



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 18, 2006

Ms. Sarah Irwin Swanson  
Assistant Director of General Law  
Public Utilities Commission of Texas  
P.O. Box 13326  
Austin, Texas 78711

OR2006-12284

Dear Ms. Swanson:

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# 262320.

The Public Utility Commission of Texas (the "PUC") received a request "to review those certifications for all Competitive retailers that serve residential customers in Texas.<sup>1</sup> You state that the PUC is releasing portions of the requested information to the requestor. Although you take no position with respect to the remaining requested information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, pursuant to section 552.305, you state that you notified several interested third parties whose proprietary interests may be implicated of the request and of their opportunity to submit comments to this office. *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 Act in certain circumstances). The parties you notified are: Reliant Energy Retail Services, LLC, WTU Retail Energy, CPL Retail Energy, Gexa Energy, LP, Cirro Group, Inc., Direct Energy, Tara Energy, Inc., Just Energy Texas, LLC, SUEZ Energy Resources NA, Inc., AmeriPower, LLC, Freedom Group, LLC, W Power and Light, LP, Dynowatt, LP, Affordable Power Plan, LP, Stream Energy, and Champion Energy

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<sup>1</sup> The requestor excluded customer names and email addresses. Therefore, any customer names and email addresses within the requested documents are not responsive to the present request. This ruling does not address the public availability of any non-responsive information, and that information need not be released. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Services, LLC. We received arguments from five companies: Cirro Group, Inc., Dynowatt, LP, Freedom Group, LLC, Stream Energy, and Gexa Energy, LP. We have reviewed the submitted information and the third parties' arguments.

Government Code section 552.305 permits an interested third party to submit to this office within ten days of receiving notification of the request reasons why requested information should not be released. *See* Gov't Code § 552.305; *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Because Reliant Energy Retail Services, WTU Retail Energy, CPL Retail Energy, Direct Energy, Tara Energy, Inc., Just Energy Texas, LLC, SUEZ Energy Resources NA, Inc., AmeriPower, LLC, W Power and Light, LP, Affordable PowerPlan, LP and Champion Energy Services, LLC did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that these companies' information is excepted from disclosure because of their proprietary interests. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, the PUC may not withhold any portion of the submitted information based on the proprietary interests of these third parties.<sup>2</sup>

Each of the five companies that submitted arguments raises section 552.110 of the Government Code. Section 552.110 protects the property 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. Each individual business entity claiming section 552.110(a) or (b) bears its own burden for proving that its information falls under one of these prongs. *See* Gov't Code § 552.110; Open Records Decision No. 661 at 5 (1999). With respect to the trade secret prong of section 552.110, we note that 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

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<sup>2</sup> This office received correspondence from a representative of Champion Energy Service, LLC ("Champion") informing us that it has resolved this matter informally and that the requestor has agreed to withdraw the formal request for Champion's information. However, the PUC has not withdrawn its request for a ruling on Champion's responsive information.

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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> This office has held that when, as here, a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a business entity's claim for exception as valid under that branch if that entity establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

A business entity raising the commercial and financial information prong of section 552.110 is required to provide this office a specific factual or evidentiary showing, not conclusory or generalized allegations, that it would suffer substantial competitive injury from disclosure of its information. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

We have considered the companies' submitted arguments and the submitted information. We conclude that Cirro Group, Inc, Dynowatt, LP, Stream Energy, and Gexa Energy have established that section 552.110(b) applies to their responsive information.<sup>4</sup> As for Freedom

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<sup>3</sup> 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).

<sup>4</sup> In light of this conclusion, we need not address the companies' additional arguments against disclosure.

Group, we conclude that Freedom Group has not established that section 552.110 applies to its submitted information.

We also conclude that the PUC may not withhold Freedom Group's information based on section 552.104 of the Government Code. Freedom Group raised section 552.104. Section 552.104, however, protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the PUC does not raise section 552.104, this section is not applicable to Freedom Group's information. *Id.* (Government Code section 552.104 may be waived by governmental body).

Lastly, for the remaining information, we note that the submitted information contains bank account numbers. Section 552.136 of the Government Code states 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."<sup>5</sup> Gov't Code § 552.136. The PUC must, therefore, withhold the marked bank account and credit card numbers under section 552.136.

We note that a portion of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990).

In summary, based on section 552.110(b), the PUC must withhold the responsive information related to Cirro Group, Inc, Dynowatt, LP, Stream Energy, and Gexa Energy. Based on section 552.136, the PUC must withhold the marked bank account numbers in the remaining responsive information. The PUC must release the remaining information to the requestor.

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

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<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions like sections 552.101 and 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KHH/sdk

Ref: ID# 262320

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