



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 1, 2009

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

OR2009-05753

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# 341569 (PUC Request No. 2009-02-009).

The Public Utility Commission (the "commission") received a request for twelve categories of information related to Vega Resources, L.L.C. d/b/a Amigo Energy ("Amigo"). You state that some responsive information has been released to the requestor. You have submitted information that you claim is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ You have also submitted responsive information that you state may be subject to a third party claim by Amigo. You state that you notified Amigo of the commission's receipt of the request for information and of Amigo's right to submit arguments to this office as to why the requested information should not be released to the requestor.² We have considered the arguments and have reviewed the submitted information.

¹We note that in its correspondence of March 5, 2009, the commission withdrew its claim under section 552.111 of the Government Code.

²See 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).

The commission asserts that some of the submitted information is excepted from disclosure under section 552.103 of the Government Code which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a).

You explain that the commission is authorized to investigate and assess penalties for violations of the Public Utility Regulatory Act ("PURA"), Title 2 of the Utilities Code. Util. Code §§ 15.21, .023(a). You state that such proceedings are subject to the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. *Id.* at § 15.024(f). For purposes of section 552.103(a), this office considers a contested case under the APA to constitute "litigation." See Open Records Decision No. 588 (1991). You state, and provide documentation showing, that the commission received a formal complaint against Amigo alleging failure to comply with PURA and commission rules relating to retail customer protection standards. You inform us that pursuant to its authority under section 39.101(e) of PURA, the commission has adopted a rule establishing the procedures for disposition of a formal complaint. You further state that such proceedings are contested cases that must be conducted according to the APA, and that a contested case governed by the APA was pending on the date the commission received this request for information. Based on your representations and our review, we determine that litigation in this matter, in the form of a contested case under the APA, was pending prior to the date the commission received the present request. We further find that the information at issue relates to the pending litigation

for purposes of section 552.103(a). Thus, we find that you have demonstrated the applicability of section 552.103. Accordingly, the commission may withhold the information you have marked pursuant to section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Next, you assert that a portion of the submitted information reflects the giving or seeking of legal advice and is excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless

otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the pages you have marked under section 552.107 document communications between privileged parties, whom you have identified. You state that the communications were made to facilitate the rendition of professional legal services to the commission. You further state that the communications were only exchanged between privileged parties and their confidentiality has been maintained. Based on your representations and our review, we agree that the commission may withhold the information you have marked under section 552.107.

Amigo argues that portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code.³ 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 trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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 single or ephemeral events 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.

³Amigo seeks to withhold Appendices I, II, IIIa, IV, and V. The commission has not submitted Appendix II to this office for review. This ruling does not address information that was not submitted by the commission and is limited to the information submitted as responsive by the commission. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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* Open Records Decision No. 661 at 5-6 (1991) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Amigo contends that portions of its information are trade secrets excepted under section 552.110(a). Having considered Amigo’s arguments, we find that Amigo has established a *prima facie* case that some of its information, which we have marked, constitutes trade secrets. Therefore, the commission must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, Amigo has failed to demonstrate that any of the remaining information it seeks to withhold meets the definition of a trade secret, nor has Amigo demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

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).

Amigo also asserts that some of the remaining information is excepted under section 552.110(b). Upon review of the submitted arguments and information at issue, we find that Amigo has established that the release of the information we have marked would cause it substantial competitive injury. Therefore, the commission must withhold the marked information under section 552.110(b) of the Government Code. We find, however, that Amigo has made only conclusory allegations that the release of the remaining information at issue would result in substantial damage to the company's competitive position. Thus, Amigo has not demonstrated that substantial competitive injury would result from the release of any of the remaining information. We therefore conclude that none of the remaining information is excepted from disclosure under section 552.110(b). *See* Open Records Decision Nos. 661 (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).

We note that portions of the remaining information contain customer account numbers.⁵ Section 552.136 of the Government Code provides 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. We have marked the type of information that the commission must withhold under section 552.136 of the Government Code.

We note that some of the remaining information is excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of the e-mail address at issue. Therefore, the commission must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to disclosure.

In summary, the commission may withhold the information you have marked under sections 552.103 and 552.107 of the Government Code. The commission must withhold the information we have marked under section 552.110 of the Government Code. We have marked the type of information that the commission must withhold under section 552.136

⁵The Office of the Attorney General will raise mandatory exceptions such as section 552.136 and 552.137 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of the Government Code. The commission must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to disclosure. The remaining submitted 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 341569

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. John K. Arnold
Locke Lord Bissell & Liddell, L.L.P.
600 Travis Street, Suite 3400
Houston, Texas 77002
(w/o enclosures)