



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2011

Mr. Hans P. Graff
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2011-17554

Dear Mr. Graff:

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# 437268.

The Houston Independent School District (the "district") received a request for final pricing information submitted by prospective vendors of electricity.¹ Although you take no position on the public availability of the requested information, you believe it may implicate the proprietary interests of the Texas General Land Office (the "GLO"), Hudson Energy ("Hudson"), and Reliant Energy Retail Services, LLC ("Reliant"). You inform us the district notified the GLO, Hudson, and Reliant 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. We received arguments under sections 552.104 and 552.110 of the Government Code from the GLO and from an attorney for Reliant. We have considered the parties' arguments and reviewed the submitted information.²

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This

¹You inform us the requestor provided clarification of his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We note Reliant has submitted information the company contends should be withheld from disclosure. This decision is applicable only to the requested information the district submitted to this office. *See* Gov't Code § 552.301(e)(1)(D).

exception protects a governmental body's interests in connection with competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has concluded 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 the governmental body can satisfy two criteria. *See id.* First, the governmental body must demonstrate 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 it has specific marketplace interests because the agency has statutory authorization to "sell or otherwise convey power or natural gas generated from royalties taken in kind[.]" Util. Code § 35.102. The GLO states that under its statutory authority, the agency 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 explains it competes with private companies for the awards of these contracts. Based on the agency's representations, we find the GLO has demonstrated it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See* ORD 593.

The GLO contends release of the pricing information submitted as Exhibit 4 would harm the agency's marketplace interests. The GLO argues that if its competitors had access to the agency's pricing 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 information at issue will undermine its ability to compete in the electrical energy marketplace. Based on the agency's representations, we conclude the GLO has demonstrated the release of Exhibit 4 would cause specific harm to the GLO's marketplace interests. *See* ORD 593. We therefore conclude the district may withhold Exhibit 4 under section 552.104 of the Government Code.³

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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).

³As we are able to make this determination, we need not address the GLO's other arguments against disclosure.

The Supreme Court of Texas 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 single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees 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). This office will accept a private person’s claim for exception as valid under section 552.110(a) 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.⁴ *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude section 552.110(a) is applicable, however, unless the information is shown to meet 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* Open Records Decision No. 661 at 5-6 (1999) (business

⁴The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Reliant contends its pricing information, which the district has submitted as Exhibit 2, constitutes a trade secret under section 552.110(a). Reliant also contends its pricing information is protected by section 552.110(b). Reliant acknowledges, however, that the company won the bidding to which the information at issue pertains and was awarded a contract by the district. We note pricing information pertaining to a particular contract with a governmental body is generally not a trade secret under section 552.110(a) 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. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 2 (1982), 306 at 2. Likewise, the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dept of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). We also note the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Therefore, having considered Reliant’s arguments and affidavit, we find the company has not demonstrated any of the information in Exhibit 2 constitutes a trade secret under section 552.110(a). We also find Reliant has not demonstrated section 552.110(b) is applicable to any of the information at issue. We therefore conclude the district may not withhold any of the information in Exhibit 2 under section 552.110 of the Government Code.

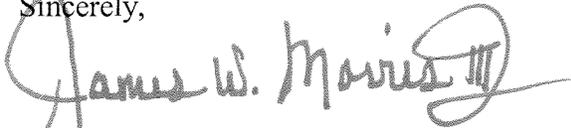
Lastly, we note an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Hudson. Thus, because the company has not demonstrated the information relating to Hudson submitted as Exhibit 3 is proprietary for purposes of the Act, the district may not withhold any of the information in Exhibit 3 on the basis of any interest Hudson may have in the information. *See id.* § 552.110(a)-(b); ORD 552 at 5, 661 at 5-6.

In summary, the district may withhold Exhibit 4 under section 552.104 of the Government Code. Exhibits 2 and 3 must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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

JWM/em

Ref: ID# 437268

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Ms. Ashley Allen
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873
(w/o enclosures)

Mr. Kris Hertel
Hudson Energy
P.O. Box 142109
Irving, Texas 75014-2109
(w/o enclosures)

Mr. Andrew J. Schumacher
Winstead PC
401 Congress Avenue Suite 2100
Austin, Texas 78701
(w/o enclosures)