



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2013

Mr. Frank J. Garza
Davidson, Troilo, Ream & Garza, P.C.
7550 West Interstate 10, Suite 800
San Antonio, Texas 78229-5815

OR2013-01273

Dear Mr. Garza:

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# 476791.

The Brownsville Public Utility Board (the "board"), which you represent, received a request for the proposals and the final bid tabulation pertaining to a specified RFP for cooling tower repairs. You state the board will release some of the requested information. You claim some of the submitted information is excepted from disclosure under section 552.133 of the Government Code but do not take a position as to whether the remaining information is excepted from disclosure under the Act. However, Cooling Towers, LLC d/b/a Cooling Towers of Texas ("Cooling Towers"); Advance Cooling Towers ("Advance Cooling"); and Industrial Cooling Solutions ("ICS"), which are interested third parties, assert in correspondence to this office that some of the information at issue is excepted from disclosure under the Act. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted arguments and information.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." Gov't Code § 552.133(b). Section 552.133 provides in relevant part the following:

(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:

...

(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 certificated retail provider[.]

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

We understand the board is a municipally owned utility for purposes of section 552.133. You seek to withhold Exhibit C, which consists of the winning bid for the Silas Ray Power Plant Unit 5 & 6 Cooling Tower Life Extension Project, under section 552.133(b). 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 your representations and our review, we find Exhibit C relates to a competitive matter as defined by section 552.133(a-1). *See id.* § 552.133(a-1)(1)(E). Thus, the board must withhold Exhibit C under section 552.133.¹

Cooling Towers argues some of its information is excepted from disclosure under section 552.104 of the Government Code. However, section 552.104 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).* The board did not assert section 552.104. Therefore, the board may not withhold

¹As our ruling is dispositive, we do not address ICS’s arguments to withhold this information.

any of the information at issue pursuant to that section. *See* ORD 592 (governmental body may waive section 552.104).

Cooling Towers asserts the information at issue is excepted from disclosure under section 552.110 of the Government Code. We also understand Advance Cooling to assert some of its information is excepted from disclosure under section 552.110(b). 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.” 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* 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.

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.² RESTATEMENT OF TORTS § 757 cmt. b. This office 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

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

law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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) 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, 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 release of information would cause it substantial competitive harm).

We find Cooling Towers and Advance Cooling have established the release of some of the information at issue would cause each third party substantial competitive injury. Therefore, the board must withhold this information, which we have marked, under section 552.110(b). However, Advance Cooling has made some of its customer information publicly available on its website. Because Advance Cooling itself published this information, we are unable to conclude such information is proprietary. We conclude Cooling Towers and Advance Cooling have made only conclusory allegations that release of the remaining information at issue would cause these companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. In addition, we find Cooling Towers has failed to establish a *prima facie* case that any of the remaining information at issue is a trade secret. Therefore, the board may not withhold any of the remaining information under section 552.110.

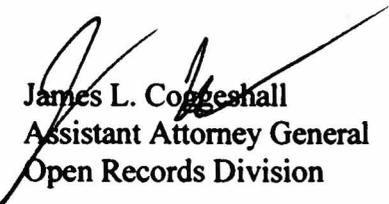
We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

To conclude, the board must withhold Exhibit C under section 552.133 of the Government Code. The board must also withhold the information we have marked under section 552.110(b) of the Government Code. The board must release the remaining information but may only release any copyrighted information in accordance with copyright law.

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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 476791

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. R. Michael Sentel
Counsel for Cooling Solutions, Inc.
8792 South Ault Lane
Morrison, Colorado 80465
(w/o enclosures)

Mr. Steve Smith
Advance Cooling Towers
P.O. Box 735
Andrews, Texas 79714
(w/o enclosures)

Mr. Roni M. Most
Counsel for Cooling Towers, L.L.C.
The Most Law Firm, P.C.
555 West Loop South, Suite 200
Bellaire, Texas 77401
(w/o enclosures)