ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2006

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
Office of the General Counsel
P. O. Box 4004
Huntsville, Texas 77342-4004

OR2006-12386

Dear Mr. Frazier:

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# 262481.

The Texas Department of Criminal Justice (the "department") received a request for "all documents associated with [Solicitation No. 696-FD-6-Q019, including] all RFQ submittals [and] any and all internal and external correspondence related to the issuance and evaluation of this solicitation." Although you indicate that the requested information may be excepted from disclosure under section 552.110 of the Government Code, you make no arguments regarding this exception. However, you believe that this information may implicate the proprietary interests of the following companies: Ameresco, Inc. ("Ameresco"); APS Energy Services ("APS"); Burns & McDonnell ("B&M"); Chevron Energy Solutions Company ("Chevron"); FPL Energy Systems Texas ("FPL"); Johnson Controls, Inc. ("Johnson"); Sempra Energy Services Company ("Sempra"); Siemens Building Technologies, Inc. ("Siemens"); TAC Americas ("TAC"); and Trane. Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the department notified these companies of the request for information and of each company's right to submit arguments explaining why the requested information should not be released. *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 in certain

circumstances). We have reviewed the submitted information and considered the submitted arguments.

Initially, we note that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2006-11900 (2006).[1] As you indicate that there has not been a change in the law, facts, or circumstances on which the prior ruling was based, we conclude that the department must continue to rely on our decision in Open Records Letter No. 2006-11900 with respect to the information that was subject to that ruling. *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001) (setting forth the four criteria for a "previous determination).[2]

Next, 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, the following companies have not submitted comments explaining why their information should be withheld from disclosure: B&M; Chevron; FPL; Sempra; and Siemens. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 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). Accordingly, the department may not withhold any of the submitted information on the basis of any proprietary interests that these companies may have in the information.

Ameresco claims its information is excepted from disclosure under section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). In this instance, the department has not made

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[1]Specifically, information pertaining to Johnson, TAC, and Noresco, LLC was subject to Open Records Letter No. 2006-11900. We note that there is some additional information pertaining to Johnson and TAC that is at issue in this request and was not subject to the prior ruling. Accordingly, we do address Johnson's and TAC's arguments for that additional information.

[2]The four criteria for this type of "previous determination" are (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

arguments under section 552.104 as an exception to disclosure. Thus, we conclude that none of the information at issue may be withheld under section 552.104.

Next, Ameresco, APS, Johnson, TAC, and Trane all raise 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.[3] *See* ORD 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue

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[3]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).

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* ORD 661 at 5-6 (1999). We also note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *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).

Upon review of the submitted arguments and information, we find that Ameresco, TAC and Trane have made *prima facie* cases that some of their customer information is protected as trade secret information. Having received no arguments that rebut this claim as a matter of law, we conclude that the department must withhold this information, which we have marked, under section 552.110(a). However, the remaining customer information that these companies seek to withhold pertains to customers that are acting as references for the companies. We find that none of Ameresco, TAC, or Trane has established that this remaining customer information is excepted from disclosure under section 552.110, and none of the remaining customer information may therefore be withheld on this basis. We also find that Ameresco and APS have established that release of some of their remaining information would cause them substantial competitive harm. The department must withhold this information, which we have marked, under section 552.110(b). Otherwise, we find that none of Ameresco, APS, Johnson, TAC, or Trane has established that any of the remaining information at issue is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the companies substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); Open Records Decision Nos. 661 (1999), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, none of the remaining information may be withheld under section 552.110.

Next, we note that the remaining information includes a bank account number and insurance policy numbers that are subject to section 552.136 of the Government Code.[4]

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[4]The Office of the Attorney General will raise a mandatory exception such as section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.136 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. Accordingly, the department must withhold the bank account number and the insurance policy numbers that we have marked pursuant to section 552.136.

Lastly, we note that some of the remaining submitted information bears notices 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 copyrighted materials 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).

In summary, the department must continue to rely on our decision in Open Records Letter No. 2006-11900 with respect to the information that was subject to that ruling. The department must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining submitted information must be released to the requestor. However, in releasing any information that is protected by copyright, the department must comply 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,

Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/eb

Ref: ID# 262481

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