



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2013

Ms. Patricia Fleming
Assistant General Counsel
TDCJ - Office of the General Counsel
P.O. Box 4004
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OR2013-12449

Dear Ms. Fleming:

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# 493730.

The Texas Department of Criminal Justice (the "department") received a request for three categories of information pertaining to the department's procurement of the supply and delivery of natural gas to the department's facilities. You state you have made or will make available some of the requested information to the requestor. Although you take no position regarding the public availability of the submitted information, you state this information may implicate the proprietary interests of third parties. Accordingly, you notified Atmos Energy ("Atmos"); CenterPoint Alternative Fuel ("CNP Alternative Fuel"); CenterPoint Energy Entex; CenterPoint Energy, Inc. ("CenterPoint"), Luminant Energy Company, LLC ("Luminant"); Millennium Midstream Energy, LLC; ONEOK Energy Marketing Company; and WTG Gas Marketing, Inc. of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); 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). Further, you also notified the Texas General Land Office (the "GLO") of the request for information and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Atmos, CenterPoint, CNP

Alternative Fuel, Luminant, and the GLO. We have considered the submitted arguments and reviewed the submitted information.

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, this office has received comments from only Atmos, CenterPoint, CNP Alternative Fuel, Luminant, and the GLO explaining why their information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate any of the remaining third parties' interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, we conclude the department may not withhold any of the submitted information on the basis of any interest the remaining third parties may have in the information.

Atmos, CenterPoint, CNP Alternative Fuel, and the GLO raise section 552.104 of the Government Code. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). Accordingly, we will not consider Atmos's, CenterPoint's, or CNP Alternative Fuel's claims under this section. However, we will consider the GLO's claim under section 552.104 for its submitted information. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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 asserts it has specific marketplace interests in the information at issue 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 advises that, under that authority, it has created the Public Customer Gas Program, through which it bids on contracts

for the right to sell natural gas to public retail customers. The GLO states it competes with other private companies for the awards of these contracts. Based on these 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 its information would harm its marketplace interests because this information details the services and the prices the GLO offers its public gas customers, thereby placing the GLO at a competitive disadvantage in the natural gas marketplace. Based on these representations and arguments, we conclude the GLO has shown release of its information would cause specific harm to the GLO’s marketplace interests. *See id.* Therefore, we conclude the department may withhold the GLO’s information, which we have marked, under section 552.104 of the Government Code.¹

Atmos, CenterPoint, CNP Alternative Fuel, and Luminant raise section 552.110 of the Government Code for their information at issue. 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. Gov’t Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] 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. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this

¹As our ruling is dispositive, we need not address the GLO’s remaining argument against disclosure of its information.

office considers the Restatement's definition of trade secret, as well as the Restatement's list of six trade secret factors.² See RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made 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) 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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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). This exception to disclosure 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. *Id.* § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Luminant claims its information, including its pricing information, constitutes trade secrets. We note pricing information pertaining to a particular proposal or contract is generally not a trade secret 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; *see also Huffines*, 314 S.W.2d at 776. Upon review, we find Luminant has failed to demonstrate its information meets the definition of a trade secret, nor has Luminant demonstrated the necessary factors to establish a trade secret claim for its information. Accordingly, the department may not withhold any of the remaining information on the basis of section 552.110(a).

Atmos, CenterPoint, CNP Alternative Fuel, and Luminant contend some of their information is commercial or financial information, release of which would cause the companies substantial competitive harm. We note the pricing information of winning bidders, such as

²There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Atmos, CenterPoint, CNP Alternative Fuel, and Luminant, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see also* ORD 319 at 3. *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. Further, we find Atmos, CenterPoint, CNP Alternative Fuel, and Luminant have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988) (because 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 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). We therefore conclude the department may not withhold any of the remaining information under section 552.110(b).

Atmos also asserts its submitted information is excepted under section 552.133 of the Government Code, which excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." *See* Gov't Code § 552.133(b). 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 Atmos. *See* Open Records Decision No. 666 at 2 (2000) (statutory predecessor to section 552.133 enacted to protect municipally owned utilities from public disclosure of competitive matters). Thus, we find Atmos has failed to demonstrate the applicability of section 552.133 to its submitted information, and the department may not withhold it on that basis.

We note the remaining information contains information subject to section 552.136 of the Government Code, which provides, "[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."³ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the department must withhold the information we have marked under section 552.136 of the Government Code.

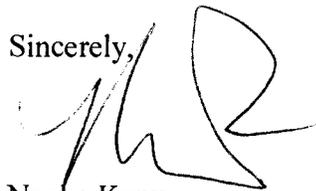
In summary, the department may withhold the information we have marked under section 552.104 of the Government Code and must withhold the information we have marked under section 552.136 of the Government Code. The department must release the remaining information.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Nneka Kanu
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NK/bhf

Ref: ID# 493730

Enc. Submitted documents

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