



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 26, 2012

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

OR2012-11649

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# 460194.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received four requests for bid tabulation and contract award information pertaining to RFQ No. 10348011 - Braunig Dam Security Fence Project. Although you take no position with respect to the public availability of the requested information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified Amco Steel Fabrication, LLC ("Amco"), Border Construction Services ("Border"), Construction Rent-A-Fence, Inc. ("Rent-A-Fence"), JAMCO Ventures, LLC ("JAMCO"), MJC & Associates ("MJC"), US Fence and Gate, Inc. ("USFG"), and Ed A. Wilson, Inc. ("Wilson") of the requests and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). You state Rent-A-Fence and USFG do not object to release of their respective information. We have received comments from Amco and JAMCO. Thus, we have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to

that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties. Thus, Border, MJC, and Wilson have failed to demonstrate that they have protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)–(b); Open Records Decision Nos. 661 at 5–6 (1999), 552 at 5 (1990), 542 at 3. Accordingly, CPS may not withhold the submitted information on the basis of any proprietary interests Border, MJC, or Wilson may have in the submitted information.

Next, we note a portion of the information Amco seeks to withhold was not submitted by CPS for our review. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by CPS, this ruling does not address Amco's arguments against disclosure of this information.

JAMCO states it "objects to any release of the bid tabulation prior to award and execution of the awarded contract." However, JAMCO has not raised any exceptions to disclosure under the Act or provided any arguments against disclosure. Thus, we are unable to conclude JAMCO has a protected proprietary interest in any portion of the submitted information. *See id.* § 552.110; ORDs 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), 552 at 5 (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, CPS may not withhold any portion of the submitted information based upon the proprietary interest of JAMCO.

Amco asserts its bid tabulation amount is 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. *See* Gov't Code § 552.110(a)-(b). 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 2. 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.<sup>1</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). 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* ORD 552 at 5. 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.*; *see also* ORD 661 at 5-6.

Upon review, we find Amco has failed to demonstrate how the information at issue meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We note pricing information pertaining to a particular contract is generally

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<sup>1</sup>The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, CPS may not withhold any of Amco’s information pursuant to section 552.110(a) of the Government Code.

Amco also claims the information at issue constitutes commercial or financial information that, if released, would cause the company substantial competitive harm. Upon review, we find Amco has made only conclusory allegations that the release the information at issue would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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). Further, we note the pricing information of a winning bidder, such as Amco, is generally not excepted under section 552.110(b). This office considers prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Consequently, CPS may not withhold any of the information at issue under section 552.110(b) of the Government Code. As no other exceptions to disclosure have been raised, the submitted 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](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,



Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/som

Ref: ID# 460194

Enc. Submitted documents

c: 4 Requestors  
(w/o enclosures)

U.S. Fence  
6612 I-10 West  
Orange, Texas 77632  
(w/o enclosures)

AMCO Steel Fabrication  
603 Perrin, Building 338  
San Antonio, Texas 78226  
(w/o enclosures)

MJC & Associates  
10906 Laureate Drive  
San Antonio, Texas 78249  
(w/o enclosures)

Jamco Ventures  
1502 South Flores  
San Antonio, Texas 78204  
(w/o enclosures)

Ed A. Wilson, Inc.  
2526 West Pafford Street  
Fort Worth, Texas 76110  
(w/o enclosures)

Border Construction Services  
3208 Clair Cove  
Bulverde, Texas 78163  
(w/o enclosures)