



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 12, 2005

Ms. Michele Austin  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR2005-11129

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 236798.

The City of Houston (the "city") received a request for "a copy of an agreement between the city and Reliant Energy under which the [c]ity purchases electricity from Reliant Energy for the operation of [c]ity buildings and other facilities." You claim that the responsive information may be excepted from disclosure pursuant to sections 552.101, 552.104, 552.110, 552.113, 552.131, or 552.133 of the Government Code, but make no arguments and take no position as to whether the information is so excepted. You inform us that the city notified Reliant Energy, Inc. ("Reliant") and the Texas General Land Office ("GLO"), the third parties whose proprietary interests may be implicated by the request, of the city's receipt of the request and their right to submit arguments to us as to why any portion of the requested information should not be released to the requestor. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in Act in certain circumstances). We have received comments from Reliant and the GLO.

Initially, we note that the documents we have marked are not responsive to the present request. The requestor only seeks a copy of a specified agreement. Accordingly, the city

need not release the documents we have marked in response to this request, and this ruling only addresses the availability to the requestor of the specified agreement. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed).

Next, we must address the applicability of section 552.007 of the Government Code to the responsive information. Section 552.007 provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See Gov't Code 552.007*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). The responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2002-2831 (2002). In that ruling, we noted the city voluntarily released the agreement at issue. In this instance, the GLO claims that the responsive information is excepted from disclosure under section 552.104.<sup>1</sup> Section 552.104 of the Government Code is a discretionary exception to disclosure under the Act and does not constitute law that makes information confidential or expressly prohibits its release for purposes of section 552.007. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 subject to waiver). Accordingly, the city may not withhold the requested information under section 552.104. Reliant also claims that the responsive information is excepted from disclosure under section 552.110. Although as noted, protection for information protected by the Act's permissive exceptions can be waived, protection for information deemed confidential by law ordinarily is not waived through "selective disclosure." *See* Open Records Decision Nos. 490, 400. As we have no indication that Reliant had an opportunity to raise section 552.110 to protect its proprietary information in the agreement at issue before the city disclosed this information in 2002, the previous release of this information did not serve to waive Reliant's arguments under this section. Therefore, we will address Reliant's arguments under section 552.110.

First, we note that the submitted responsive information consists exclusively of a "contract 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 Reliant asserts that this information is excepted from disclosure under section 552.110,

---

<sup>1</sup>We note that Reliant also argues that the information is excepted under section 552.104. However, section 552.104 is designed to protect the interests of governmental bodies and not third parties. Open Records Decision No. 592 (1991). Therefore, we do not consider any arguments submitted by Reliant under section 552.104.

which consists of “other law” for purposes of section 552.022, we will address Reliant’s arguments under section 552.110.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov’t Code § 552.110(a), (b).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its] competitors;

(5) the amount of effort or money expended by [the company] in developing this information; and

(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 No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude 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. Open Records Decision No. 402 (1983).

Section 552.110(b) 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Reliant claims that the information at issue, including its pricing information, constitutes trade secrets under section 552.110(a). We note that pricing information 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 (1939); *see Hyde Corp.*, 314 S.W.2d at 776, *see also* Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Reliant has not established that its pricing information or any of the remaining information at issue meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, none of this information may be withheld under section 552.110(a).

Reliant also claims that the information at issue is excepted from disclosure under section 552.110(b). We note that pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Reliant has not sufficiently demonstrated that substantial competitive injury would likely result from the release of its pricing information or any of the remaining 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). Thus, the city may not withhold this information under section 552.110(b) of the Government Code. Accordingly, the city must release the requested agreement in its entirety.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

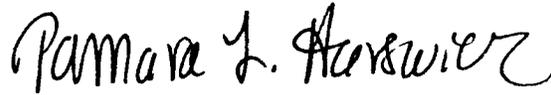
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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. 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,



Tamara L. Harswick  
Assistant Attorney General  
Open Records Division

TLH/sdk

Ref: ID# 236798

Enc. Submitted documents

c: Mr. John P. Littlejohn  
Infrastructure Development Partners, L.L.C.  
Via Facsimile: (713) 552-0140  
(w/o enclosures)

Ms. Orlesia A. Hawkins  
Graves, Dougherty, Hearon & Moody, P.C.  
P.O. Box 98  
Austin, Texas 78767  
(w/o enclosures)

Mr. John Tipton  
Reliant Energy Solutions, L.L.C.  
P.O. Box 4300  
Houston, Texas 77210-4300  
(w/o enclosures)

Ms. Noelle C Letteri  
Legal Services Division  
General Land Office  
P.O. Box 12873  
Austin Tx 78711-2873  
(w/o enclosures)