



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2012

Mr. James G. Nolan
Assistant General Counsel
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2012-00073

Dear Mr. Nolan:

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# 441062 (CPA ID#s 7645827744 and 7657380553).

The Texas Comptroller of Public Accounts (the "comptroller") received requests from two requestors for information regarding a request for proposals ("RFP") related to electricity procurement and invoice processing services. You state some of the requested information either has been or will be released. Although you take no position on its public availability, you believe the submitted information may implicate the proprietary interests of Affiliated Energy Group ("AEG"); Ameresco, Inc. ("Ameresco"); Dynamic Energy Concepts ("DEC"); GDS Associates, Inc. ("GDS"); NRG/Simply Smart ("NRG"); TFS Energy Solutions, LLC dba Tradition Energy ("TFS"); and Texas Energy Aggregation, LLC ("TEA"). You inform us the interested parties were notified of these requests for information and of their right to submit arguments to this office as to why the information at issue should not be released.¹ We received correspondence from AEG, NRG, and TFS. We have considered their arguments and reviewed the submitted information.

We first note the comptroller has marked some of the submitted information as being not responsive to these requests for information. This decision does not address the public availability of information that is not responsive to these requests, and the comptroller need not release any such information in response to the requests.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

NRG contends these “Open Records Requests are inapplicable to [NRG’s] response [to the RFP], and, therefore, the requestors should not receive any part of [NRG’s r]esponse to the RFP.” We note a governmental body that receives a request for information must make a good-faith effort to relate the request to responsive information that is within the governmental body’s possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). The comptroller has submitted the information the agency deems to be responsive to the present requests for information. Therefore, this decision will address the public availability of all the submitted information the comptroller deems to be responsive to the requests.

We next note an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Ameresco, DEC, GDS, or TEA. Moreover, TFS indicates the company does not object to release of the submitted responsive information pertaining to TFS. Thus, as Ameresco, DEC, GDS, TEA, and TFS have not demonstrated any of the responsive information is proprietary for purposes of the Act, the comptroller may not withhold any of the responsive information on the basis of any interest any of those parties may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we consider the arguments we received from AEG and NRG. AEG claims section 552.104 of the Government Code, which excepts from 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. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the comptroller does not claim an exception to disclosure under section 552.104(a). Therefore, the comptroller may not withhold any of the responsive information under section 552.104 of the Government Code.

Both AEG and TFS claim section 552.110 of the Government Code. This exception protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” 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.” Gov’t Code § 552.110(a)-(b).

The Supreme Court of Texas 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 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, 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 [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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.² *See* ORD 552 at 5. We cannot conclude section 552.110(a) is applicable, however, unless the information is shown to meet the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

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 information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

We understand AEG to contend pricing and other responsive information pertaining to AEG constitute trade secrets under section 552.110(a) and commercial or financial information protected by section 552.110(b). NRG generally claims both aspects of section 552.110 for responsive information pertaining to NRG but has submitted no arguments in support of its objection to disclosure. Having considered the companies' claims and reviewed the information at issue, we conclude the comptroller must withhold AEG's pricing information, which we have marked, under section 552.110(b). Otherwise, we find that neither AEG nor NRG has demonstrated that any of the remaining information at issue constitutes a trade

²The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

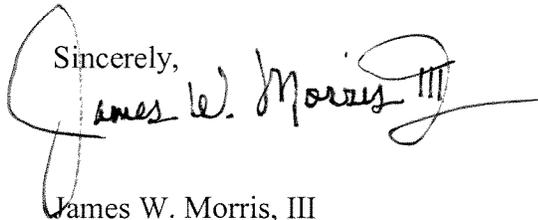
secret under section 552.110(a). We also find that neither party has made the specific factual or evidentiary showing required by section 552.110(b) that release of any the remaining information at issue would cause either AEG or NRG substantial competitive harm. We therefore conclude the comptroller may not withhold any of the remaining responsive information under section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); ORD 552 at 5, 661 at 5-6; *see also* Open Records Decision Nos. 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience).

In summary, the comptroller must withhold the information we have marked under section 552.110(b) of the Government Code. The rest of the responsive information must be released.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, looping initial "J" on the left side.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 441062

Enc: Submitted documents

c: Requestors
(w/o enclosures)

Ms. Andrea Barbeau
Affiliated Energy Group
2401 Fountain View, Suite 462
Houston, Texas 77057
(w/o enclosures)

Ms. Vickie Tilley-Wilson
Dynamic Energy Concepts
919 Congress Avenue, Suite 800
Austin, Texas 78701
(w/o enclosures)

Mr. James W. Daniel
GDS Associates, Inc.
919 Congress Avenue, Suite 800
Austin, Texas 78701
(w/o enclosures)

Mr. T. J. Ermoian Jr.
Texas Energy Aggregation
1708 Austin Avenue
Waco, Texas 76701
(w/o enclosures)

Mr. Mark Feichtner
Ameresco, Inc.
1330 North Washington Street, Suite 5200
Spokane, Washington 99201
(w/o enclosures)

Ms. Elizabeth R. Killinger
NRG SimplySmart Solutions, LLC
1201 Fannin, 11th Floor
Houston, Texas 77002
(w/o enclosures)

Mr. Brian McDermott
TFS Energy Solutions, LLC
680 Washington Boulevard
Stamford, Connecticut 06901
(w/o enclosures)