



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2008

Ms. Renee Byas
General Counsel
Houston Community College
3100 Main
Houston, Texas 77002

OR2008-15008

Dear Ms. Byas:

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# 326792.

Houston Community College ("HCC") received a request for responses to an RFP for a retail electricity provider. You take no position on the public availability of the requested information. You believe, however, that this request for information may implicate the proprietary interests of third parties. You notified the interested parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from attorneys for the Texas General Land Office (the "GLO"), Integrys Energy Services, Inc. ("Integrys"), Reliant Energy, Inc. ("Reliant"), and Suez Energy Resources NA, Inc. ("Suez"). We have considered all of the submitted arguments and reviewed the submitted information.

We first note that HCC did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) provides that a governmental body must ask for the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. – Austin 1990, no writ).

You inform us that HCC received this request for information on August 7, 2008; therefore, HCC's deadlines under subsections 552.301(b) and 552.301(e) were August 21 and August 28, respectively. You requested this decision by U.S. Mail meter-marked August 25. You submitted a copy of the request for information to this office on September 8. Thus, because HCC did not comply with section 552.301, the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Accordingly, we will determine whether any of the submitted information must be withheld to protect the interests of the third parties.

An interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Direct Energy. Therefore, because Direct Energy has not demonstrated that any of the submitted information is proprietary for the purposes of the Act, HCC may not withhold any of the information that pertains to Direct Energy on that basis. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Turning to the arguments that we received from the third parties, we begin with the GLO's claim under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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 states that in conjunction with Reliant, it submitted a proposal to HCC. The GLO contends that it has specific marketplace interests in the proposal because the GLO is authorized by statute to “sell or otherwise convey power or natural gas generated from royalties taken in kind[.]” Util. Code § 35.102. The GLO explains that under its authority, it has created the State Power Program, through which the GLO bids on contracts for the right to sell electrical energy to public retail customers. The GLO states that it competes with private entities 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 the purposes of section 552.104. *See* ORD 593.

The GLO contends that the release of its proposal would harm its marketplace interests because the proposal reveals the methods by which the GLO will provide electrical energy to its customers and charge for its services. The GLO argues that if its competitors had access to this information, they “will 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 information 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* ORD 593. We therefore conclude that HCC may withhold that information, which we have marked, under section 552.104.² We also conclude that the GLO has not established that release of any of the remaining information at issue would cause specific harm to the GLO’s marketplace interests; therefore, HCC may not withhold any of that information under section 552.104.

Next, we address the arguments that we received from Integrys, Reliant, and Suez. Among other things, Reliant states that its response to the RFP is labeled “proprietary and confidential” and that matters related to its proposal are required to be kept confidential. Likewise, Suez states that confidential treatment was requested for its proposal. We note,

²Because we conclude that HCC may withhold this information under section 552.104, we do not address Reliant’s arguments against disclosure of the marked information.

however, that information is not confidential under the Act simply because the party that submitted the information anticipated or requested confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 Gov’t Code § 552.110). Therefore, unless the submitted information relating to Reliant and Suez falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Reliant claims an exception to disclosure under section 552.104 of the Government Code. We note, however, that this exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties such as Reliant. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, HCC may not withhold any of the remaining information in the proposal submitted by the GLO and Reliant under section 552.104.

The GLO, Integry, Reliant, and Suez claim exceptions under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret 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.” 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 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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim under section 552.110(a) as valid if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.³ *See* ORD 552 at 5. 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. *See* Open Records Decision No. 402 (1983).

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 information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Integrays contends that its pricing information qualifies as a trade secret under section 552.110(a) and also is protected by section 552.110(b). The GLO and Reliant argue that the remaining information in their proposal constitutes a trade secret under section 552.110(a) and also is protected by section 552.110(b). Suez claims both section 552.110(a) and section 552.110(b) for portions of its proposal. Having considered all of the parties' arguments and reviewed the information at issue, we conclude that HCC must withhold Integrays's and Suez's pricing information under section 552.110(b). We also conclude that HCC must withhold some of Suez's customer information under section 552.110(a). Although Suez's proposal identifies other customers of the company, those customers also are identified on Suez's website. We are unable to conclude that the release of information published on Suez's website constitutes a trade secret of Suez or that the release of such information would cause Suez competitive harm. We conclude that the GLO, Reliant, and Suez have not demonstrated that any of the remaining information at issue constitutes a trade secret under section 552.110(a). We also conclude that the GLO, Reliant,

³The Restatement of Torts lists the following six factors 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 other 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).

section 552.110(b) that release of any of the remaining information at issue would cause the GLO, Reliant, or Suez substantial competitive harm. Therefore, HCC may not withhold any of the remaining information under section 552.110. *See* Gov't Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 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 was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

We note that section 552.136 of the Government Code is applicable to some of the remaining information.⁴ Section 552.136(b) 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.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked bank account and routing numbers that HCC must withhold under section 552.136.

We also note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) HCC may withhold the information that we have marked under section 552.104 of the Government Code; and (2) HCC must withhold the information that we have marked under sections 552.110 and 552.136 of the Government Code. The rest of the submitted information must be released. Any information that is protected by copyright must 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

⁴Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III", written over a horizontal line.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jh

Ref: ID# 326792

Enc: Submitted documents

c: Mr. Jason Davila
Legacy Energy Solutions.
1221 Lamar Street Suite 510
Houston, Texas 77010
(w/o enclosures)

Mr. Steven Carroll
Direct Energy
90 Lake Carolyn Parkway Suite 1100
Irving, Texas 75039
(w/o enclosures)

Ms. Lesli R. Barber
Texas General Land Office
1700 North Congress Avenue Suite 910
Austin, Texas 78701
(w/o enclosures)

Ms. Linda Hookham
Integrays Energy Services, Inc.
1716 Lawrence Drive
De Pere, Wisconsin 54115
(w/o enclosures)

Ms. Naveen Rabie
Suez Energy Resources NA, Inc.
1990 Post Oak Boulevard Suite 1900
Houston, Texas 77056
(w/o enclosures)

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