



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2006

Ms. Sarah Irwin Swanson
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2006-10666

Dear Ms. Swanson:

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# 259107.

The Public Utility Commission of Texas (the "commission") received a request for information relating to the number of shut-offs during the last 12-month period for the Dallas/Fort Worth and Houston areas. You state that the commission takes no position with respect to the public availability of the information that you have submitted. The commission believes, however, that the submitted information implicates the proprietary interests of third parties. You notified the interested parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from CenterPoint Energy Houston Electric, LLC ("CenterPoint"), Constellation NewEnergy, Inc. ("Constellation"), Direct Energy, LP ("Direct"), Gexa Corp. ("Gexa"), Pre-Buy Electric, LLC ("Pre-Buy"), Reliant Energy, Inc. ("Reliant"), Stream Gas & Electric, Ltd. ("Stream"), Tenaska Power Services

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Company (“Tenaska”), and TXU Energy Retail Company, LP (“TXU”).² We have considered all of the submitted arguments and have reviewed the submitted information.

Initially, we address TXU’s assertion that the submitted information regarding specific retail electric providers, including TXU, is not responsive to this request. TXU contends that aggregated totals of monthly disconnects by service area would be sufficiently responsive. The question of whether the submitted information is responsive to the instant request is a factual issue. This office cannot resolve factual disputes in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision or on those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). The commission informs us that it has submitted the records available to the commission that contain responsive information.³ We accept the commission’s representation and will address the public availability of all of the submitted information.

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released.⁴ *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Affordable, AmeriPower, Azor, Bvista, Locke, Alliance, Ampro, Bridgepoint, Cirro, Electric, Energy, First, Hino, Liberty, Mutual, Fire, Freedom, Green, Just, mPower, Republic, Starlight, Tara, Triagle, Usave, W Power, Spark, Worsham, or Vantage. Thus, none of these parties has demonstrated that any of the submitted information is

²We note that CenterPoint makes a general claim of confidentiality on behalf of the retail electric providers to which the submitted information pertains, but neither raises any exceptions nor submits any arguments on its own behalf.

³We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990).

⁴You inform us that the other parties that received notice of this request for information are Affordable Power Plan (“Affordable”), AmeriPower, Azor Energy, LP (“Azor”), Bvista Energy, LP (“Bvista”), Locke Liddell & Sapp, LLP (“Locke”), Alliance Power Company, LLC (“Alliance”), Ampro Energy, Inc. (“Ampro”), Bridgepoint Power & Light (“Bridgepoint”), Cirro Corp. (“Cirro”), Electric Now, LP (“Electric”), Entergy Solutions, Ltd. (“Energy”), First Choice Power, Inc. (“First”), Hino Electric Power Co. (“Hino”), Liberty Power Corp. (“Liberty”), Mutual Energy CPL, PL (“Mutual”), Fire Fly Spark (“Fire”), Freedom Group, LLC (“Freedom”), Green Mountain Energy Co. (“Green”), Just Energy (“Just”), mPower Retail Energy (“mPower”), Republic Power (“Republic”), Starlight Electric (“Starlight”), Tara Energy (“Tara”), Triagle Energy (“Triagle”), Usave Energy Services, Inc. (“Usave”), W Power & Light (“W Power”), Spark Energy (“Spark”), Worsham Forsythe Wooldridge, LLP (“Worsham”), and Vantage Power (“Vantage”).

confidential or proprietary for the purposes of the Act. *See id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the claimed exceptions to disclosure. Section 552.101 of the Government Code excepts from 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 other statutes make confidential. Constellation, Direct, Stream, and Tenaska raise section 552.101 in conjunction with sections 39.001, 39.155, and 39.352 of the Utilities Code. Gexa and Reliant raise section 552.101 in conjunction with section 39.001.

Section 39.001 of the Utilities Code provides in part that “it is in the public interest to . . . protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information during the transition to a competitive market and after the commencement of customer choice.” Util. Code § 39.001(b)(4). Section 39.155 of the Utilities Code provides in part:

(a) Each person, municipally owned utility, electric cooperative, and river authority that owns generation facilities and offers electricity for sale in this state shall report to the commission its installed generation capacity, the total amount of capacity available for sale to others, the total amount of capacity under contract to others, the total amount of capacity dedicated to its own use, its annual wholesale power sales in the state, its annual retail power sales in the state, and any other information necessary for the commission to assess market power or the development of a competitive retail market in the state. The commission shall by rule prescribe the nature and detail of the reporting requirements and shall administer those reporting requirements in a manner that ensures the confidentiality of competitively sensitive information.

Id. § 39.155(a). Section 39.352 of the Utilities Code provides in part that “[t]he commission shall use any information required in this section in a manner that ensures the confidentiality of competitively sensitive information.” *Id.* § 39.352(f). Although sections 39.001, 39.155, and 39.352 reflect concern for the security of competitively sensitive information that regulated persons and entities submit to the commission, these sections do not expressly make information confidential for the purposes of section 552.101 of the Government Code. We therefore conclude that none of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 39.001, section 39.155, or section 39.352 of the Utilities Code. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

Constellation, Stream, and Tenaska also raise section 552.101 in conjunction with section 17.004 of the Utilities Code. Section 17.004 provides in part that “[a]ll buyers of telecommunications and retail electric services are entitled to . . . privacy of customer consumption and credit information[.]” Util. Code § 17.004(a)(6). We note that the submitted records consist of aggregated customer information. Constellation, Stream, and Tenaska have not demonstrated that these records tend to identify or otherwise relate to any particular customer. We therefore conclude that the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 17.004 of the Utilities Code.

Constellation also contends that the submitted records contain proprietary customer information that is protected by section 25.272 of title 16 of the Texas Administrative Code. Section 25.272(g)(1) provides for the protection of proprietary customer information of a utility. See 16 T.A.C. § 25.272(g)(1). Section 25.272(c)(3) defines “proprietary customer information” as being “[a]ny information compiled by an electric utility on a customer in the normal course of providing electric service that makes possible the identification of any individual customer by matching such information with the customer’s name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed.” 16 T.A.C. § 25.272(c)(3). Section 25.272(c)(3) further provides, however, that “[i]nformation that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.” *Id.* Constellation has not demonstrated that the aggregated information that is at issue here makes it possible to identify any customer to which the information relates. We therefore conclude that the commission may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of section 25.272 of title 16 of the Texas Administrative Code.

Constellation, Stream, and Tenaska also raise section 552.101 in conjunction with the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992), 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983).

Constellation, Stream, and Tenaska contend that the submitted documents contain information that a utility customer would consider to be private and that is not a matter of

legitimate public interest. As previously noted, however, the submitted records consist of aggregated customer information that does not tend to identify or otherwise relate to any particular customer.⁵ We therefore conclude that the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Pre-Buy raises section 552.104 of the Government Code. Section 552.104 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 Pre-Buy. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, because the commission does not claim this exception, none of the submitted information is excepted from disclosure under section 552.104 of the Government Code.

Next, we address section 552.110 of the Government Code. This section protects the proprietary interests of private parties with respect to 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.” 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 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,

⁵To the extent that the submitted information involves customers that are entities and organizations, rather than individuals, we note that common-law privacy protects the interests of individuals, not those of business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy).

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” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid 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.⁶ *See Open Records Decision No. 552 at 5 (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. *See Open Records Decision No. 402 (1983)*.

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 information at issue. *See Open Records Decision No. 661 at 5-6 (1999)* (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Constellation, Direct, Gexa, Pre-Buy, Stream, and Tenaska assert that their respective information qualifies as a trade secret under section 552.110(a). Constellation, Direct, Gexa, Pre-Buy, Stream, and Tenaska also raise section 552.110(b), as do Reliant and TXU. Under section 552.110(b), the parties argue that the submitted information could be used to their disadvantage by competitors. Having carefully considered all of the parties’ claims under section 552.110(a), we find that none of the parties has demonstrated that any of the submitted information constitutes a trade secret under section 552.110(a). *See RESTATEMENT OF TORTS § 757 cmt. b* (trade secret is “not simply information as to a single or ephemeral event in the conduct of the business”). Likewise, having considered all of the arguments under section 552.110(b), we find that none of the parties has made the required factual or evidentiary showing that release of any of the submitted information would cause

⁶The 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)*.

substantial competitive harm to the party to which the information pertains. *See* Open Records Decision No. 661 at 5-6. We therefore conclude that none of the submitted information is excepted from disclosure under section 552.110 of the Government Code. As no other exceptions to disclosure are claimed, the commission must release all of the submitted information.

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).

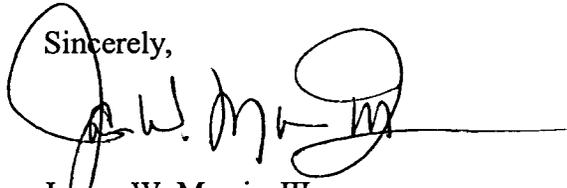
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 259107

Enc: Submitted documents

c: Ms. Jayne Junkin
Houston ACORN
2600 South Loop Freeway West, Suite 270
Houston, Texas 77054
(w/o enclosures)

Ms. Elizabeth Drews
Ms. Christina Wisdom
Brown McCarroll, LLP
111 Congress Avenue, Suite 1400
Austin, Texas 78701
(w/o enclosures)

Ms. DeAnn T. Walker
CenterPoint Energy
1005 Congress Avenue, Suite 650
Austin, Texas 78701
(w/o enclosures)

Ms. Andrea Moore Stover
Graves Dougherty Hearon & Moody
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(w/o enclosures)

Mr. Christopher Malish
Foster Malish & Blair, L.L.P.
1403 West Sixth Street
Austin, Texas 78703
(w/o enclosures)

Ms. Cecily Small Gooch
TXU Energy
1601 Bryan, 8th Floor
Dallas, Texas 75201
(w/o enclosures)

Mr. Garson Knapp
Gexa Energy
20 Greenway Plaza, Suite 600
Houston, Texas 77046
(w/o enclosures)

Mr. Kamran Virani
Affordable Power Plan
6161 Savoy Drive, Suite 248
Houston, Texas 77036
(w/o enclosures)

Mr. Robert Burton
AmeriPower
5005 Riverway, Suite 550
Houston, Texas 77056
(w/o enclosures)

Mr. Tom F. Coleman
Azor Energy LP
402 Main, Suite 3 North
Houston, Texas 77002
(w/o enclosures)

Mr. Jere Thompson, Jr.
Bvista Energy LP
14901 Quorum Drive, Suite 250
Dallas, Texas 75254
(w/o enclosures)

Mr. Vanus J. Priestley
Constellation NewEnergy
1301 Capital of Texas Highway South, Suite A-304
Austin, Texas 78746
(w/o enclosures)

Mr. Jerald W. Epps
Locke Liddell & Sapp LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
(w/o enclosures)

Mr. Gary Vickers
Alliance Power Company LLC
811 6th Street, Suite 205
Wichita Falls, Texas 76301
(w/o enclosures)

Ms. Amy Gasca
Ampro Energy, Inc.
19747 Highway 59 North, Suite 250
Humble, Texas 77338
(w/o enclosures)

Ms. Daniela Saldana
Bridgepoint Power & Light
500 West Bethany Drive, Suite 200
Allen, Texas 75013
(w/o enclosures)

Mr. Tim Rogers
Cirro Corp.
4949 Hedgcoxe Road, Suite 200
Plano, Texas 75024
(w/o enclosures)

Mr. Robert Frank
Direct Energy LP
8 Greenway Plaza, Suite 1000
Houston, Texas 77046
(w/o enclosures)

Mr. Michael E. Osowski
Electric Now LP
2603 Augusta, 14th Floor
Houston, Texas 77057
(w/o enclosures)

Mr. Michael Volpi
Entergy Solutions Ltd.
20 East Greenway Plaza, Suite 500
Houston, Texas 77046
(w/o enclosures)

Mr. Gary W. Boyle
First Choice Power, Inc.
4100 International Plaza
Fort Worth, Texas 76109
(w/o enclosures)

Mr. Alejandro Hinojosa, Jr.
Hino Electric Power Co.
P.O. Box 2307
Harlingen, Texas 78551-2307
(w/o enclosures)

Ms. Leah Lopez
Liberty Power Corp.
800 West Cypress Creek Boulevard, Suite 330
Fort Lauderdale, Florida 33309
(w/o enclosures)

Mutual Energy CPL, PL
c/o Mr. Paul S. Ruiz
Clark, Thomas & Winters
700 Lavaca Street, Suite 1200
Austin, Texas 78701
(w/o enclosures)

Ms. Vicki Oswalt
Reliant Energy Retail
1005 Congress Avenue, Suite 650
Austin, Texas 78701
(w/o enclosures)

Fire Fly Spark
675 Bering Drive, Suite 700
Houston, Texas 77057
(w/o enclosures)

Mr. Scott Evans
Freedom Group LLC
9720 Beechnut, Suite 200
Houston, Texas 77036
(w/o enclosures)

Mr. Gillan A. Taddune
Green Mountain Energy Company
3815 Capital of Texas Highway South, Suite 100
Austin, Texas 78704
(w/o enclosures)

Ms. Deborah Merrill
Just Energy
510 Bering, Suite 300
Houston, Texas 77057
(w/o enclosures)

Mr. Mike Starcher
mPower Retail Energy
1221 McKinney, Suite 3010
Houston, Texas 77010
(w/o enclosures)

Ms. Laura Bosley
Pre-Buy Electric LLC
P.O. Box 1460
Bridgeport, Texas 765426
(w/o enclosures)

Mr. Robert Frank
Republic Power dba Direct Energy Business Services
8 Greenway Plaza, Suite 1000
Houston, Texas 77046
(w/o enclosures)

Ms. Rona Riley
Starlight Electric
4025 Woodland Park Boulevard #410
Arlington, Texas 76013
(w/o enclosures)

Tara Energy
4635 Southwest Freeway, Suite 310W
Houston, Texas 77027
(w/o enclosures)

Mr. W. Daniel Cook
Trieagle Energy
1717 Woodstead Court
The Woodlands, Texas 77380
(w/o enclosures)

Mr. Charlie Owens
USave Energy Services, Inc.
2416 Park Stream Avenue
Clearwater, Florida 33759
(w/o enclosures)

Mr. Kevin Yung
W Power & Light
310 West Wall Street, Suite 100
Midland, Texas 79701
(w/o enclosures)

Spark Energy
675 Bering Drive, Suite 700
Houston, Texas 77057
(w/o enclosures)

Mr. Ray Balestri
Stream Gas & Electric Ltd.
2561 North Harwood
Dallas, Texas 75201
(w/o enclosures)

Ms. Norma Rosner Iacovo
Tenaska Power Services Company
1701 East Lamar Boulevard, Suite 100
Arlington, Texas 76006
(w/o enclosures)

Ms. Carolyn E. Shellman
Worsham, Forsythe Wooldridge, LLP
1601 Bryan Street, 30th Floor
Dallas, Texas 75201
(w/o enclosures)

Mr. T. Pat Harrison
Vantage Power
4606 FM 1960, Suite 390
Houston, Texas 77069
(w/o enclosures)