



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2012

Mr. Kipling D. Giles
Senior Counsel
CPS Energy
P.O. Box 1771
San Antonio, Texas 78296

OR2012-07607

Dear Mr. Giles:

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# 454543.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received two requests from different requestors for the bid tabulation pertaining to RFQ 7000107741- URD Distribution Streetlight. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Chain Electric Company ("Chain"); L.E. Myers Company ("Myers"); and Pike Electric, Inc. ("Pike") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.¹ 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 an attorney representing Myers. We have considered the submitted arguments and reviewed the submitted information.

¹You inform us the remaining third parties, Zachary Underground & Utility Services, Inc., Milcon Construction, LLC, and Willbros T&D Services, do not object to release of their information.

Initially, we note 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. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Chain or Pike explaining why their information should not be released. Therefore, we have no basis to conclude Chain or Pike have 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, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, CPS may not withhold any of the information at issue on the basis of any proprietary interest Chain or Pike may have in it.

Myers contends its information does not constitute public information for purposes of section 552.002 of the Government Code. The Act is applicable to "public information." *See* Gov't Code § 552.021. "Public information" is defined as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all information in the physical possession of a governmental body is public information that is encompassed by the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Myers generally asserts its information is not public information. However, upon review, we find CPS maintains the submitted information in connection with the transaction of official business by or for CPS. Accordingly, we conclude the submitted information is subject to the Act. Consequently, CPS may only withhold this information from the requestors if it is excepted from disclosure pursuant to a provision of the Act.

Myers raises section 552.104 of the Government Code as an exception to disclosure for its pricing information. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, 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). As CPS does not seek to

withhold any information pursuant to section 552.104, no portion of Myers' information may be withheld on this basis.

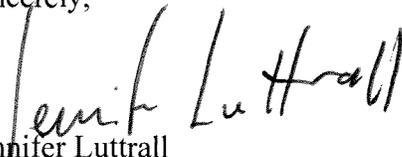
Next, Myers claims its pricing information is excepted under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person 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* ORD 661 at 5-6 (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).

Upon review of Myers’ arguments under section 552.110(b), we find Myers has established its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, CPS must withhold the information we have marked under section 552.110(b) of the Government Code.² 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, toll free, at (888) 672-6787.

Sincerely,


Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/bhf

²As our ruling on this information is dispositive, we need not address Myers’ remaining argument against its disclosure.

Ref: ID# 454543

Enc. Submitted documents

c: Requestor
(w/o enclosures)