



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2007

Mr. Scott A. Kelly
Deputy General Counsel
Office of General Counsel
Texas A&M System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2007-16329

Dear Mr. Kelly:

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# 297082.

The Texas A&M University System (the "system") received a request for "bid documents" submitted to the system "concerning bids to supply electricity to system schools." You raise no exception to disclosure of the submitted information. However, you indicate that release of the information may implicate the proprietary interests of interested third parties. Accordingly, you state, and provide documentation showing, that you notified these parties of the request and of their right to submit arguments to this office as to why their proposals should not be released.¹ *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). We have received comments from AEP, the Texas General Land Office ("GLO"), and Reliant. We have reviewed the submitted information.

¹The third parties provided notice pursuant to section 552.305 are the following: American Electric Power ("AEP"); Champion Energy Services, L.L.C.; Constellation New Energy, Inc.; Direct Energy; Gexa Energy; Liberty Power; Reliant Energy, Inc. ("Reliant"); Sempra Energy Solutions, L.L.C.; Suez Energy Resources NA, Inc.; and TXU Energy.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from any of the remaining third parties for withholding their information. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of any of these companies, and the system may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

The GLO states it submitted a bid reponse to the system with Reliant as GLO's representative. The GLO asserts that the documents it submitted to the system in response to the request for proposals at issue are excepted under section 552.104 of the Government Code, which 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).

The GLO asserts that it has specific marketplace interests in the information at issue because the GLO is authorized by statute to "sell or otherwise convey power generated from royalties taken in kind." Tex. Util. Code § 35.102. The GLO advises that under that authority, it has created the State Power Program through which it bids on contracts for the right to sell electrical energy to public retail customers. The GLO states it competes with other private companies for the awards of these contracts. Based on these representations, we find 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 (1991).

The GLO contends that the release of its information would harm its marketplace interests because this information represents the method by which the GLO will provide and charge for electric energy to its electrical energy customers. The GLO further asserts 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.” Thus, the GLO contends that allowing competitors access to the documents at issue will undermine its ability to compete in this marketplace. Based on the GLO’s representations and arguments, we conclude that the GLO has shown that release of some of the information at issue would cause specific harm to the GLO’s marketplace interests. *See* Open Records Decision No. 593 (1991). We therefore conclude that the system may withhold this information, which we have marked, under section 552.104.² However, we find that the GLO has not established that release of any of the remaining information would cause specific harm to GLO’s marketplace interests; therefore, the system may not withhold any of the remaining information under section 552.104.

Reliant asserts that some of the remaining information in the GLO bid response is excepted under section 552.110 of the Government Code. AEP also asserts that its information, including its pricing information, is excepted from disclosure under section 552.110. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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. 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.

²We note that the GLO, in its brief to this office, submitted a copy of its proposal with specific information marked to be withheld pursuant to section 552.104. The information we have marked under section 552.104 corresponds to the GLO’s markings. We further note that the GLO has submitted some information that it seeks to withhold under the Act that the system did not submit to us for review. This ruling does not address information not submitted to us by the system.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. 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 position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person 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). 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) 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.” 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 requested information. *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).

Upon review, we determine that AEP has made a specific factual or evidentiary showing that the release of some of the information at issue would result in substantial competitive injury. Accordingly, the system must withhold the information we have marked in AEP's documents pursuant to section 552.110(b). However, we determine that no part of the remaining information for which AEP asserts section 552.110(b) may be withheld on this basis. We also find that Reliant has made only conclusory allegations that release of the information at issue in its documents would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, the system may not withhold any of Reliant's information pursuant to section 552.110(b).

Further, we find that neither AEP nor Reliant has shown that any of the information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a

³The following are the six factors that the Restatement gives 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 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).

trade secret claim. Thus, the system may not withhold any of the information at issue pursuant to section 552.110(a).

AEP also asserts that the company's remaining information is excepted under section 552.133 of the Government Code, which excepts from disclosure a public power utility's information related to a competitive matter. AEP does not inform us that it is a public power utility. *See* Gov't Code § 552.133(a)(1) (defining "public power utility"). Thus, AEP has failed to demonstrate that section 552.133 is applicable, and the system may not withhold any of the information at issue on this basis.

We note that some of the materials 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, we have marked the information the system (1) may withhold under section 552.104 of the Government Code, and (2) must withhold under section 552.110 of the Government Code. The system must release the remaining information, but any information that is copyrighted may only be released in accordance 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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,



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Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 297082

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