



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 5, 2006

Ms. Sarah Irwin Swanson  
Assistant Director of General Law  
Public Utilities Commission of Texas  
P. O. Box 13326  
Austin, Texas 78711

OR2006-14247

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# 266235.

The Public Utility Commission of Texas (the "commission") received two requests from the same requestor for complaint information and residential customer counts associated with TXU Energy, Reliant Energy, National Power Company, and Spark Energy. You state that you have released the complaint information to the requestor. Although you take no position with respect to the remaining requested information, you state that it may contain proprietary information subject to exception under the Act. You state, and provide documentation showing, that you notified the interested third parties, TXU Electric Delivery Company ("TXU"), Reliant Energy Retail Services, LLC ("Reliant"), AEP Texas ("AEP"), National Power Company ("National"), Spark Energy ("Spark"), CenterPoint Energy (CenterPoint), and Texas-New Mexico Power Company ("TX-NM") of the commission's receipt of the request for information and of the right of those companies to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted arguments as well as the submitted information.

You inform this office that some of the data in Exhibit D is not responsive to the instant request for information. The commission need not release nonresponsive information in

response to this request and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Section 552.305 of the Government Code permits an interested third party to submit to this office within ten days of receiving notification of the request reasons why requested information should not be released. *See Gov't Code § 552.305; 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). Because National, Spark, and TX-NM did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that these companies' information is excepted from disclosure because of their proprietary interests. *See Open Records Decision Nos. 639 at 4 (1996)* (to prevent 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), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, the commission may not withhold any portion of the submitted information based on the proprietary interests of these third parties.

CenterPoint contends that pursuant to Public Utility Commission Substantive Rule 25.88 it is required to file the information at issue with the commission. CenterPoint further contends that pursuant to subsection (c) of that rule it has filed the information as confidential. We note, however, that Public Utility Commission Substantive Rule 25.88(c), does not make information confidential for purposes of the Act. *See P.U.C. Subst. R. 25.88*. Furthermore, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indust. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); *Open Records Decision No. 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.”). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

TXU, Reliant, and AEP raise section 552.101 in conjunction with section 39.001 of the Utilities Code. Section 39.001 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)*. Although section 39.001 reflects concern for the security of competitively sensitive information this section does 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 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).

Reliant also 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 Reliant. *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, 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.<sup>1</sup> *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).

TXU, Reliant, AEP and CenterPoint each assert that their respective information qualifies as a trade secret under section 552.110(a) and as commercial or financial information which, if disclosed, would cause substantial competitive harm under section 552.110(b). Having considered the companies' submitted arguments and the submitted information, we conclude that TXU, Reliant, and AEP have established that section 552.110(b) applies to their responsive information. However, in its brief, CenterPoint states "that the requested information is not confidential to nor a trade secret of CenterPoint Energy," therefore its responsive information may not be withheld pursuant to 552.110.

In summary, based on section 552.110(b) of the Government Code, the commission must withhold the responsive residential customer count information related to TXU, Reliant, and AEP. The remaining information must be released.

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.

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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).

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), ©. 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).

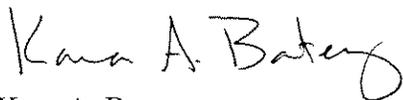
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



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Open Records Division

KAB/krl

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