



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 26, 2015

Ms. Kathleen Decker
Director
Litigation Division
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

OR2015-12780

Dear Ms. Decker:

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# 568910 (PIR No. 15-21296).

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to waste disposal by Praxair, Inc. at the CES Environmental Services Site at a specified address and all responses to requests for information issued by the commission or the Environmental Protection Agency (the "EPA") pertaining to specified notice letters.¹ You claim a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of OFS International, LLC ("OFS"). Thus, pursuant to section 552.305 of the Government Code, you notified OFS of

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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

the request and of its right to submit arguments to this office as to why the submitted information should not be released. Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have received comments from OFS. We have considered the submitted arguments and reviewed the submitted information.

Section 552.111 excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

You explain the commission is conducting a removal action at the CES, site and if the removal costs are not reimbursed voluntarily, then the commission must file a cost recovery action. *See* Health & Safety Code § 361.197(d). Thus, you state Attachment E, Enclosure 1 was created in anticipation of litigation involving the commission. You argue Attachment E, Enclosure 1 consists of the commission's mental processes, conclusions, and legal theories and was created by a party or a party's representative for the anticipated litigation. Based on your representations and our review, we find the commission may withhold Attachment E, Enclosure 1 under section 552.111 of the Government Code.

Section 552.110(b) 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* ORD 661 at 5.

OFS states Attachment E, Enclosure 2 details the terms of various asset purchase agreements between OFS and third parties as well as other business information. You state release of the information at issue will give competitors an advantage in future transactions because the companies will have direct insight into OFS's business and what it is willing to accept in certain business negotiations. Thus, OFS argues Attachment E, Enclosure 2 consists of commercial or financial information, the release of which would cause OFS substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Attachment E, Enclosure 2 constitutes commercial or financial information, the release of which would cause the companies substantial competitive injury. Therefore, the commission must withhold Attachment E, Enclosure 2, under section 552.110(b) of the Government Code.²

In summary, the commission may withhold Attachment E, Enclosure 1 under section 552.111 of the Government Code. Further, the commission must withhold Attachment E, Enclosure 2, under section 552.110(b) of the Government Code.

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/>

²As our ruling is dispositive, we need not address OFS's remaining arguments.

[ori_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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a large, prominent "C" at the beginning.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/eb

Ref: ID# 568910

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)