

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 14, 2019

The Honorable Ken Paxton
Office of the Attorney General
Price Daniel Sr. Building, 6th Floor
209 W. 14th Street
Austin, Texas 78701

Attention: Justin Gordon, Division Chief, Open Records Division

Re: Public Information Act Request Regarding Axis Midstream Holdings LLC; Permit
No. 154527
Request for Attorney General Opinion; PIR No.: 19-47243

Dear Attorney General Paxton:

The Texas Commission on Environmental Quality (TCEQ) received a Public Information Act (PIA) request for access to TCEQ information. By letter dated April 30, 2019, which was received by the TCEQ on May 3, 2019, Mr. John Donovan requested access to information regarding Axis Midstream Holdings LLC (Axis Midstream) (Attachment A). The tenth business day after the receipt of the request is May 17, 2019. The TCEQ now submits its formal arguments and the documents in question for review.

The TCEQ has made available to Mr. Donovan the information that the TCEQ believes to be public information. On May 10, 2019, the TCEQ notified Mr. Donovan of our intention to not release any documents which TCEQ believes may fall within an exception to disclosure under the Public Information Act ("PIA") pending a decision from the Attorney General (Attachment B).

Additionally, in accordance with subsections (d) and (e) of § 552.305, the TCEQ notified Axis Midstream via certified mail, return receipt request no. 7017 2400 0000 6501 1927, of the request and made available related documents submitted to the Office of the Attorney General (Attachment C).

It is our interpretation that certain documents are not subject to disclosure under §§ 552.101, 552.110 and 552.305 of the PIA. In accordance with § 552.301(e) of the PIA, the TCEQ submits the following information: 1) written comments explaining why the exceptions raised are applicable; 2) a copy of the request for information (Attachment A); 3) this signed statement evidencing the date the request was received; 4) copies or representative samples of the information at issue; and 5) labeled information indicating which exceptions apply to which parts of the requested information (Attachment D).

Section 552.101, Information Considered Confidential by Law; 552.110, Confidentiality of Trade Secrets

Texas Government Code § 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information made confidential by other statutes, such as TEX. HEALTH & SAFETY CODE § 382.041(a), 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.” The Office of the Attorney General has concluded TEX. HEALTH & SAFETY CODE § 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 documents submitted in Attachment D were marked “Confidential” by Axis Midstream when it provided the documents to the TCEQ. Thus, we believe that the submitted information may be confidential under TEX. HEALTH & SAFETY CODE § 382.041 to the extent this information constitutes a trade secret as stated in that statute. The Texas Supreme Court has adopted the definition of trade secret from Restatement (First) of Torts § 757 (1939).

TEX. GOVT. CODE § 552.110(a)-(b) 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. The TCEQ believes the information marked in Attachment D may be subject to this exception.

In accordance with TEX. GOV'T CODE § 552.110, six factors must be considered in determining whether particular information constitutes a trade secret: (1) the extent to which the information is known outside the Third Party's business; (2) the extent to which it is known by employees and others involved in the Third Party's business; (3) the extent of measures taken by the Third Party to guard the secrecy of the information; (4) the value of the information to the Third Party and to its competitors; (5) the amount of effort or money expended by the Third Party in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

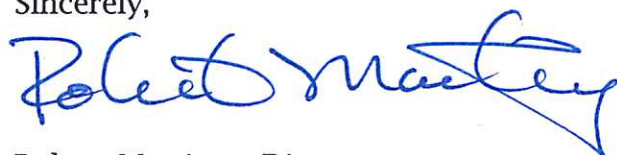
Pursuant to TEX. GOVT. CODE § 552.305, which states in pertinent part that, “the governmental body may, but is not required to, submit its reasons why the information should or should not be withheld or released,” the TCEQ has not taken a position on this matter. However, the TCEQ understands that the Open Government Section will provide Axis Midstream with an opportunity to provide its reasons why the enclosed information should be withheld from disclosure. *See* Open Records Decision No. 575 (1990).

Conclusion

We ask that you make a determination on whether the information should be withheld from disclosure under TEX. GOV'T CODE §§ 552.101, 552.110, and TEX. HEALTH & SAFETY CODE § 382.041. In accordance with § 552.301 of the PIA, I request a formal opinion on this matter.

I appreciate your response to this request. If you have any questions about this matter, please call Betsy Peticolas, Staff Attorney, with the TCEQ's Environmental Law Division, at (512) 239-6033.

Sincerely,

A handwritten signature in blue ink that reads "Robert Martinez". The signature is fluid and cursive, with the first name "Robert" and last name "Martinez" clearly legible.

Robert Martinez, Director
Environmental Law Division
Texas Commission on Environmental Quality

Enclosures

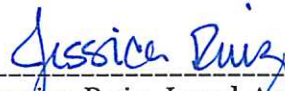
cc: Jessica Ruiz, TCEQ, General Law Division (via email)
Lena Roberts, TCEQ, General Law Division (via email)
Betsy Peticolas, TCEQ, Environmental Law Division (via email)
John Donovan, Port Aransas Conservancy (via email, without enclosures)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this referral was sent, via interagency mail, on May 14, 2019 to:

The Honorable Ken Paxton
Open Records Division,
Office of the Attorney General
Price Daniel, Sr. Building, 6th Floor
209 West 14th Street
Austin, Texas 78701

Attention: Justin Gordon, Division Chief, Open Records Division



Jessica Ruiz, Legal Assistant
General Law Division