



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 2, 2009

Ms. Zandra L. Pulis
Senior Counsel
Legal Services Division
CPS Energy
P.O. Box 1771
San Antonio, Texas 78296

OR2009-04317

Dear Ms. Pulis:

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# 338920.

The City Public Service Board of the City of San Antonio, d/b/a CPS Energy ("CPS") received a request for a copy of the bid response submitted by the vendor awarded the contract for a particular RFP. Although you take no position on the requested information, you state it may contain proprietary information subject to exception under the Act. Accordingly, you state and provide documentation showing CPS notified Accurate Background, Inc. ("Accurate") of the request for information and of its right to submit arguments to this office as to why the requested information should 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 Accurate, considered the submitted arguments, and reviewed the submitted information.

Initially, we note and you acknowledge CPS failed to timely submit the requested information as required by section 552.301(e)(1)(D) of the Government Code. *See* Gov't Code § 552.301(e)(1)(D). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the information is public and must be released unless a governmental body demonstrates a compelling reason 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). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third-party interests are at stake, we will consider whether the submitted information must be withheld.

Accurate asserts some of its information is excepted under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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 . . . [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.

Restatements of Torts § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776.

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;
- (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 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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. 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). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990).

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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Accurate claims section 552.110(a) for portions of its submitted information. Having considered Accurate's argument, we conclude it has established a *prima facie* case that a portion of its customer list and the information we have marked constitute its trade secret. Therefore, CPS must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note Accurate has published a portion of the information it seeks to withhold on its website. Thus, Accurate has failed to demonstrate the information it has published on its website is a trade secret. Further, Accurate has failed to demonstrate any portion of its remaining information at issue constitutes a trade secret. Thus, the remaining information at issue may not be withheld under section 552.110(a) of the Government Code.

Accurate also argues section 552.110(b) for portions of its remaining information. As noted above, Accurate has published a portion of the information it seeks to withhold on its website. Thus, Accurate has failed to demonstrate that release of this information would cause it substantial competitive injury. Further, we find Accurate has failed to provide specific factual evidence demonstrating that release of any of its remaining information at issue would result in substantial competitive harm to the company. *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). We also note Accurate was the winning bidder, and the pricing information of a winning bidder is not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, we determine no portion of the remaining information is excepted from disclosure under section 552.110(b).

In summary, CPS must withhold the information we have marked under section 552.110(a) of the Government Code. 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/eeg

Ref: ID# 338920

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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