



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

June 18, 2019

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

OR2019-16458

Dear Ms. Backens:

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# 771572 (PIR No. 19-46535).

The Texas Commission on Environmental Quality (the "commission") received a request for six categories of information pertaining to a specified incident at a named company. The commission states it has released some information to the requestor. The commission claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. Additionally, the commission states release of the submitted information may implicate the proprietary interests of Davis Gas Processing, Inc. ("DGP") and the Environmental Protection Agency, Region 6 (the "EPA"). Accordingly, the commission states, and provides documentation showing, it notified these third parties of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released.<sup>1</sup> *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .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

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<sup>1</sup>As of the date of this letter, this office has not received comments from the EPA explaining why any of the submitted information should not be released.

comments from DGP. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [.]

Gov't Code § 552.022(a)(1). The submitted information includes completed reports and information pertaining to a completed investigation that are subject to section 552.022(a)(1). The commission must release the completed reports and the information pertaining to the completed investigation pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The commission seeks to withhold the information subject to section 552.022(a)(1) under sections 552.101, 552.103, and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the commission may not withhold the information subject to section 552.022, which we have marked, under sections 552.103 or 552.111 of the Government Code. However, as section 552.101 of the Government Code applies to confidential information, we will consider the commission's argument under section 552.101 for the information subject to section 552.022.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. The commission asserts some of the information at issue is protected by section 552 of title 5 of the United States Code, the federal Freedom of Information Act ("FOIA"). This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. *See* Attorney General Opinions H-917 (1976), H-836 (1974); Open Records Decision Nos. 561 (1990), 414 (1984),

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<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that FOIA applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded, “when information in the possession of a federal agency is ‘deemed confidential’ by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a state agency to respect the confidentiality imposed on the information by federal law.” *Id.* at 7.

The commission asserts Attachments D-2 and D-3 are confidential under the deliberative process privilege found in section 552(b)(5) of title 5 of the United States Code. *See* 5 U.S.C. § 552(b)(5) (agency may withhold inter-agency memoranda or letters not available by law to a party other than an agency in litigation with the agency). Upon review, however, we find the information at issue is contained in records of the commission, which are subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988); *see also Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); ORD 561 at 7 n.3 (noting federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). As stated above, information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.,* Attorney General Opinion MW-95 (neither FOIA nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under Act when held by Texas governmental body). Further, we have no indication the EPA considers the information in Attachments D-2 and D-3 to be confidential under the deliberative process privilege found in section 552(b)(5). Therefore, the commission may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with FOIA.

The commission also seeks to withhold Attachments D-2 and D-3 based on the assertion that the EPA expressly indicated that the information at issue would not be shared publicly. However, we note information is not confidential under the Act 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 by 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 did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the commission must release it, notwithstanding any expectations or agreement specifying otherwise.

The commission states Attachment E is excepted from disclosure under section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The commission states Attachment E relates to an ongoing criminal investigation by the commission's Environmental Crimes Unit, and release of the information would interfere with the investigation of the alleged criminal conduct. This office has previously determined that the Environmental Crimes Unit of the commission is a law enforcement agency for purposes of section 552.108. Based on the commission's representation and our review, we find release of Attachment E would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the commission may withhold Attachment E under section 552.108(a)(1) of the Government Code.

DGP states some of the information at issue in Attachment D-4 is excepted from disclosure under section 552.110(b) of the Government Code. 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 (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).

DGP argues some of the information at issue in Attachment D-4 consists of commercial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find DGP has demonstrated the information at issue, which we have marked, constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold the information we marked in Attachment D-4 under section 552.110(b) of the Government Code on behalf of DGP.

In summary, the commission may withhold Attachment E under section 552.108(a)(1) of the Government Code. The commission must withhold the information we marked in Attachment D-4 under section 552.110(b) of the Government Code on behalf of DGP. The commission must release the remaining information pursuant to section 552.022 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/orl\\_ruling\\_info.shtml](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,



Lecelle Clarke  
Attorney  
Open Records Division

LC/mo

Ref: ID# 771572

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)