ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2009

Mr. Mark G. Mann
Assistant City Attorney
City of Garland
P.O. Box 469002
Garland, Texas 75046-9002

OR2009-01165

Dear Mr. Mann:

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# 333730 (City ID# GCA08-0845).

The City of Garland (the "city") received a request for four categories of information pertaining to a specified RFP. You state you will provide some of the information to the requestor. Although the city takes no position as to the disclosure of the remaining requested information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you provide documentation showing that the city has notified Ameresco, Inc. ("Ameresco") of the request for information and of its right to submit arguments to this office as to why the submitted 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 received comments from Ameresco, and have reviewed the submitted arguments and information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that

apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). Under section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You state that the city received the present request for information on October 22, 2008. However, the city did not request a ruling or submit the information at issue until November 14, 2008. You inform us that the requestor agreed to a two-week extension for the city to fulfill the request for information. We note, however, that the deadlines prescribed by section 552.301 are fixed by statute and cannot be altered by agreement. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990), 514 at 1-2 (1988). Consequently, we find that the city failed to comply with the procedural requirements of section 552.301.

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. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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 reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because there are third party interests at stake, we will consider the submitted information.

Next, we note that Ameresco seeks to withhold a "letter of interest" that was found within Appendix A of its proposal. However, this information was not submitted by the city to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

We understand Amerseco to raise section 552.110 of the Government Code for portions of the submitted information. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

> may consist of 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 single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
>
> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (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 to [its] competitors;
>
> (5) the amount of effort or money expended by [the company] in developing this information; and
>
> (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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[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[.]" Gov't Code § 552.110(b). This exception to disclosure 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. *Id.* § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review, we find that Ameresco has made a *prima facie* case that portions of the submitted information pertaining to its customers and projects are protected as trade secrets. Moreover, we have received no arguments that would rebut this claim as a matter of law. Thus, we have marked the information that the city must withhold pursuant to section 552.110(a). We note, however, that some of the customer and project information that Ameresco seeks to withhold pertains to customers that are acting as references for the company. We find that Ameresco has not established that this customer information is excepted from disclosure under section 552.110(a). *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Further, we find that none of the remaining information qualifies as a trade secret under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"). Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Ameresco also objects to the release of portions of its remaining information. Upon review, we find that Ameresco has established that portions of its remaining information at issue, which we have marked, constitute commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the city must withhold the marked information under section 552.110(b) of the Government Code. However, we find Ameresco has made only conclusory allegations that release of any of the remaining information would result in substantial competitive harm. *See* ORD 661 at 5-6 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the city

may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the city must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 333730

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Mr. Michael T. Bakas
Vice President, Renewable Energy
Ameresco, Inc.
111 Speen Street, Suite 410
Framingham, Massachusetts 01701
(w/o enclosures)