



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 7, 2007

Ms. Ruth H. Soucy
Deputy General Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2007-10114

Dear Ms. Soucy:

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# 284537.

The Comptroller of Public Accounts (the "comptroller") received a request for information pertaining to all applications for tax limitations under chapter 313 of the Tax Code received by the comptroller.¹ You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. In addition, you note that release of the requested information may implicate the protected proprietary interests of third parties.² Thus, pursuant to section 552.305 of the Government Code, you have notified the

¹The comptroller informs us it sought and received clarification from the requestor regarding a portion of her request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²The third parties that received notice pursuant to section 552.305 are the following: Air Liquide Large Industries U.S., LP ("Air Liquide"); Airtricity Champion Wind Farm, LLC ("Airtricity Champion"); Airtricity Forest Creek Wind Farm, LLC ("Airtricity Forest Creek"); Airtricity Roscoe Wind Farm, LLC ("Airtricity Roscoe"); Airtricity Wild Horse Wind Farm, LLC ("Airtricity Wild Horse"); American Marazzi Tile, Inc. ("Marazzi"); ATOFINA Chemicals, Inc. ("ATOFINA"); BASF Corporation ("BASF"); Brazos Power, LLC ("Brazos"); Buffalo Gap Wind Farm, LLC and SeaWest Windpower LLC ("Buffalo Gap"); Capital Wind, LLC ("Capital"); ConocoPhillips; Corpus Christi Interests, LLC ("Corpus Christi"); CPV Wind Trew Ranch ("CPV"); DG WindPower, LLC ("DG"); The Dow Chemical Company ("Dow"); ExxonMobil Oil Corporation ("ExxonMobil"); Formosa Plastics Corporation Texas ("Formosa"); FPL Energy Horse Hollow Wind GP, LLC ("FPL"); Freescale Semiconductor ("Freescale"); Goat Mountain Wind, LLC ("Goat Mountain"); Golden Pass LNG, LLC ("Golden Pass"); Great Plains WindPower, LLC ("Great Plains"); Hackberry Wind, LLC ("Hackberry Wind"); Heartland Wind, LLC ("Heartland"); Hewlett-Packard Company ("Hewlett-Packard"); Hilmar Cheese Company ("Hilmar"); Home Depot, U.S.A. Inc. ("Home Depot"); Ingleside Energy Center, LLC ("Ingleside"); Mesquite Wind, LLC ("Mesquite Wind"); Motiva Enterprises, LLC ("Motiva"); Noelke Wind,

interested third parties of the request and of each company's right to submit arguments to this office as to why the 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 under the Act in certain circumstances). We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have reviewed the submitted information and considered the submitted 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, only Brazos, Capital, FPL, Goat Mountain, Heartland, Marazzi, Noelke, and Samsung have submitted to this office reasons explaining why their information should not be released. We thus have no basis for concluding that any portion of the remaining third parties' information constitutes protected proprietary information, and none of it may be withheld on that basis. *See, e.g., 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).

We next address Heartland's contention that its application is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Government Code provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.*

LLC ("Noelke Wind"); Panhandle Energies of Dumas, LP ("Panhandle"); Plainview BioEnergy, LLC ("Plainview"); Praxair, Inc. ("Praxair"); The Premcor Refining Group, Inc. ("Premcor"); Sabina Petrochemicals ("Sabina"); Samsung Austin Semiconductor ("Samsung"); Scurry County Wind, LLC ("Scurry"); Silver Star Power Partners, LLC ("Silver Star"); Spansion, LLC ("Spansion"); Sweetwater Wind Power, LLC ("Sweetwater"); Texas Instruments Incorporated ("TI"); Toyota Motor Manufacturing Texas, Inc. ("Toyota"); Wildorado Wind, LLC ("Wildorado"); WKN Texas, LLC ("WKN").

§ 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).

Heartland states that it withdrew its application for tax limitation under chapter 313 of the Tax Code. Heartland asserts that “[s]ince the application is no longer pending before the State it is no longer a public document.” We note, however, that the comptroller was still in possession of a copy of the application when it received the request for information. Therefore, having considered Heartland’s arguments and the comptroller’s representations, we find that Heartland’s application constitutes information that the comptroller collected, assembled, or maintains in connection with the transaction of official business. *See* Gov’t Code § 552.002(a)(1). We therefore conclude that Heartland’s application constitutes public information under section 552.002(a) and must be released, unless it falls within an exception to public disclosure.

We next address the comptroller’s contention that the submitted information is excepted from disclosure under section 552.101 of the Government Code.³ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. *Id.* § 552.101. You contend that the submitted information is confidential under section 313.028 of the Tax Code, which provides as follows:

Information provided to a school district in connection with an application for a limitation on appraised value under this subchapter that describes the specific processes or business activities to be conducted or the specific tangible personal property to be located on real property covered by the application is confidential and not subject to public disclosure unless the governing body of the school district approves the application. Information in the custody of a school district if the governing body approves the application is not confidential under this section.

Tax Code § 313.028. Section 313.025 provides in relevant parts:

(c) In determining whether to grant an application, the governing body of the school district is entitled to request and receive assistance from

(1) the comptroller[.]

...

(d) On receipt of an application under this section that the governing body elects to consider, the school district shall deliver one copy of the application to the comptroller.

³We note that FPL and Marazzi join the comptroller in claiming that the submitted information is excepted from disclosure under section 552.101.

Id. § 313.025(c)(1), (d). You state that the submitted information consists of applications for limitations on the appraised values of properties that were submitted by school districts to the comptroller as prescribed by section 313.025(d) of the Tax Code. However, you state that “[b]ecause school districts are not required to notify the [c]omptroller whether an application is approved,” the comptroller does not know which, if any, of the submitted applications have been approved by the submitting school district. Thus, as confidentiality under section 313.028 is limited to information in applications that have not been approved by the governing body of a school district, we must rule conditionally. Upon review of the submitted documents, we find that the information we have marked describes the specific processes or business activities to be conducted or the specific tangible personal property to be located on real property covered by the applications. Therefore, to the extent an application for limitation on appraised value had not been approved by the governing body of the relevant school district on the date of the comptroller’s receipt of this request for information, the comptroller must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 313.028 of the Tax Code. The remainder of the submitted information is not made confidential by section 313.028 and may not be withheld under section 552.101 on this basis. In addition, if a submitted application had been approved by the governing body of a school district on the date of the comptroller’s receipt of this request for information, then section 313.028 is not applicable to the application, and none of the information in or relating to the application may be withheld under section 552.101 on this basis.

FPL and Goat Mountain assert that portions of their applications are confidential under 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 information at issue 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).

Samsung claims that its application is excepted from disclosure under 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 Samsung. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, because the comptroller does not claim this exception, Samsung’s application may not be withheld under section 552.104 of the Government Code.

Next, Brazos, Capital, FPL, Goat Mountain, Marazzi, Noelke, and Samsung claim exception to 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.” 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.⁴ *See* ORD 552 at 5. The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983).

⁴The 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).

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.

After reviewing the information at issue and the submitted arguments, we conclude that FPL, Goat Mountain, and Samsung have established that the release of some of the information at issue would cause each company substantial competitive injury. Therefore, the comptroller must withhold this information, which we have marked, under section 552.110(b). But we conclude that Brazos, Capitol, FPL, Goat Mountain, Marazzi, Noelke, and Samsung have failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See* ORD 402. In addition, Brazos, Capitol, FPL, Goat Mountain, Marazzi, Noelke, and Samsung have made only conclusory allegations that release of the remaining information at issue would cause any of these companies substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. Thus, the comptroller may not withhold any of the remaining information under section 552.110.

The comptroller claims that some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Upon review, we find that the comptroller has established that some of the remaining information consists of advice, recommendations, opinions, or other material reflecting the

policymaking processes of the comptroller. Therefore, the comptroller may withhold the information we have marked under section 552.111 of the Government Code.

FPL and Goat Mountain also argue that the maps and survey data submitted with its applications are excepted from disclosure under section 552.113 of the Government Code. Section 552.113 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is:

...

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency[.]

Gov't Code § 552.113(a)(2). In Open Records Decision No. 627 (1994), this office concluded that section 552.113(a)(2) protects from public disclosure only commercially valuable geological and geophysical information regarding the exploration or development of natural resources. Open Records Decision No. 627 at 3-4 (1994) (overruling rationale of Open Records Decision No. 504 (1988)); *see also* Open Records Decision No. 669 (2000). In that decision, this office explained that the phrase "information regarding the exploration or development of natural resources" means "information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation." *Id.* at 4 n.4. FPL and Goat Mountain explain that the information at issue is commercially valuable. As such, upon review, we find that FPL and Goat Mountain have demonstrated that the information at issue is commercially valuable geological or geophysical information regarding the exploration or development of natural resources. Accordingly, we conclude the comptroller must withhold the maps and survey data from FPL and Goat Mountain's applications pursuant to section 552.113.

FPL and Goat Mountain also raise section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). FPL and Goat Mountain have failed to explain how the submitted information relates to economic development negotiations involving FPL, Goat Mountain, and a governmental entity. *See id.* § 552.131. Accordingly, we conclude that the comptroller may not withhold any portion of the remaining information pursuant to section 552.131(a) of the Government Code. Furthermore, section 552.131(b) is designed to protect the interests of governmental bodies, not private parties such as FPL and Goat Mountain. As the comptroller does not seek to withhold any information pursuant to section 552.131(b), we find this section does not apply to the information at issue, and it may not be withheld on that basis. Accordingly, no portion of the remaining information is excepted under section 552.131(b) of the Government Code.

We note that the remaining information includes e-mail addresses. Section 552.137(a) of the Government Code states that "[e]xcept as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter."⁵ *Id.* § 552.137(a). This section excepts from disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the owner of the e-mail address has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked personal e-mail addresses that the comptroller must withhold under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.

Finally, we note that some of the submitted information bears 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 copyrighted materials unless an exception

⁵Unlike other exceptions to disclosure under the Act, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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, to that extent that an application for limitation on appraised value had not been approved by the governing body of the relevant school district on the date the comptroller received the present request for information, the comptroller must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 313.028 of the Tax Code. The comptroller must withhold the information we have marked under section 552.110(b) of the Government Code. The comptroller may withhold the information we have marked under section 552.111 of the Government Code. The comptroller must also withhold the maps and survey data submitted with FPL's applications under section 552.113 of the Government Code. The comptroller must withhold the e-mail addresses that we have marked under section 552.137 of the Government Code unless the owner of an e-mail address has consented to its release. The comptroller must release the remaining information. In releasing information protected by copyright, the comptroller 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 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,



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LJJ/eeg

Ref: ID# 284537

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