



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2011

Ms. Elaine Nicholson
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR2011-14067

Dear Ms. Nicholson:

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# 431317.

The City of Austin (the "city") received a request for seven categories of information relating to Austin Energy. You state you will release some of the requested information to the requestor. You claim a portion of the submitted information is excepted from disclosure under section 552.133 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Navigant Consultants, Inc. ("Navigant"). Accordingly, you have notified Navigant of the request 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)* (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We received comments from Navigant. We have considered the submitted arguments and reviewed the submitted information.

We note the requestor has asked the city to answer questions. In responding to a request for information under the Act, a governmental body is not required to answer factual questions, conduct legal research, or disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See Open Records Decision No. 561 at 8-9* (1990). We assume the city has made a good-faith effort to do so.

Next, you acknowledge that the city failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting an open records decision from our office. Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because third-party interests can provide a compelling reason for non-disclosure, we will consider Navigant's arguments. Additionally, because your claim under section 552.133 can provide a compelling reason for non-disclosure, we will consider the applicability of this exception to the information at issue.¹

Section 552.133 excepts from disclosure a public power utility's information related to a competitive matter. Section 552.133 was recently amended by the 82nd Legislature and now provides in relevant part:

Information or records are excepted from [required public disclosure] if the information or records are reasonably related to a competitive matter, as defined in this section. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1613, § 2 (to be codified as an amendment to Gov't Code § 552.133(b)). Section 552.133(a-1) defines a "competitive matter" as a utility-related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1613, § 2 (to be

¹The city raises section 552.133 for Exhibits 1 and 2. We note the city submits alternative claims under both the previous and amended versions of section 552.133. We further note this office will apply the laws that are effective at the time of the issuance of a ruling. *See Houston Indep. Sch. Dist. v. Houston Chronicle Publ'g Co.*, 798 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (absent contrary legislative mandate, newly adopted exception to Act applied to records as of effective date of exception); *see also* Open Records Decision No. 600 (1992). Accordingly, we will apply the amended section 552.133 to the information at issue.

codified as an amendment to Gov't Code § 552.133(a-1)). The definition of competitive matter includes information reasonably related to generation unit specific and portfolio fixed and variable costs, including forecasts of those costs, capital improvement plans for generation units, generation unit operating characteristics, proposals and analyses for system improvements, and customer billing, contract and usage information. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1613, § 2 (to be codified as an amendment to Gov't Code § 552.133(a-1)(1)(A), (E), (F)). However, section 552.133(a-1)(2) also provides fifteen categories of information that may not be deemed competitive matters.

The city informs us that it owns and operates a public power utility, Austin Energy, for purposes of section 552.133. The city further informs us that the information it has marked in Exhibit 1 pertains to the city's power generation, customer information, and production costs. The information at issue in Exhibit 1 is not among the fifteen categories of information section 552.133(a-1)(2) expressly excludes from the definition of a "competitive matter." Based on our review of your arguments and the information at issue in Exhibit 1, we find that the information you have marked relates to a competitive matter as defined under section 552.133(a-1). Accordingly, the city must withhold the information it has marked in Exhibit 1 under section 552.133 of the Government Code. The city further informs us the information it has marked in Exhibit 2 pertains to "financial and operational performance of power generation assets, both at the unit level and as a portfolio, and related analyses and reports, as well as recommended actions and capital improvements to increase power supply efficiency and finances." Based on our review of your arguments and the submitted information, we find that the information you have marked in Exhibit 2 relates to a competitive matter as defined under section 552.133(a-1). Thus, we conclude that the information you have marked in Exhibit 2 is excepted from disclosure under section 552.133 of the Government Code and must be withheld from the requestor on this basis.²

Next, we address Navigant's arguments against disclosure of the remaining information at issue. We understand Navigant to assert the submitted information is confidential because it was "prepared pursuant to terms of confidentiality." We note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See Attorney General Opinion JM-672* (1987); *Open Records Decision Nos. 541 at 3* (1990) ("[T]he obligations of a governmental body under [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 did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Navigant has not identified any law that authorizes the city to enter into an agreement to keep any of the submitted information confidential. Therefore, the city must release the remaining

²As our ruling is dispositive, we need not address Navigant's arguments against disclosure of this information.

information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Navigant also asserts the remaining information is excepted under section 552.110 of the Government Code, which 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.

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.³ 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

³The 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).

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* Open Records Decision No. 661 (1999) at 5-6.

Navigant contends the remaining information consists of trade secret information excepted under section 552.110(a). Having considered Navigant’s arguments, we find that Navigant has failed to demonstrate that any of the remaining information meets the definition of a trade secret, nor has Navigant demonstrated the necessary factors to establish a trade secret claim for this information. We note information pertaining to a particular 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.” 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). Accordingly, we find none of the remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Upon review of Navigant’s arguments under section 552.110(b) and the remaining information, we find that Navigant has made only conclusory allegations that the release of the remaining information would result in substantial damage to its competitive position. *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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, we conclude no portion of the remaining information may be withheld under section 552.110(b) of the Government Code.

We note the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the city must withhold the information it has marked in Exhibits 1 and 2 under section 552.133 of the Government Code. The remaining information must be released, but any information protected by copyright may be released only 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, toll free at (888) 672-6787.

Sincerely,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 431317

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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