



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 3, 2008

Mr. Erik A. Eriksson  
General Counsel  
Port of Houston Authority  
P.O. Box 2562  
Houston, Texas 77252-2562

OR2008-15006

Dear Mr. Eriksson:

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# 326676.

The Port of Houston Authority (the "authority") received a request for a specified energy audit and "any other related presentations [and] RFQ responses associated with this project." Although you take no position with respect to the requested information, you state that it may contain proprietary information. You state, and provide documentation showing, that you have notified the following interested third parties of the request and of their opportunity to submit comments to this office: Science Applications International Corp. ("Science Applications"); Burns & McDonnell; Johnson Controls; TAC Energy Solutions ("TAC"); and Siemens Building Technologies ("Siemens"). *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 the applicability of exception to disclose under Act in certain circumstances). We have considered comments submitted by Science Applications and Siemens and reviewed the submitted information.

Initially, we note that Science Applications argues to withhold from public disclosure only information that the authority did not submit. This ruling does not address information that was not submitted by the authority and is limited to the information submitted as responsive by the authority. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, Burns & McDonnell, Johnson Controls, and TAC have not submitted to this office any reasons explaining why the submitted information should not be released. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110(b) (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 result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the authority may not withhold any portion of the information pertaining to these companies on the basis of any proprietary interests that these companies may have in the information.

Siemens asserts that its information is confidential because it has been marked confidential. We note, however, that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless Siemens's information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Siemens asserts that its information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the authority does not seek to withhold any information pursuant to this exception, we find that the authority may not withhold any of Siemens's information under section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

Next, Siemens claims that its information is excepted from disclosure under section 552.110 of the Government Code, which 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.” Gov’t Code § 552.110(a). 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* ORD 552 at 2. 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); *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. RESTATEMENT OF TORTS § 757 cmt. b (1939). The 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; 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 Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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. ORD 552 at 5-6. 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." Gov't Code § 552.110(b). 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find that Siemens has established that its customer information, which we have marked, constitutes commercial and financial information, the release of which would cause the company substantial competitive harm. Accordingly, the authority must withhold the information we have marked under section 552.110(b). We find, however, that Siemens has made only conclusory allegations that release of any of the remaining submitted information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (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 is too speculative), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we conclude that Siemens has failed to establish that any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, none of the remaining information may be withheld under section 552.110.

Section 552.136 states that "[n]otwithstanding any other provision of [the Act], 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>1</sup> Gov't Code § 552.136(b). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of

---

<sup>1</sup>The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). The authority must withhold the utility service account numbers and insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, we note that some of the remaining information is 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 protected by copyright. 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 materials protected by copyright, 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, the authority must withhold: (1) the information we have marked under section 552.110(b) of the Government Code, and (2) the utility service account numbers and insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright 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). If the governmental body does not file suit over 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 challenge 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,



Bill Dobie  
Assistant Attorney General  
Open Records Division

WJD/jh

Ref: ID# 326676

Enc. Submitted documents

cc: Ms. Hudielle A. de Souza  
Legal Assistant/Law Clerk  
Chevron Energy Solutions Company  
345 California Street, 18<sup>th</sup> Floor  
San Francisco, California 94109  
(w/o enclosures)

Mr. Jared McCurley  
TAC Energy Solutions  
10669 Richmond Avenue  
Building 6, Suite 160  
Houston, Texas 77042  
(w/o enclosures)

Mr. David M. Temming, P.E.  
Senior Project Manager  
Burns & McDonnell  
9400 Ward Parkway  
Kansas City, Missouri 64114-3319  
(w/o enclosures)

Mr. Chad L. Nobles  
Energy & Environmental Solutions  
Siemens Building Technologies, Inc.  
8850 Fallbrook  
Houston, Texas 77064  
(w/o enclosures)

Ms. Lisa Loupe  
Regional Solutions Manager, South Region  
Johnson Controls  
3021 West Bend Drive  
Irving, Texas 77563  
(w/o enclosures)

Mr. Brad Boerger  
Regional Director  
Chevron Energy Solutions  
12980 Foster Drive, Suite 400  
Overland Park, Kansas 66213  
(w/o enclosures)