



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 5, 2012

Ms. Leah A. Curtis  
Mr. George Ivan Alexander  
Curtis, Alexander, McCampbell & Morris, P.C.  
P. O. Box 1256  
Greenville, Texas 75403

OR2012-03307

Dear Ms. Curtis and Mr. Alexander:

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# 447026.

The City of Greenville, the Greenville Board of Development, and the Greenville Electric Utility System (“GEUS”), which you represent, received a request for six categories of information pertaining to GEUS and a facility owned by Newell Rubbermaid (“Rubbermaid”). You state you do not possess information responsive to four categories of the request.<sup>1</sup> You state some of the requested information is being made available to the requestor. You claim portions of the submitted information are excepted from disclosure under section 552.133 of the Government Code.<sup>2</sup> Additionally, you state release of a portion of the submitted information may implicate the proprietary interests of Rubbermaid. Accordingly, you have notified Rubbermaid of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov’t Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio, 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you raise sections 552.111 and 552.131 of the Government Code, you make no arguments to support these exceptions. Accordingly, we understand you no longer assert these exceptions. *See* Gov’t Code § 552.301(e) (governmental body must provide comments stating why exceptions raised should apply to information requested).

requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Rubbermaid. We have considered the submitted arguments and reviewed the submitted information.

We understand both GEUS and Rubbermaid to assert that portions of the submitted information are excepted under section 552.133 of the Government Code. Section 552.133 only protects the competitive interest of a public power utility. This exception does not protect the interests of third parties, such as Rubbermaid. *See* Open Records Decision No. 666 at 2 (2000) (section 552.133 enacted to protect municipally owned utilities from public disclosure of competitive matters). Accordingly, we address only GEUS's arguments under section 552.133.

Section 552.133 excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." Gov't Code § 552.133(b). The Texas Legislature recently amended section 552.133, which now provides in relevant part:

(a) In this section, "public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, "competitive matter" means a utility-related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

...

(D) risk management information, contracts, and strategies, including fuel hedging and storage;

(E) plans, studies, proposals, and analyses for system improvements, additions, or sales, other than transmission and distribution system improvements inside the service area for which the public power utility is the sole certified retail provider; and

(F) customer billing, contract, and usage information, electric power pricing information, system load characteristics, and electric power marketing analyses and strategies[.]

*Id.* § 552.133(a)-(a-1)). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *See id.* § 552.133(a-1)(2).

You state GEUS is a public power utility for purposes of section 552.133. You inform us the information you marked relates to “retail rates, energy loads, and usage and strategy” as well as the “evaluation of rates, energy load and usage as well as discussion related to strategies for business development.” The information at issue is not among the fifteen categories of information expressly excluded from the definition of “competitive matter” by section 552.133(a-1)(2). Based on our review of your arguments and the submitted information, we find the information you have marked relates to a competitive matter as defined under section 552.133(a-1). Thus, we conclude the marked information is excepted from disclosure under section 552.133 of the Government Code.<sup>3</sup>

Next, we address Rubbermaid’s arguments for the remaining information. Rubbermaid raises section 552.104 of the Government Code for portions of the remaining information. This section excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). However we note section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which 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 GEUS does not seek to withhold any information pursuant to this exception, none of the remaining information may be withheld on this basis.

Rubbermaid raises section 552.110 of the Government Code for portions of the remaining information. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a), (b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957). 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

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments for this information.

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.<sup>4</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (party must establish *prima facie* case that information is trade secret). However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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) of the Government Code 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* Open Records Decision No. 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of the information at issue, we find Rubbermaid has failed to demonstrate any of the submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code. We further note Rubbermaid has made only conclusory allegations that the release of any of the remaining information would result in substantial harm to its competitive position. *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

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<sup>4</sup>The 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).

evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Next, we address Rubbermaid's contention that portions of its information are excepted from disclosure by section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

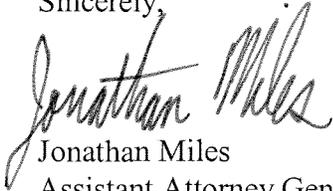
Gov't Code § 552.131(a), (b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because we have already disposed of Rubbermaid's claims under section 552.110, GEUS may not withhold any of Rubbermaid's information under section 552.131(a) of the Government Code. Furthermore, we note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As GEUS does not assert section 552.131(b) as an exception to disclosure, we conclude no portion of the remaining information is excepted under section 552.131(b) of the Government Code.

In summary, GEUS must withhold the information you have marked under section 552.133 of the Government Code. The remaining information 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](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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 447026

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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