



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 11, 2016

Ms. Jordan Hale
Public Information Coordinator
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2016-05672

Dear Ms. Hale:

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# 601280 (OOG Ref. No. 15-496).

The Office of the Governor (the "governor's office") received a request for a specified application and agreement, and the most recent fiscal and employment evaluations pertaining to the specified agreement.¹ You state you will redact information pursuant to section 552.136 of the Government Code.² You state you will release some information to the requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of Chevron Corporation ("Chevron"). Accordingly, you state, and provide documentation demonstrating, you notified Chevron of the request for information and of its right to submit arguments to this office as to why the information at issue should

¹We note the requestor narrowed his request for information. *See* Gov't Code § 552.222 (providing 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).

²We note section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *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).

not be released. *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 comments from Chevron. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-15974 (2013). In Open Records Letter No. 2013-15974, the governor's office notified Chevron pursuant to section 552.305 when the governor's office received the previous request for information, and Chevron failed to submit comments objecting to the release of its information. Accordingly, in our previous ruling, we ruled, among other things, the governor's office must release Chevron's information. We understand the governor's office did so. However, Chevron now argues its information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, to the extent any of the submitted information was previously released pursuant to Open Records Letter No. 2013-15974, the governor's office may not withhold Chevron's previously released information under section 552.104. However, because information subject to sections 552.101 and 552.110 is deemed confidential by law, we will address Chevron's claims under these exceptions for the information at issue. We will also consider Chevron's arguments under sections 552.101, 552.104, and 552.110 of the Government Code for the submitted information that was not at issue in the previous ruling.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 of the Government Code encompasses section 171.206 of the Tax Code, which provides that:

Except as provided by Section 171.207, the following information is confidential and may not be made open to public inspection:

- (1) information that is obtained from a record or other instrument that is required by this chapter to be filed with the [Texas Comptroller of Public Accounts (the "comptroller"); or
- (2) information, including information about the business affairs, operations, profits, losses, cost of goods sold, compensation, or expenditures of a taxable entity, obtained by an examination of the books and records, officers,

partners, trustees, agents, or employees of a taxable entity on which a tax is imposed by this chapter.

Tax Code § 171.206. This provision protects information that is in the possession of the comptroller. In this instance, the information at issue is in the possession of the governor's office. Therefore, no portion of the information at issue is confidential under section 171.206 of the Tax Code. Accordingly, no portion of the submitted information may be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses section 171.208 of the Tax Code, which provides as follows:

A person, including a state officer or employee or an owner of a taxable entity, who has access to a report filed under this chapter may not make known in a manner not permitted by law the amount or source of the taxable entity's income, profits, losses, expenditures, cost of goods sold, compensation, or other information in the report relating to the financial condition of the taxable entity.

Id. § 171.208. Section 171.208 of the Tax Code prohibits the release of specific information in a report filed under chapter 171 of the Tax Code. *Id.* Chevron generally argues section 171.208 of the Tax Code prohibits the disclosure of Chevron's business affairs, operations, profits, losses, cost of goods sold, compensation, or expenditures obtained by a government examination. However, upon review, we find Chevron has failed to demonstrate the information at issue was filed under chapter 171 of the Tax Code. Thus, we conclude the governor's office may not withhold the submitted information under section 552.101 in conjunction with section 171.208 of the Tax Code.

Chevron generally raises 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. 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 (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. 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* Open Records Decision No. 552 at 5 (1990). 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. *See* Open Records Decision No. 402 (1983). We note pricing 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; *see also Huffines*, 314 S.W.2d at 776; Open Record 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* Open Records Decision No. 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).

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

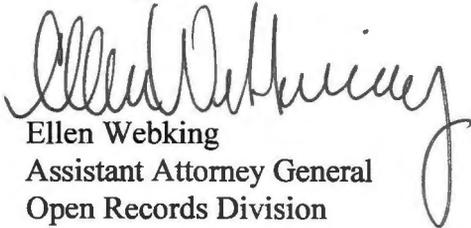
Upon review, we conclude Chevron has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find Chevron has not demonstrated the necessary factors to establish a trade secret claim for its information. See ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Additionally, we find Chevron has not established any of the information at issue constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. See Gov't Code § 552.110(b). Therefore, none of the information at issue may be withheld under section 552.110(a) or section 552.110(b) of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). A private third party may invoke this exception. *Boeing*, 466 S.W.3d at 831. 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." *Id.* at 841. Chevron generally asserts section 552.104 for the information not ruled upon in the previous ruling. After review of the information at issue and consideration of the arguments, we find Chevron has failed to establish the release of the information at issue would give advantage to a competitor or bidder. Accordingly, the governor's office may not withhold any of the submitted information under section 552.104 of the Government Code. As no further exceptions to disclosure have been raised, the governor's office must release the submitted information.

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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/akg

Ref: ID# 601280

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Andrew J. Zalewski
Chevron
6001 Bollinger Canyon Road
San Ramon, California 94583
(w/o enclosures)