



ATTORNEY GENERAL OF TEXAS
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November 2, 2004

Ms. Noelle C. Letteri
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Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2004-9330

Dear Ms. Letteri:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211983.

The Texas General Land Office (the "GLO") received a request for a copy of the GLO's current agreements with Reliant Energy, Inc. ("Reliant") related to the state power program, including an agreement for the sale of natural gas from the GLO to Reliant and an agreement for the administration of the state power program. You claim that a portion of the requested information is excepted from disclosure under section 552.104 of the Government Code. You also claim that release of the requested information may implicate the proprietary interests of Reliant under section 552.110 of the Government Code, although you take no position as to whether the information is so excepted. You state, and provide documentation showing, that you have notified Reliant of the request and of its right to submit arguments to this office as to why the information should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act ("Act") in certain circumstances).* We have considered all of the submitted arguments and reviewed the submitted information.

You inform us that information subject to a portion of this request is subject to a previous ruling by this office. In Open Records Letter No. 2004-2923 (2004), we concluded that the GLO, pursuant to section 552.104 of the Government Code, may withhold from public disclosure the State Power Program Agreement between the GLO and Reliant, including Amendment 4. You state that "the only difference between the responsive documents

submitted under OR2004-2923 and this present request is the addition of Amendment No. 5." Therefore, to the extent that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the GLO may continue to rely on our decision in Open Records Letter No. 2004-2923 with respect to the information requested in this instance that was previously ruled upon in that decision.¹ *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001).

We note that the remaining submitted information consists exclusively of "contract[s] relating to the receipt or expenditure of public or other funds by a governmental body" and is therefore generally "public information and not excepted from required disclosure . . . unless . . . expressly confidential under other law." *See* Gov't Code § 552.022(a)(3). However, as the GLO asserts that this information is excepted from disclosure under section 552.104 and Reliant asserts section 552.110, we will address these arguments. *See* Gov't Code § 552.104(b) (section 552.022 does not apply to information that is excepted from disclosure under section 552.104).

The GLO contends that Amendment No. 5 of the State Power Program Agreement is excepted from disclosure 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. 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).

You assert that the GLO has specific marketplace interests in the information at issue because the GLO is authorized by statute to "utilize royalties taken in kind to convey power

¹ The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Public Information Act (the "Act"); and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

directly to its public retail customers.” Tex. Util. Code § 35.102. You inform us that under this authority, the GLO has created the State Power Program through which it competes in the electrical energy marketplace to supply electrical energy to public retail customers. You also inform us that the GLO “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* ORD 593.

You also assert that release of the submitted information would harm the GLO’s marketplace interests. You inform us that the submitted information “reveal[s] how the GLO provides its customers electrical energy.” You assert that, if the GLO’s 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.” You further contend that “[t]he competitors could use this information to structure their own proposals for future bidding situations” to better compete against the GLO. You also inform us that “[t]he GLO working with Reliant is able to offer unique products, services and pricing formulas in the competitive marketplace of electrical energy” and contend that allowing competitors access to this information will undermine the GLO’s ability to compete in this marketplace. Based on your representations and arguments, we conclude that the GLO has shown that release of the information at issue will bring about specific harm to the GLO’s marketplace interests. *See* ORD 593. Accordingly, under section 552.104 of the Government Code, the GLO may withhold Amendment No. 5 of the State Power Program Agreement.²

Next, in regard to the agreement between the GLO and Reliant that relates to the sale of natural gas (the “gas contract”), we note that the GLO did not submit a copy of the requested gas contract for our review within the fifteen-business-day period prescribed by section 552.301(e). *See* Gov’t Code § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov’t Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Thus, we will address the arguments submitted by Reliant in regard to this gas contract.

² As our ruling is dispositive, we need not address Reliant’s arguments against disclosure of this information.

Reliant claims that portions of the requested gas contract are excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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 [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 a single or ephemeral event 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. . . . [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), *cert. denied*, 358 U.S. 898 (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 (1939). This office has held that if a governmental body takes no

³ The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (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 [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).*

position with regard to the application of the trade secret branch of section 552.110 to requested information, we will accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for the exception and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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) of the Government Code excepts from disclosure “[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 5-6 (1999).

Upon review of Reliant’s arguments and the submitted gas contract, we find that Reliant has not established that any portion of the gas contract qualifies as a trade secret under 552.110(a). We conclude, however, that Reliant has established that a portion of the gas contract, which we have marked, is excepted under section 552.110(b). However, we find that Reliant has failed to establish that release of any other portion of the requested gas contract would cause Reliant substantial competitive injury as required by section 552.110(b). *See* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Accordingly, pursuant to section 552.110, the GLO must withhold only those portions of the gas contract which we have marked.

We note that the gas contract contains bank account information that is subject to section 552.136 of the Government Code. This section provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, the GLO must withhold the bank account information we have marked in the gas contract pursuant to section 552.136.

In summary, to the extent that the documents at issue here are precisely the same records that we addressed in Open Records Decision No. 2004-2923 (2004), we conclude that the GLO may continue to rely on that letter ruling as a previous determination. The GLO may withhold Amendment No. 5 of the State Power Program Agreement pursuant to section 552.104 of the Government Code. The GLO must withhold the information we have marked

in the requested gas contract pursuant to sections 552.110 and 552.136 of the Government Code. The remaining responsive information must be released to the requestor.

The GLO has requested that we issue a previous determination for the responsive information. However, we decline to do so at this time. Accordingly, 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. *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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Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 211983

Enc. Submitted documents

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