



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 28, 2008

Mr. Rodrigo Figueroa  
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OR2008-04114

Dear Mr. Figueroa:

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# 305869.

The City Public Service Board for the City of San Antonio d/b/a/ CPS Energy (the "CPS"), which you represent, received a request for a copy of all Request for Proposals and Specifications for wind power. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. You also state that releasing the submitted information may implicate the interests of third parties. Accordingly, you have notified twelve third parties of the request and of each company's opportunity to submit arguments to this office.<sup>1</sup> See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have received comments from Invenergy Wind, LLC ("Invenergy"), Clipper Windpower, Inc. ("Clipper"), and Orion Energy, LLC ("Orion"). We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>You notified Orion Energy, LLC, Tierra Energy, Invenergy Wind, LLC, Gamesa Energy USA, Inc., DKR Wind Energy, LLC, PPM Energy, AES SeaWest, Inc., Clipper Windpower, Inc., FPL Energy, LLC, Flying Cloud, Inc., Renewable Energy Systems Americas, Inc., and Superior Renewable Energy, LLC.

CPS asserts that the submitted information is subject to section 552.104 of the Government Code.<sup>2</sup> Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

In the present case, you inform us that contracts have been awarded. You state, however, that CPS "may be in competition with other utilities for electric customers in the future." Based on our review, we conclude that you have not demonstrated that public release of the submitted information would cause specific harm to CPS's interests in a specific competitive bidding situation. *See* Open Records Decision No. 509 at 5 (1988) (because costs, 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 to withhold information under predecessor statute). Therefore, CPS may not withhold the submitted information under section 552.104 of the Government Code.

CPS, Invenergy, and Orion all claim that the submitted information is subject to section 552.133 of the Government Code. Section 552.133 excepts from disclosure a public power utility's information related to a competitive matter. Section 552.133(b) provides:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a

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<sup>2</sup>Although Invenergy and Orion also assert that the submitted information is excepted from disclosure pursuant to section 552.104, we note that section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). Thus, we do not address Invenergy's and Orion's arguments under this exception.

multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b). Section 552.133(a)(3) defines a "competitive matter" as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. *See id.* § 552.133(a)(3). However, section 552.133(a)(3) also provides thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

CPS is a public power utility for purposes of section 552.133. You inform us, and provide documentation showing, that the CPS Energy Board of Trustees (the "board"), as governing body of CPS, passed a resolution by vote pursuant to section 552.133 in which the board defined the information considered to be within the scope of the term "competitive matter." You assert that the submitted information comes within the scope of specified provisions within the resolution. Having reviewed those provisions of the resolution and considered the submitted arguments, we find that the resolution does not encompass the entirety of the submitted responses to the request for proposals, including the names of the responding companies. Rather, the resolution only encompasses the pricing and location of the wind energy generating facilities in the responses to the request for proposals. We find that pricing and location is not clearly among the types of information that section 552.133(a)(3) expressly excludes from the definition of a competitive matter. Moreover, based on the information that you have provided, we cannot conclude that CPS has failed to act in good faith. *See id.* § 552.133(c). We therefore conclude that CPS must withhold the pricing information for each company that submitted a proposal and the location of the wind energy generating facilities of those companies that CPS did not publicly announce under section 552.133.<sup>3</sup> We find, however, that you have not sufficiently demonstrated that the remaining information is reasonably related to a competitive matter, as defined by the resolution. We therefore conclude that the board may not withhold any of the remaining information under section 552.133.

Next, we note that 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure.

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<sup>3</sup>As our ruling is dispositive, we need not address Inverngy's, Clipper's, and Orion's arguments against disclosure for the pricing and location of each company's wind energy generating facilities.

*See id.* § 552.305(d)(2)(B). As of the date of this decision, only Invenergy, Clipper, and Orion have submitted to this office any reasons explaining why their information should not be released. Therefore, none of the remaining interested third parties have provided us with any basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g., id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3. Accordingly, we conclude that CPS may not withhold any portion of the submitted information based on the proprietary interests of the remaining nine notified third parties.

Invenergy, Clipper, and Orion claim that portions of their information are excepted from disclosure under section 552.110 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others 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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 also* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552. 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. Open Records Decision No. 402 (1983).

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.* § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Having considered Invenergy’s, Clipper’s, and Orion’s arguments, we conclude that each company has established a *prima facie* case that a portion of its submitted information, which we have marked, constitutes a trade secret. Therefore, CPS must withhold the information we have marked pursuant to section 552.110(a) of the Government Code.<sup>4</sup> We note that both Invenergy and Orion have made some of the information they seek to withhold publicly available on their websites. Because Invenergy and Orion have published this information,

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<sup>4</sup>As our ruling is dispositive, we need not address Clipper’s remaining argument against disclosure of this information.

they have failed to demonstrate that this information is trade secrets. Further, Invenergy, Clipper, and Orion have each failed to demonstrate that its remaining information at issue constitutes trade secrets; thus, the remaining information at issue may not be withheld under section 552.110(a) of the Government Code.

Orion and Clipper also claim section 552.110(b) for portions of the remaining information. Upon review, we find that Orion has established that release of some of its remaining information at issue would cause it substantial competitive injury; therefore, CPS must withhold this information, which we have marked, under section 552.110(b) of the Government Code. As noted above, Orion has published a portion of the information it seeks to withhold on its website. Thus, Orion has failed to demonstrate that release of this information would cause it substantial competitive injury. Further, both Orion and Clipper have made only conclusory allegations that the release of their remaining information at issue would result in substantial damage to each company's competitive position. Thus, neither Orion nor Clipper has demonstrated that substantial competitive injury would result from the release of any their remaining information at issue. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, CPS may not withhold the remaining information at issue under section 552.110(b) of the Government Code.

We note that a portion of the remaining information is subject to section 552.136 of the Government Code.<sup>5</sup> Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Upon review, we find that CPS must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

Finally, we also note that a portion of the submitted information is 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 protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies

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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of materials protected by copyright, 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. *See* Open Records Decision No. 550 (1990).

In summary, CPS must withhold: (1) the information relating to the pricing of each company that submitted a proposal and the location of the wind energy generating facilities of those companies that CPS did not publicly announce under section 552.133, (2) the information we have marked under section 552.110, and (3) the bank account and routing numbers we have marked under section 552.136. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

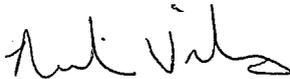
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Melanie J. Villars  
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Open Records Division

MJV/jh

Ref: ID# 305869

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