



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 23, 2015

Mr. Ronny H. Wall  
Associate General Counsel  
Office of General Counsel  
Texas Tech University System  
P.O. Box 42021  
Lubbock, Texas 79409-2021

OR2015-15047

Dear Mr. Wall:

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# 572661.

Angelo State University (the "university") received a request for copies of all responses and the evaluation results related to a specified RFQ. Although the university takes no position as to whether the submitted information is excepted under the Act, the university informs us release of this information may implicate the proprietary interests of multiple third parties. Accordingly, the university states, and provides documentation showing, it notified the Texas General Land Office (the "GLO"); Energy Market Exchange, LLC; Satori Energy; Acclaim Energy Advisors ("Acclaim"); Alden Energy Consulting, LLC; Tradition Energy ("Tradition"); Texas Energy Aggregation, LLC; TruEnergy; Affiliated Energy Group, LLC; MidAmerican Energy; Unified Energy; United Energy Services; NORESKO Energy & Sustainability Services; and Cavallo Energy Texas ("Cavallo") of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code §§ 552.304 (interested party may submit written comments regarding availability of requested information), .305; *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 Act in certain circumstances). We have received comments from the GLO, Tradition, Cavallo, and Acclaim. We have considered the submitted arguments and reviewed the submitted information.

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) of the Government Code 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, we have only received comments from the GLO, Tradition, Cavallo, and Acclaim explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at \*9 (Tex. June 19, 2015).

The GLO informs us it is authorized by statute to sell or otherwise convey power generated from royalties taken in kind. Util. Code § 35.102. The GLO advises us, under that authority, it has created the State Power Program, with Cavallo and Reliant Energy Solutions as its representatives, through which it bids on contracts for the right to sell electrical energy to public retail customers. The GLO states it "competes with private companies for the awards of these contracts." Additionally, the GLO contends the release of the information it has marked would put it at an enormous disadvantage in future bids because this information details services, and the GLO's business strategies, business methodologies, pricing formulas, and pricing structures. The GLO further asserts, if its competitors had access to this information, it would allow competitors to gain insight into the GLO's business and marketing strategies, and this would put the GLO at a great disadvantage in the marketplace. Thus, the GLO contends that allowing competitors access to the information at issue will undermine its ability to compete in this marketplace. Based on the GLO's representations and arguments, we conclude the GLO has shown that release of the information at issue would give advantage to a competitor or bidder. Therefore, we conclude the university may withhold the information at issue, which we have marked, under section 552.104 of the Government Code.<sup>1</sup>

Next, Cavallo, Acclaim, and Tradition claim some of their information is excepted from disclosure under section 552.110 of the Government Code, which protects (1) trade secrets,

---

<sup>1</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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. *See 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.<sup>2</sup> 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 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. *See* Open Records Decision No. 402 (1983).

---

<sup>2</sup>The 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).

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 at 5-6 (1999).

Tradition argues its customer information is excepted from disclosure under section 552.110(a) of the Government Code. Upon review, we find Tradition has established a *prima facie* case its customer information constitutes trade secret information for purposes of section 552.110(a). Nevertheless, to the extent Tradition has published any of the customer information at issue on its website, this information is not confidential under section 552.110. Accordingly, the university must withhold Tradition’s customer information under section 552.110(a), provided Tradition has not published the information on its website. However, upon review, we find Cavallo has failed to demonstrate how its remaining information meets the definition of a trade secret, nor has Cavallo demonstrated the necessary factors to establish a trade secret claim. *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). Therefore, the university may not withhold any of Cavallo’s remaining information pursuant to section 552.110(a) of the Government Code.

Acclaim contends some of its information constitutes commercial or financial information that, if released, would cause it substantial competitive harm. Further, Cavallo asserts its remaining information constitutes commercial or financial information that, if released, would cause it substantial competitive harm. Upon review, we find Acclaim and Cavallo have failed to demonstrated the release of their information at issue would result in substantial harm to their competitive position. *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). Consequently, the university may not withhold any of Acclaim’s or Cavallo’s information at issue under section 552.110(b) of the Government Code.

We note some of 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 university may withhold the GLO’s information under section 552.104 of the Government Code. The university must withhold Tradition’s customer information

under section 552.110(a), provided Tradition has not published the information on its website. The university must release the remaining information; however, any information protected by copyright may only 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Rahat Huq  
Assistant Attorney General  
Open Records Division

RSH/som

Ref: ID# 572661

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Hadassah Schloss  
Director of Open Government  
Texas General Land Office  
P.O. Box 12873  
Austin, Texas 78711-2873  
(w/o enclosures)

Mr. Ryk J. Holden  
Acclaim Energy Advisors  
Two Riverway, Suite 800  
Houston, Texas 77056  
(w/o enclosures)

Ms. Teresa Kelly  
Vice President  
Cavallo Energy Texas, LLC  
4545 Post Oak Place, Suite 342  
Houston, Texas 77027  
(w/o enclosures)

Mr. Phillip T. Golden  
Energy Market Exchange, LLC  
11011 Richmond Avenue  
Suite 500  
Houston, Texas 77042  
(w/o enclosures)

Mr. Travis H. Cooke  
Alden Energy Consulting, LLC  
P.O. Box 3062  
Coppell, Texas 75019  
(w/o enclosures)

Mr. David Wilson  
TruEnergy  
2930 Commerce Street  
Dallas, Texas 75226  
(w/o enclosures)

Ms. Paula Ramirez  
MidAmerican Energy  
4201 Spring Valley, Suite 1410  
Dallas, Texas 75244  
(w/o enclosures)

Mr. Michael Scott  
United Energy Services  
111 East Wacker, Suite 900  
Chicago, Illinois 60601  
(w/o enclosures)

Mr. Michael Ayala  
Senior Director  
Tradition Energy  
5215 North O'Connor Boulevard  
Central Tower, Suite 470  
Las Colinas, Texas 75039  
(w/o enclosures)

Ms. Lucia Minick Crates  
Satori Energy  
2409 Faron Street  
Fort Worth, Texas 76107  
(w/o enclosures)

Mr. Kevin Schaffer  
Texas Energy Aggregation, LLC  
712 Austin Avenue  
Waco, Texas 76701  
(w/o enclosures)

Mr. Chad Price  
Affiliated Energy Group, LLC  
2401 Fountain View Street, Suite 462  
Houston, Texas 77057  
(w/o enclosures)

Mr. John Weems  
Unified Energy  
3900 Essex, Suite 750  
Houston, Texas 77027  
(w/o enclosures)

Mr. Ken Sissingh  
NORESO Energy & Sustainability  
Services  
1515 Hyde Park Boulevard, Suite 28  
Houston, Texas 77006  
(w/o enclosures)