



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2004

Ms. Mia Settle-Vinson
Assistant City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251-1562

OR2004-9485

Dear Ms. Settle-Vinson:

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# 211522.

The City of Houston (the "city") received a request for information related to the Electric Supply Agreement. You claim that the responsive information may be excepted from disclosure pursuant to sections 552.101, 552.104, 552.110, 552.113, 552.131, and/or 552.133 of the Government Code, but make no arguments and take no position as to whether the information is so excepted. You inform us that the city notified Reliant Energy, Inc. ("Reliant"), and the Texas General Land Office (the "GLO"), the third parties whose proprietary interests may be implicated by the request, of the city's receipt of the request and of each third party's right to submit arguments to us as to why any portion of the remaining requested information should not be released to the requestor. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in Act in certain circumstances). We have considered the claimed exceptions and have reviewed the submitted information.

Reliant argues that the marked information in Exhibit 2, including the Monthly Utilization Report for January 2004, is excepted from disclosure pursuant to section 552.110 of the Government Code. This section 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any 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); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining 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 this 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 (1939); *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). 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. Open Records Decision No. 552 (1990). 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Reliant states that the GLO provides electric service to the city under an Electric Service Agreement (“ESA”) that includes provisions for Reliant’s implementation of a Minority and Woman-owned Business Enterprise (“MWBE”) program. Reliant states that disclosure of the information at issue would compromise Reliant’s ability to implement the MWBE Participation Plan by allowing MWBE firms to obtain information about specific MWBE transactions, which in turn would allow MWBE firms to modify their negotiation strategy with Reliant. Reliant explains that “if MWBE firms know what power purchases Reliant has made from other MWBE firms, then they would be able to adapt their strategy to the competitive disadvantage of Reliant,” and thus Reliant’s and the GLO’s ability to compete in the Texas retail electric market would be severely affected. Based on these representations and our review of the submitted information, we find that release of the information at issue would cause Reliant substantial commercial harm. Accordingly, we conclude that the city must withhold the marked information in Exhibit 2 pursuant to section 552.110(b) of the Government Code.

The GLO claims that the remaining submitted information is excepted from public disclosure under section 552.104 of the Government Code. This section excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder,” and protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Gov’t Code § 552.104(a), 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 that it has specific marketplace interests in the information at issue because the GLO is authorized by statute to "sell or otherwise convey power generated from royalties taken in kind." Tex. Util. Code § 35.102. The GLO advises that under this authority, the GLO has created the State Power Program through which it bids on contracts for the right to sell electrical energy 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 that the GLO has demonstrated that it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See Open Records Decision No. 593 (1991).*

The GLO also asserts that release of the remaining submitted information would harm its marketplace interests, stating that the information at issue "[represents] GLO's and Reliant's program to award electricity supply agreements to Minority and Women-owned Business Enterprises [and] the GLO and Reliant's strategies, programs and plans it will use to encourage and facilitate MWBE participation in supplying the City electricity." The GLO asserts that, if its competitors had access to this information, they would "be able to design similar programs to offer in the next competitive bidding arena requiring such MWBE participation" to better compete against the GLO. Based on these representations and arguments, we determine that the GLO has shown that release of the information at issue will cause specific harm to the GLO's marketplace interests. *See Open Records Decision No. 593 (1991).* Accordingly, the city must withhold the remaining submitted information under section 552.104 of the Government Code.

In summary, the city must withhold the marked information in Exhibit 2 pursuant to section 552.110(b) of the Government Code. The remaining submitted information is excepted under section 552.104 of the Government Code.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 211522

Enc. Submitted documents

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