



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2004

Ms. Sedora Jefferson
General Counsel
Texas Local Government Purchasing Cooperative
P.O. Box 400
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OR2004-8011

Dear Ms. Jefferson:

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# 209563.

The Texas Local Government Purchasing Cooperative (the "cooperative") received a request for information relating to a Texas Association of School Boards Pool 5 RFP, including a copy of the final contract executed by the winning bidder and information relating to the five short-listed bidders, including (1) the exact wording of performance guarantees; (2) the form and amount of performance assurance offered; (3) copies of the financial statements or equivalent information; (4) the exact wording of any switching and billing performance guarantees; and (5) contract prices and exact wording of contract terms describing what is or is not included in contract prices. The cooperative takes no position with regard to the public availability of the requested information. However, you believe that this information implicates the proprietary interests of the parties that submitted the information to the cooperative. You notified those parties of the request for information and of their right to submit arguments to this office as to why the information should not be released.¹ You also submitted the information that the cooperative deems to be responsive to the request. We also received correspondence from representatives of Constellation NewEnergy, Inc.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

("Constellation"); Direct Energy, LP ("Direct Energy"); the Texas General Land Office (the "GLO"); Reliant Energy, Inc. ("Reliant"); and TXU Energy Retail Company LP ("TXU"). We have considered all of the submitted arguments and have reviewed the submitted information.²

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from First Choice Power, Inc. ("First Choice"). Thus, First Choice has not demonstrated that any of its responsive information is proprietary for purposes of section 552.110 of the Government Code. We also note that Direct Energy has submitted a letter in which the company raises sections 552.101 and 552.110, but has not submitted any arguments demonstrating that either of these exceptions is applicable to any of Direct Energy's information. *See id.* § 552.301(e)(1)(A) (requiring submission of written comments stating reasons why claimed exceptions would allow information to be withheld). Thus, Direct Energy has not demonstrated that any of its responsive information is confidential or proprietary for purposes of sections 552.101 or 552.110. *See id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the arguments that the GLO submitted under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

²We note that the submitted documents contain information that the cooperative has not designated as being responsive to this request for information. Likewise, some of the submitted arguments address information that the cooperative has not identified as being responsive to this request. This decision is applicable only to the submitted information that the cooperative considers to be responsive to this request and does not address the public availability of any other information. *See* Gov't Code §§ 552.301(e)(1)(D), .302.

The GLO asserts that it has specific marketplace interests in information that it was involved in submitting to the cooperative because the GLO is authorized by statute to utilize royalties taken in kind to convey power directly to its public retail customers. *See* Util. Code § 35.102. The GLO informs us that under this authority, it has created the State Power Program, through which the GLO competes in the electrical energy marketplace to supply electrical energy to public retail customers. The GLO also informs us that it “competes with other private companies for the awards of these contracts.” Based on these representations, we conclude that the GLO has demonstrated that it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. *See* Open Records Decision No. 593 at 3.

The GLO also asserts that the release of the information at issue would harm its marketplace interests. The GLO informs us that the information at issue reveals how it provides its customers with electrical energy. The GLO argues that if its competitors had access to this information, they would “be able to use the GLO’s methods of delivery of electrical services and its pricing formula for such services as their own.” The GLO further contends that “[t]he competitors could use this information to structure their own proposals for future electrical customers” so as to place the GLO at a competitive disadvantage in the electrical energy marketplace. The GLO also informs us that, “working with Reliant[, the GLO] is able to offer unique products, services and pricing formulas in the competitive marketplace of electric energy.” The GLO contends that allowing competitors access to information that relates to these products, services, and formulas will significantly impair the GLO’s ability to compete in the marketplace. Based on the submitted arguments, we conclude that the GLO has shown that release of the information for which it claims an exception to disclosure under section 552.104 would cause specific harm to the GLO’s marketplace interests in a particular competitive situation. *See* Open Records Decision No. 593 at 10. We therefore conclude that the information relating to the GLO that we have marked is excepted from disclosure under section 552.104.

Constellation, Reliant, and TXU have submitted arguments under section 552.110. This section 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) “commercial 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.” *See* Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “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 a single or ephemeral event 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 763, 776 (Tex. 1958). If the governmental body takes no position on the applicability of the trade secret aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.³ *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude, however, 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Constellation contends that its responsive information qualifies as a trade secret under section 552.110(a) and also is excepted from disclosure under section 552.110(b). Having considered the company's arguments, we conclude that Constellation has shown that all of the information at issue is excepted from disclosure under section 552.110(b). We have marked the information relating to Constellation that the cooperative must withhold.

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

- (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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Reliant also contends that its responsive information qualifies as a trade secret under section 552.110(a) and is excepted from disclosure under section 552.110(b).⁴ Having considered the company's arguments, we find that Reliant has demonstrated that all of the information at issue is excepted from disclosure under section 552.110(b). We have marked the information relating to Reliant that the cooperative must withhold.

TXU also asserts that its responsive information qualifies as a trade secret under section 552.110(a) and is excepted from disclosure under section 552.110(b). Based on the company's arguments, we conclude that TXU has demonstrated that all of the information at issue is excepted from disclosure under section 552.110(b). We have marked the information relating to TXU that the cooperative must withhold.

Lastly, we note that some of the responsive information that must be released is subject to copyright protection. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted materials. *Id.* A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the cooperative may withhold the responsive information relating to the GLO that is excepted from disclosure under section 552.104; and (2) the cooperative must withhold the responsive information relating to Constellation, Reliant, and TXU that is excepted from disclosure under section 552.110. The rest of the responsive information must be released. In releasing information that is protected by copyright, the cooperative must comply with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

⁴We note that the responsive information encompassed by Reliant's arguments under section 552.110 overlaps the information encompassed by the GLO's claim under section 552.104. As we have concluded that much of the information encompassed by Reliant's section 552.110 claims is excepted from disclosure under section 552.104, we do not address Reliant's arguments with respect to that information.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

JWM/sdk

Ref: ID# 209563

Enc: Submitted documents

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