



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 11, 2015

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

OR2015-19005

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# 578770 (PIR Nos. 15-22513 and 15-22595).

The Texas Commission on Environmental Quality (the "commission") received two requests from the same requestor for specified information pertaining to specified permits and facilities.¹ You state you have made some of the requested information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code.² You also state you notified Chevron Phillips Chemical Company, LP ("Chevron"); Equistar Chemicals, LP ("Equistar");

¹You state the commission sought and received clarification of the requests for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (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).

²Although you also raise section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. See Open Records Decision No. 676 at 1-2 (2002).

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 Chevron, Equistar, and Invista. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by section 382.041 of the Health and Safety Code, which provides in 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 section 382.041 protects information 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, Chevron, Equistar, and Invista state the information at issue was designated as being confidential when it was provided to the commission.⁴ Thus, the information at issue is confidential under section 382.041 to the extent this information constitutes a trade secret. Because section 552.110(a) of the Government Code also protects trade secrets, we will address the claims by Chevron, Equistar, and Invista for the information at issue under section 552.110(a) of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *7 (Tex. June 19, 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether

³We 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.

⁴We note information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests confidentiality for the information. *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 did not satisfy requirements of statutory predecessor to Gov't Code § 552.110).

it would be a decisive advantage.” *Id.* at *9. Invista states it has competitors. In addition, Invista states release of its information at issue would provide an advantage to a competitor. After review of the information at issue and consideration of the arguments, we find Invista has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may generally withhold Invista’s information at issue, which we have marked and indicated, under section 552.104(a) of the Government Code.⁵

Although the commission argues some of the submitted is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the commission’s argument under section 552.110. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and (2) “[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. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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.

⁵As our ruling is dispositive, we need not address Invista’s remaining arguments against disclosure of this information.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (citation omitted); *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.⁶ *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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).

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.*; ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Chevron and Equistar argue portions of their submitted information constitute trade secrets under section 552.110(a). Based on the submitted arguments and our review of the information at issue, we conclude Equistar has established the information we have marked constitutes trade secrets. Accordingly, the commission must generally withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code.⁷ However, we conclude Chevron and Equistar have failed to establish a *prima facie* case that any portion of their remaining information at issue meets the definition of a trade

⁶There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

⁷As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

secret. We further find Chevron and Equistar have not demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of Chevron's and Equistar's remaining information at issue may be withheld under section 552.110(a).

Chevron and Equistar also contend the release of some of the information at issue would result in substantial competitive harm to the companies. Having considered the arguments and reviewed the information at issue, we conclude Chevron has demonstrated a portion of its information at issue consists of commercial or financial information, disclosure of which would cause the companies substantial competitive harm. Accordingly, the commission must generally withhold the information we have marked under section 552.110(b). We find Chevron and Equistar have not established any of the remaining information at issue constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the commission may not withhold any of the remaining information at issue on this basis.

However, as the commission and Equistar acknowledge, 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). We note that 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. *See id.* Thus, to the extent any of the information at issue constitutes emissions 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.

In summary, the commission may generally withhold the information we have marked and indicated under section 552.104(a) of the Government Code. The commission must generally withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 382.041 of the Health & Safety Code and section 552.110(a) of the Government Code. The commission must also generally withhold the information we have marked under section 552.110(b) of the Government Code. However, to the extent any of the marked information constitutes emissions 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 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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bhf

Ref: ID# 578770

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Phyliss Rodriguez
Environmental Engineer
Lyondellbasell
1515 Miller Cut Off Road
La Port, Texas 77571-9810
(w/o enclosures)

Chevron Phillips Chemical Company
c/o Mr. Michael F. Vitris
Beveridge & Diamond
98 San Jacinto Boulevard, Suite 1420
Austin, Texas 78701-4296
(w/o enclosures)

Equistar Chemicals
1221 McKinney Street
Houston, Texas 77010
(w/o enclosures)

Ms. Molly E. Caperton
Litigation Counsel
Chevron Phillips Chemical Company
P.O. Box 4910
The Woodland, Texas 77380
(w/o enclosures)

INVISTA
c/o Ms. Lisa Uselton Dyar
Winstead
401 Congress Avenue, Suite 2100
Austin, Texas 78701
(w/o enclosures)