



ATTORNEY GENERAL OF TEXAS
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December 12, 2014

Mr. Francisco J. Garza
For the City of Bulverde
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San Antonio, Texas 78229-5815

OR2014-22575

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# 548148.

The City of Bulverde (the "city"), which you represent, received a request for (1) all documents, notes, and calculations used by the city to estimate the city's population; and (2) any e-mails to or from the mayor and/or the city council discussing the population estimate during the last year. You state the city has no information responsive to the second category of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.110 and 552.133 of the Government Code. In addition, you state release of this information may implicate the interests of the City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") and the Pedernales Electric Cooperative ("PEC"). Accordingly, you state, and provide documentation showing, you notified CPS and PEC of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304, .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of

¹The 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).

exception in the Act in certain circumstances). We received comments from CPS and PEC. We have considered the submitted arguments and reviewed the submitted information.

Initially, PEC asserts its information is confidential pursuant to an agreement between PEC and the city. However, information is not confidential under the Act simply because the party that submits the information requests that it be kept confidential. *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 through an 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 section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

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:

...

(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)(1)(F). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *Id.* § 552.133(a-1)(2). You state CPS is a municipally owned electric utility, and thus, a public power utility for the purposes of section 552.133. You assert the information in Attachment B-1 consists of customer billing, contract, and usage information. Further, 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 the information in Attachment B-1 relates to competitive matters as defined by section 552.133(a-1)(1)(F). Thus, we conclude the city must withhold the information in Attachment B-1, which consists of customer addresses and bill amounts, under section 552.133 of the Government Code.² However, section 552.133 only protects the competitive interests of a public power utility. PEC is a private electric utility owned by the members it serves. Thus, section 552.133 of the Government Code is not applicable to PEC's information, and it may not be withheld on that basis.

The city and PEC both raise section 552.110 of the Government Code for the remaining information. Section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address your argument under section 552.110 of the Government Code. However, we will address PEC's claim under section 552.110 for 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 id.* § 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, 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the

²As our ruling is dispositive, we do not address your remaining argument, or CPS's argument, to withhold this information.

Restatement's list of six trade secret factors.³ 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 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 (1990). 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. 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.*; *see also* Open Records Decision No. 661 at 5 (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).

Upon review, we find PEC has established a *prima facie* case its customer information constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent it is not publicly available on the company’s website, the city must withhold PEC’s customer information under section 552.110(a).⁴ However, PEC has failed to demonstrate any of its remaining information meets the definition of a trade secret, and has failed to demonstrate the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision No. 402 (1983) (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Consequently, none of PEC’s remaining information may be withheld under section 552.110(a) of the Government Code.

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

⁴As our ruling is dispositive, we do not address PEC’s other arguments to withhold this information.

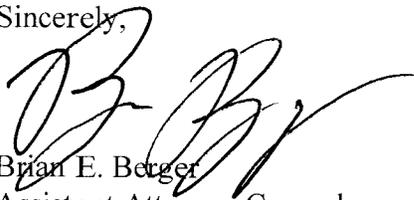
PEC further argues its remaining information is commercial or financial information excepted under section 552.110(b). However, upon review, we find PEC has failed to provide a specific factual or evidentiary showing that the release of its remaining information would cause the company substantial competitive injury. *See* ORD 661 at 5-6 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Therefore, none of the remaining information may be withheld under section 552.110(b).

In summary, the city must withhold the information in Attachment B-1 under section 552.133 of the Government Code. To the extent it is not publicly available on the company's website, the city must withhold PEC's customer information under section 552.110(a). 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/ac

Ref: ID# 548148

Enc. Submitted documents

c: Requestor
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