



January 27, 2015

Ms. Kasey Feldman-Thomason
General Law Attorney
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2015-01511

Dear Ms. Feldman-Thomason:

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# 551502 (PUC ID No. 2014 -10-027).

The Public Utility Commission of Texas (the "commission") received a request for all communications that reference the use of in-home monitoring devices, thermostats, or controls over the 2014 calendar year.¹ You state the commission will release some of the requested information upon payment of costs.² You state the commission has redacted

¹You state the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S. W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²You acknowledge, and we agree, the commission did not comply with section 552.301 of the Government Code in requesting this decision and, consequently, the commission waived its arguments under sections 552.107 and 552.111 of the Government Code for the submitted information. *See* Gov't Code § 552.301 (b), (e), .302; *see also* Open Records Decision Nos. 676 at 12 (2002) (attorney-client privilege under section 552.107 constitutes a compelling reason to withhold information under section 552.302 only if information's release would harm third party), 522 (1989) (discretionary exceptions in general), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Thus, you have withdrawn your arguments under sections 552.107 and 552.111 of the Government Code. However, because section 552.137 of the Government Code and third party interests can provide compelling reasons to overcome the presumption of openness, we will consider the applicability of section 552.137 and any third party arguments. *See* Gov't Code §§ 552.007, .302, .352.

e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).³ We also understand the commission has redacted certain access device information subject to section 552.136 of the Government Code.⁴ Additionally, you state the proprietary interests of third parties might be implicated by the request. Accordingly, you notified Opower; Just Energy Texas, LP; Texas-New Mexico Power Company; Oncor Electric Delivery Company; Reliant Energy Retail Services, LLC; and TXU Energy Retail Company, LLC (“TXU”) of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments submitted by Opower and TXU. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the information you have submitted is not responsive to the request at issue. The requestor seeks specified communications conveyed during the 2014 calendar year. Some of the information you have submitted consists of correspondence that originated in 2013, and was not re-communicated in 2014; this information is not responsive to the request. This ruling does not address the public availability of that information, and the commission need not release any non-responsive information.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from Opower and TXU. Thus, none of the remaining third parties have demonstrated they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); Open Records Decision Nos. 661 at 5–6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the commission may not withhold any of the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

³Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

⁴Section 552.136(c) of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov’t Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

Next, Opower contends its information is not subject to disclosure under the Act. The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, 552.021. Section 552.002(a) defines “public information” as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988). Opower asserts its information is not subject to the Act because it was generated by Opower, which is not a governmental body subject to the Act, and Opower conveyed the information to an individual who identified himself as a consultant, rather than to a governmental body directly. *See* Gov’t Code § 552.003(1)(A) (defining “governmental body”). Opower asserts that, when it shared the information with the individual, Opower understood that, “[the] information was not shared in response to any official business with a governmental body in Texas; and . . . [the individual to whom the information was conveyed] was not an officer or employee of the Texas government.” We note, however, the information at issue relates to a program overseen by the commission.

We further note the information at issue is in the possession of the commission. Moreover, the commission has submitted this information as being subject to the Act. Thus, we find the commission collected, assembled, or maintains this information in connection with the transaction of its official business. We therefore conclude the information at issue is subject to the Act and must be released, unless it is demonstrated that the information falls within an exception to disclosure under the Act. *See id.* §§ 552.006, .021, .301, .302.

Next, we note TXU argues against disclosure of information the commission has not submitted to this office for review. This ruling does not address information beyond what the commission has submitted to us for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Accordingly, this ruling is limited to the information the commission submitted as responsive to the request for information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *See id.* at 681–82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See Open Records Decision No. 455* (1987). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

TXU raises section 552.104 of the Government Code, which excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). TXU asserts the plain language of section 552.104 does not prevent a private party from asserting the exception to protect the private party’s interests. However, in *Open Records Decision No. 592* (1991), this office determined the purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers, and not interests of private parties submitting information to government. *See ORD 592* at 8, 9. Thus, we conclude section 552.104 does not protect the interests of third parties. Because the commission does not assert section 552.104, we conclude this exception is not applicable to TXU’s information and the commission may not withhold it on that basis.

Opower asserts the entirety of its information is excepted under section 552.110(a), and 552.110(b) of the Government Code and TXU asserts portions of its information are

excepted from disclosure under section 552.110(b) 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, 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. . . . 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.⁵ RESTATEMENT OF TORTS § 757 cmt. b. 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 section 552.110(a) is applicable unless it has been shown 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). We note pricing information

⁵The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.

Opower claims the entirety of its information, and TXU claim portions of its information, constitute commercial or financial information, the disclosure of which would cause each respective company substantial competitive harm. Upon review, we find Opower and TXU have made the specific factual or evidentiary showing required by section 552.110(b) that release of portions of their information, including customer information, would cause substantial competitive harm. *See* ORD 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). Accordingly, the commission must withhold the information we have marked under section 552.110(b) of the Government Code; however, Opower’s customer information may only be withheld to the extent such information is not published on a publicly-available website. However, having considered Opower’s and TXU’s arguments under section 552.110(b) for the remaining information, we find neither third party has demonstrated substantial competitive injury would result from the release of such information. *See* ORD 661. Therefore, the commission may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Opower also claims its remaining information constitutes trade secrets and is protected under section 552.110(a) of the Government Code. Upon review, we find Opower has not demonstrated any of its remaining information meets the definition of a trade secret, nor has Opower demonstrated the necessary factors to establish a trade secret claim for such information. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Consequently, none of the remaining information may be withheld under section 552.110(a) 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(c)(1) states an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent”

is not excepted from public disclosure. *Id.* § 552.137(c)(1). As previously noted, the commission has redacted certain e-mail addresses under section 552.137 of the Government Code pursuant Open Records Decision No. 684. Upon review, we find additional portions of the remaining information, which we have marked, consist of personal e-mail addresses. However, we note some of the e-mail addresses at issue belong to individuals who may be in a contractual relationship with the commission, and, thus, such e-mail addresses may be specifically excluded by section 552.137(c)(1). Consequently, those e-mail addresses may not be withheld under section 552.137 of the Government Code and must be released. To the extent the e-mail addresses you have redacted, and the additional e-mail addresses we have marked, are not specifically excluded by section 552.137(c), these e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must withhold the information we have marked under section 552.110(b) of the Government Code. To the extent the e-mail addresses you have redacted, and the additional e-mail addresses we have marked, are not specifically excluded by section 552.137(c), these e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The remaining 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Belnke', with a long horizontal line extending to the right.

Joseph Belnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 551502

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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