



ATTORNEY GENERAL OF TEXAS
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August 24, 2009

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

OR2009-11886

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# 353305.

The Public Utility Commission of Texas (the "commission") received a request for calendar entries and e-mails pertaining to (1) Oncor's or TXU Electric Delivery's advanced meters, smart meters, or smart grid; (2) any relationship between Oncor, TXU, and Current Group; and (3) the possibility of the sale of Oncor or TXU Electric Delivery.¹ You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You have also submitted responsive information that you state may be subject to third party claims. You state that you notified the interested third parties of the commission's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the requestor.² *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 arguments from AzTech, Landis, and Oncor. We have considered the submitted arguments and reviewed the submitted information.

¹We note the commission sought and received clarification of the request. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify or narrow request).

²The third parties are as follows: AzTech Associates, Inc. ("AzTech"); Computime Limited; Converge Clean Energy Solutions; Honeywell Utility Solutions; Landis+Gyr ("Landis"); Office of the Public Utility Counsel ("OPC"); Oncor Electric Delivery Company ("Oncor"); Reliant Energy Retail Services, LLC; and Tendril Networks.

Initially, we note you have marked information that is not responsive to the instant request. We have marked additional information that is non-responsive because it was created after the date the commission received the instant request. The commission need not release non-responsive information in response to this request, and this ruling will not address the public availability of that information.

You claim that a portion of the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides:

(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.

Id. § 552.103(a), (c). A governmental body 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 was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). For the purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA). You state that the information you have marked relates to a pending case in which Oncor requested an increase in its rates that was assigned docket number 35717. You further state that the case was filed with the commission prior to the commission's receipt of the instant information request. You indicate that the pending case is being conducted according to the APA. Upon review,

we conclude that the commission was involved in pending litigation when it received the present request for information. Furthermore, we note that the information at issue pertains to docket number 35717 or rate increases. Accordingly, we find that the information you have marked is related to the pending litigation for purposes of section 552.103. Therefore, the commission may withhold the information you have marked under section 552.103 of the Government Code.

We note, however, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, section 552.107(1) of the Government Code 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 Tex. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 claim the information you have marked consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that these communications were between commission attorneys and staff. You further state that the communications were intended to be confidential and that the confidentiality of the communications has been maintained. Upon review, we find the commission may generally withhold the remaining information you have marked under section 552.107 of the Government Code. We note, however, that some of the individual e-mails contained in the submitted e-mail strings you seek to withhold under section 552.107 consist of communications with non-privileged parties. We have marked these non-privileged e-mails. To the extent these non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107.

You assert that some of the remaining submitted information is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." *See Gov't Code* § 552.111. Section 552.111 encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. In *Open Records Decision No. 615*, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

An agency's policymaking functions do not encompass internal administrative or personnel matters. Disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See ORD 615 at 5-6*. However, 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)*. Further, a preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. *See Open Records Decision No. 559 at 2 (1990)*. Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and

recommendations. *See* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state that the information you have marked under section 552.111 “implicate[s] the policy-making functions of the [commission] in that [it] reflect[s] advice, recommendations, and opinions of [commission] officials and employees with respect to policy matters of the [commission].” You state that one of the marked communications relates to “how the [commission] will respond to questions from the public regarding smart meters, but does not include the final decision on a response.” You state that other submitted communications “reflect discussion, information gathered, and estimates made to aid in the preparation of agency responses to questions from members of the legislature.” You claim the submitted information also contains draft policy documents. You state that the drafts have been released or are intended for release in their final form and “are excepted from public disclosure because they represent the drafters’ advice, opinion, and recommendation with regard to the form and content of the final documents.”

Upon review, we find that portions of the information at issue, which we have marked, are excepted from disclosure under section 552.111 of the Government Code. However, we note that most of the remaining information consists of purely routine administrative matters or factual information. Because the commission has failed to demonstrate how the remaining information constitutes internal communications consisting of advice, opinion, or recommendation that reflect the policymaking processes of the commission, we find that the none of the remaining information is excepted from disclosure under section 552.111. Accordingly, no portion of the remaining information may be withheld on this basis.

Next, we note 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 AzTech, Landis, and Oncor have submitted comments to this office explaining why their information should not be released to the requestor.³ The remaining third parties have not submitted to this office any reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in the information at issue. *See id.* § 552.110(b) (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); Open Records Decision

³We note that OPC informed this office that it does not object to the release of its information.

Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the commission may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in their information.

AzTech, Landis, and Oncor assert that the information at issue may not be disclosed because it was marked confidential or has been made confidential by agreement or assurances. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. 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 Nos. 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.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Next, AzTech, Landis, and Oncor contend that portions of the information at issue are excepted under section 552.110 of the Government Code. 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 ORD 552 at 2. 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.

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

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.*; *see also* ORD 661 at 5-6.

Upon review, we find AzTech, Landis, and Oncor have failed to establish that any of the information at issue meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* Open Records Decision No. 319 at 2 (1982) (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Pricing information pertaining to a particular proposal or

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).

contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; ORD 319 at 3; Open Records Decision No. 306 at 3 (1982). Therefore, the commission may not withhold any of the information at issue under section 552.110(a) of the Government Code.

We understand AzTech, Landis, and Oncor to assert the information at issue is excepted under section 552.110(b). Upon review, we conclude that the commission must withhold the pricing information of AzTech and Landis, which we have marked, under section 552.110(b) of the Government Code. However, we find each company has only provided conclusory arguments that release of the remaining information at issue would result in substantial competitive harm to their companies. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982). Accordingly, we conclude that none of the remaining information is excepted from disclosure under section 552.110(b) of the Government Code.

We note that section 552.137 of the Government Code is applicable to some of the remaining information. 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).⁵ 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 addresses at issue do 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 any of the e-mail addresses at issue. Therefore, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to disclosure.

We note that some of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish

⁵ The Office of the Attorney General will raise a mandatory exception such as section 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).

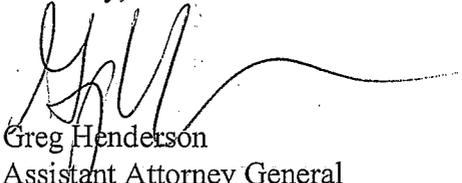
copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted 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 commission may withhold the information you have marked under section 552.103 of the Government Code. The commission may generally withhold the information you have marked under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. The commission may withhold the information we have marked under section 552.111 of the Government Code. The commission must withhold the information we have marked under section 552.110(b) of the Government Code. Finally, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.

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,



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GHeeg

Ref: ID#353305

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