



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 21, 2003

Mr. George F. Christie  
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OR2003-7534

Dear Mr. Christie:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189695.

The Tarrant Regional Water District (the "district"), which you represent, received a request for all responses submitted to the district in response to a specified Request for Proposals ("RFP"). Although the district does not take a position with regard to the release of the requested information, it claims that this information may be subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the district notified nine interested third parties, Strategic Energy, LLC ("Strategic"), Constellation New Energy, Inc. ("Constellation"), Coral Power, L.L.C. ("Coral"), First Choice Power, Inc. ("First Choice"), TXU Energy ("TXU"), Cirro Energy ("Cirro"), Utility Choice Electric ("UCE"), Tractebel Energy Services, Inc. ("Tractebel"), and Reliant Energy Solutions ("Reliant"), of the district's receipt of the request and of each company's right to submit arguments to this office as to why information relating to each company should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). We have considered all submitted arguments and have reviewed the submitted information.

Initially, we note that 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) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Coral, Cirro, and First Choice have not submitted comments to this office explaining why any portion of the requested information relating to them should not be released to the requestor. Therefore, we have no basis to conclude that the release of any portion of the submitted information would implicate Coral's, Cirro's, or First Choice's proprietary interests. *See* Open Records

Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause party substantial competitive harm). Accordingly, we conclude that the district may not withhold any portion of the submitted information relating to Coral, Cirro, or First Choice on the basis of any third party proprietary interest. Consequently, the district must release to the requestor the entirety of the submitted information relating to Coral, Cirro, and First Choice.

We now address the arguments submitted to us by Strategic, Constellation, TXU, UCE, Tractebel, and Reliant. With the exception of UCE, each of the aforementioned companies contends that all or portions of its respective information is proprietary and confidential because it submitted this information to the district in confidence. We note, however, that information is not considered to be confidential under the Act simply because the party submitting it to the governmental body anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); *see also* Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to 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 each of the aforementioned companies' information is encompassed by an applicable exception to disclosure under the Act, it must be released, notwithstanding any agreement specifying otherwise.

UCE claims that all or portions of the submitted information relating to UCE is excepted from disclosure pursuant to section 552.104 of the Government Code. We note, however, that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). We note that the district has not argued that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Accordingly, we conclude that the district may not withhold any portion of UCE's information under section 552.104 of the Government Code.

We note that Strategic, Constellation, TXU, UCE, Tractebel, and Reliant all claim that all or portions of the submitted information relating to each company is excepted from disclosure pursuant to section 552.110 of the Government Code. The Texas Supreme Court 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 a single or ephemeral event 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 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim 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.<sup>1</sup> *See Open Records Decision No. 552 at 5 (1990).*

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). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See Open Records Decision No. 639 at 4 (1996)* (to prevent

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<sup>1</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).*

disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Based on each company's arguments and our review of the submitted information relating to each company, we find that Strategic, Constellation, TXU, UCE, Tractebel, and Reliant have sufficiently demonstrated that portions of the submitted information relating to each company constitute trade secret information or commercial and financial information, the release of which would cause each company substantial competitive harm. Accordingly, we conclude that the district must withhold the information that we have marked within each of these companies' proposals pursuant to section 552.110 of the Government Code. However, we also find that no portion of the remaining submitted information from each of these companies' proposals constitutes trade secret information or commercial or financial information, the release of which would cause each company substantial competitive harm under section 552.110. Accordingly, we also conclude that the district may not withhold any portion of the remaining submitted information from each of these companies' proposals under section 552.110 of the Government Code.

In addition, TXU and Reliant claim that portions of the remaining submitted information in each companies' proposals are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers

or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. After carefully considering TXU's and Reliant's arguments and reviewing each companies' remaining submitted information, we find that no portion of this information constitutes e-mail addresses that are excepted from disclosure under section 552.137(a). Accordingly, we conclude that the district may not withhold any portion of each companies' remaining submitted information under section 552.137 of the Government Code.

In summary, the district must withhold the information that we have marked within Strategic's, Constellation's, TXU's, UCE's, Tractebel's, and Reliant's proposals pursuant to section 552.110 of the Government Code. Based on this finding, we do not reach the arguments submitted by the General Land Office. The district must release the remaining submitted information to the requestor.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
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RJB/lmt

Ref: ID# 189695

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