



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 19, 2019

Ms. Hadassah Schloss
Director
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2019-32593

Dear Ms. Schloss:

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# 797699 (GLO# 19-0747).

The Texas General Land Office (the "GLO") received a request for the mineral file lease numbers, audit or reconciliation billing statements, date amounts were paid, and payors for specified audit log letters during a certain time period. You state the GLO has released some information. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Anadarko Petroleum Corporation; Chesapeake Operating, Inc.; COG Operating, LLC ("COG"); ConocoPhillips Company ("CP"); Devon Energy Corporation; Emerald Gas & Transmission, LLC; EOG Resources, Inc.; Fasken Oil and Ranch, Ltd. ("Fasken"); Kinder Morgan Production Company; Lamar Oil & Gas, Inc.; Legacy Reserves Operating, LP ("Legacy"); Neumin Production Company; Noble Energy, Inc. ("Noble"); PetroQuest Energy, LLC; and Sequitur Energy Resources, LLC.¹ Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as

¹ We note, and you acknowledge, the GLO failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302; Open Records Decision No. 150 at 2 (1977). Thus, we will consider whether the submitted information is excepted from disclosure under the Act, notwithstanding the GLO's violation of section 552.301 in requesting this decision.

to why the information at issue 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 COG, CP, Fasken, Legacy, and Noble. We have considered the submitted arguments and reviewed the submitted information.

We note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2019-22829 (2019). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the GLO must continue to rely on Open Records Letter No. 2019-22829 as a previous determination and withhold the information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to Open Records Letter No. 2019-22829, we will address the submitted arguments against release of the submitted information.

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, we have not received comments from any remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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. Accordingly, the GLO may not withhold the submitted information on the basis of any proprietary interest any remaining third party may have in the information.

We understand Fasken to argue its information may not be released because Fasken provided the information to the GLO with the expectation the information would remain confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *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. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 Gov't Code § 552.110). Consequently, unless the

information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

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*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. COG, CP, and Legacy state they have competitors and release of the information at issue would cause them harm. After review of the information at issue and consideration of the arguments, we find COG, CP, and Legacy have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the GLO may withhold the information we indicated under section 552.104(a) of the Government Code.²

Section 552.110 of the Government Code protects (1) trade secrets obtained from a person 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:

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 Restatement of Torts § 757 cmt. b. This office must accept

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

³ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

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 section 552.110(a) is applicable unless it has been shown 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 note 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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* ORD 661 at 5.

Fasken and Noble argue portions of the remaining information consist 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 some of the information at issue, which we indicated, constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the GLO must withhold the information we indicated under section 552.110(b) of the Government Code.⁴ However, we find none of the remaining information issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. *See* ORD 661. We note the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

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- (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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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

Therefore, the GLO may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Upon review, we further conclude the third parties at issue have failed to establish a *prima facie* case that any portion of the remaining information meets the definition of a trade secret. We further find these third parties have not demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. *See* ORD 402. Therefore, the GLO may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Section 552.113 of the Government Code provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure under the Act] if it is:

...

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

Gov't Code § 552.113(a)(2). In Open Records Decision No. 627 (1994), this office concluded section 552.113(a)(2) protects from public disclosure only (i) geological and geophysical information regarding the exploration or development of natural resources that is (ii) commercially valuable. ORD 627 at 3-4 (overruling rationale of Open Records Decision No. 504 (1988)). The decision explained the phrase "information regarding the exploration or development of natural resources" means "information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation." *Id.* at 4 n.4. However, section 552.113(a)(2) does not except general geological information about a particular location that is unrelated to the "presence or absence of natural resources." In order to be commercially valuable for purposes of Open Records Decision No. 627 and section 552.113, information must not be publicly available. *See* Open Records Decision No. 669 (2000). Fasken asserts section 552.113 for portions of its remaining information. Upon review, we conclude Fasken failed to demonstrate any portion of the remaining information at issue is commercially valuable geological or geophysical information regarding the exploration of or development of natural resources. Accordingly, the GLO may not withhold any portion of the information at issue under section 552.113(a)(2) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See* Gov't Code § 552.101. This section encompasses information that another statute makes confidential. Section 52.140 of the Natural Resources Code provides in part:

- (a) All information secured, derived, or obtained during the course of an inspection or examination of books, accounts, reports, or other records, as provided in section 52.135 of this code, is confidential and may not be used publicly, opened for public inspection, or disclosed, except for information set forth in a lien filed under this chapter and except as permitted under Subsection (d) of this section.
- (b) All information made confidential in this section shall not be subject to subpoena directed to the commissioner, the attorney general, or the governor except in a judicial or administrative proceeding in which this state is a party.

...

- (d) This section does not prohibit:
 - (1) the delivery of information made confidential by this section to the lessee or its successor, receiver, executor, guarantor, administrator, assignee, or representative;
 - (2) the publication of statistics classified to prevent the identification of a particular audit or items in a particular audit;
 - (3) the release of information which is otherwise available to the public; or
 - (4) the release of information concerning the amount of royalty assessed as a result of an examination conducted under Section 52.135 of this code or the release of other information which would have been properly included in reports required under Section 52.131 of this code.

Nat. Res. Code § 52.140(a), (b), (d). Fasken asserts a portion of its remaining information is confidential pursuant to section 52.140. Upon review, we find Fasken has failed to demonstrate the information at issue was provided to the land office in accordance with section 52.135 of the Natural Resources Code or is not subject to section 52.140(d). Accordingly, the GLO may not withhold any portion of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 52.140 of the Natural Resources Code.

In summary, the GLO may withhold the information we indicated under section 552.104(a) of the Government Code. The GLO must withhold the information we indicated under section 552.110(b) of the Government Code. The GLO 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Kelly McWethy
Assistant Attorney General
Open Records Division

KM/jxd

Ref: ID# 797699

Enc. Submitted documents

c: Requestor
(w/o enclosures)

16 Third Parties
(w/o enclosures)