



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 18, 2003

Ms. Zandra L. Narvaez
Legal Services Division
City Public Service of San Antonio
P.O. Box 1771
San Antonio, Texas 78296-1771

OR2003-6561

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187855.

City Public Service of the City of San Antonio ("CPS") received a request for eight categories of information pertaining to the awarded bid for construction of the Leon Creek Power Project in San Antonio. You state that CPS "is in the process of providing the requestor with responsive information that has been approved for disclosure by the third party" You state that the remaining responsive information, consisting of portions of Volume II, Section 9 of the Executed Contract, including the Contract Guaranteed Auxiliary Load, has been withheld, as release of this information may implicate the proprietary rights of TIC – The Industrial Company ("TIC").¹ Consequently, you notified this third party of

¹We note that the seventh item of information requested is the "Details for Options Exercised." TIC states that the requested "Details of Options Exercised are not contained in the contract documents. Therefore, TIC understands we would not be required to provide this information to [the requestor]." As CPS has not provided this information to our office for review, this ruling does not address whether any such information is excepted from disclosure under chapter 552 of the Government Code.

the request for information under section 552.305 of the Government Code.² Although you do not take a position with regard to the disclosure of the requested information, TIC has submitted briefing to this office in which it contends that portions of Volume II, Section 9 of the Executed Contract are excepted from disclosure under section 552.110(b) of the Government Code. We have considered TIC's claimed exception and reviewed the submitted information.

First, we note that, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why any stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that CPS received the request on July 2, 2003. CPS did not submit the requested information to this office until July 25, 2003. Therefore, CPS failed to comply with section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). The application of section 552.110 constitutes a compelling reason to overcome the presumption of openness. Therefore, we will address TIC's arguments under this exception.

Section 552.110(b) protects the property interests of private persons by excepting from disclosure 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v.*

²See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

Morton, 498 F.2d 765 (D.C. Cir. 1974). Upon review of the arguments submitted by TIC, we find that TIC has established that release of the information that it specifically seeks to withhold would cause it substantial competitive injury. Therefore, CPS must withhold this information, which we have marked, pursuant to section 552.110(b). The remainder of the submitted information must be released to the requestor.

In summary, CPS must withhold from disclosure the portions of Volume II, Section 9 of the Executed Contract that we have marked under section 552.110(b) of the Government Code. CPS must release the remaining information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 187855

Enc: Submitted documents

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