, we find the information in Attachment D is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the commission may withhold Attachment D pursuant to section 552.103.⁵

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the commission must withhold the information we have marked in Attachment C 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 responsive information we have marked 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 may withhold Attachment D under section 552.103 of the Government Code. The remaining information must be released.

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.

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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,



Rustam Abedinzadeh
Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 543394

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Mark Berlinger
HSE Director
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Pasadena, Texas 77506
(w/o enclosures)