



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 27, 2006

Ms. Cary Grace
Assistant City Attorney
City of Austin
Law Department
P.O. Box 1088
Austin, Texas 78767-8828

OR2006-15113

Dear Ms. Grace:

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# 267655.

The City of Austin (the "city") received a request for responses submitted by Ameresco, Inc. ("Ameresco"), Chevron Energy Solutions ("Chevron"), and Tour Andover Controls ("TAC") to the city's Request for Statement of Qualifications for Comprehensive Energy Efficiency Services. You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.136 of the Government Code. You also state that release of the requested information may implicate the proprietary interests of the third parties. Accordingly, you inform us that you notified the interested third parties of the request and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d) (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 to disclosure in certain circumstances). We have reviewed the submitted information and considered the submitted arguments.

Initially, we note, and you acknowledge, that the city has failed to comply with section 552.301 of the Government Code in requesting this decision. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome

presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Here, your claims under sections 552.101 and 552.136 of the Government Code can provide compelling reasons to withhold information. Furthermore, the proprietary interests of third parties can also provide a compelling reason to withhold information. Therefore, we will address the submitted arguments.

We next address the arguments raised by the city. Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that another statute makes confidential. You raise section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. These provisions make certain information related to terrorism confidential. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov’t Code § 418.181; *see also id.* § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). The fact that information may relate to a governmental body’s security measures does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

We note that the information at issue pertains to the HVAC systems at three city facilities. Although you raise section 418.181 you do not adequately identify or explain how release of this information reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, you have not demonstrated that any of the submitted information is made confidential under section 418.181 of the Government Code. *See* Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). We therefore determine that the city may not withhold any of the submitted information under section 552.101 in conjunction with any of the provisions of the Texas Homeland Security Act.

You also note that the submitted information includes utility account numbers. Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of this chapter, 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.” Gov’t Code § 552.136(b). The city must withhold the account numbers in the submitted information under section 552.136 of the Government Code.

Next, we address the third-party arguments. 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 information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, TAC has not submitted to this office any reasons explaining why the submitted information should not be released. We thus have no basis for concluding that any portion of the submitted information pertaining to TAC constitutes proprietary information, and none of it may be withheld on that basis. *See* Gov’t Code § 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 (1990).

We next address the arguments raised by Ameresco and Chevron. We note that Chevron claims that portions of its proposal should be withheld under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, Chevron does not cite to any specific law that makes any portion of its proposal confidential under section 552.101. Therefore, we conclude that the city may not withhold any portion of Chevron’s proposal under section 552.101 of the Government Code.

Chevron also raises section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). This exception is applicable only to information that relates to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor to Gov’t Code § 552.102). Because the submitted information relates to employees of private entities, the city may not withhold any information under section 552.102(a) of the Government Code.

Ameresco raises section 552.104 of the Government Code. Section 552.104(a) excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties such as Ameresco. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus,

because the city does not claim this exception, the city may not withhold any information under section 552.104 of the Government Code.

Next, Ameresco and Chevron claim that some of the submitted information is excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial 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.” See Gov’t Code § 552.110(a)-(b).

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 [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 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). If the 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 private party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.¹ See Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the

¹The 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).

information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999).

After reviewing the submitted information and arguments, we find that Ameresco has made a *prima facie* case that a portion of its information is protected as trade secret information. Furthermore, we find that Chevron has demonstrated based on specific factual evidence that disclosure of a portion of the submitted information would cause it substantial competitive harm. Accordingly, the city must withhold the information we have marked under section 552.110 of the Government Code. We conclude that the city may not withhold any of the remaining information under section 552.110. *See* Open Records Decision Nos. 552 at 5, 661 at 5-6; *see also* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov’t Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We also note that the pricing information of a winning bidder is generally not excepted under section 552.110. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government).

We note that some of the remaining information includes notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990). Accordingly, in releasing the remaining information the department must release copyrighted information only in accordance with copyright law.

In summary, the city must withhold the account numbers you have marked under section 552.136 of the Government Code and the information we have marked under section 552.110 of the Government Code. The remaining information must be released to the requestor. In releasing the remaining information, the department must release information protected by copyright only in accordance with copyright law.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



L. Joseph James
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Open Records Division

LJJ/dh

Ref: ID# 267655

Enc. Submitted documents

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