



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 16, 2013

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

OR2013-06127

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# 484585.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received a request for the bid tabulations for all bid offers from Collective RQ No. 7000112379, Electrical Transmission Right of Way Maintenance Contract. Although you take no position as to whether the submitted information is excepted under the Act, you inform us release of this information may implicate the proprietary interests of Asplundh Tree Expert Co.; Border Construction Services; Legacy Homestead Development; McCoy Tree Surgery Co.; National Tree Expert Co.; Paloma Blanca Enterprises, Inc. ("Paloma"); Trees, Inc.; and Wolf Tree Experts, Inc. Accordingly, you have notified these third parties 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. *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 Act in certain circumstances). We have received comments from Paloma. We have considered the submitted arguments and reviewed the submitted information.

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, only Paloma has submitted comments to this office explaining why its submitted information should not be released. Therefore,

we have no basis to conclude the remaining third parties 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 portion of the information pertaining to the remaining third parties on the basis of any proprietary interest those companies may have in the information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses the common-law. 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* 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. Having considered its arguments, we find Paloma has failed to demonstrate any of the information it seeks to withhold meets the definition of a trade secret, nor has Paloma demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the submitted information may be withheld under section 552.101 in conjunction with the common-law as a trade secret.

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<sup>1</sup>The following are the six factors that the Restatement gives 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 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).

Paloma raises section 552.104 of the Government Code as an exception to disclosure for its 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 Paloma's information may be withheld on this basis.

Section 552.110 of the Government Code 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." Gov't Code § 552.110(a). As stated above, the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. See Open Records Decision No. 402 (1983).

Upon review, we find Paloma failed to establish a *prima facie* case that any of its information at issue is a trade secret protected by section 552.110(a). See *id.* We further note pricing information pertaining to a particular proposal or contract is generally 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; ORD 319 at 3, 306 at 3. Therefore, CPS may not withhold any of Paloma's information under section 552.110(a) of the Government Code.

Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. See ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Paloma has established release of its pricing information would cause the company substantial competitive harm. Therefore, CPS must withhold the information

we have marked under section 552.110(b) of the Government Code. However, we find Paloma has made only conclusory allegations release of the remaining information at issue would result in substantial harm to the company's competitive position. Thus, Paloma has not demonstrated that substantial competitive harm would result from the release of any of the remaining information at issue and none of it may be withheld under section 552.110(b) of the Government Code. *See generally* Open Records Decision Nos. 661, 509 at 5 (1988), 319 at 3. As no other exceptions to disclosure have been raised for the remaining information, it 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# 484585

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Jesse R. Castillo  
Counsel for Paloma Blanca Enterprises, Inc.  
Castillo Snyder, P.C.  
300 Convent Street, Suite 1020  
San Antonio, Texas 78205-3789  
(w/o enclosures)

Mr. Sam Batty  
McCoy Tree Surgery Co.  
3201 Broce Drive  
Norman, Oklahoma 73072  
(w/o enclosures)

Mr. Tom Wolf  
Wolf Tree Experts, Inc.  
3310 Greenway Drive  
Knoxville, Tennessee 37918  
(w/o enclosures)

Mr. William Mills  
Trees Inc.  
650 North Sam Houston Parkway E, Suite 209  
Houston, Texas 77060  
(w/o enclosures)

Mr. Allen LeBlanc  
Asplundh Tree Expert Co.  
621 Diamond Cuty Road  
Corpus Christi, Texas 78409  
(w/o enclosures)

Mr. Stanely Hiegener  
Legacy Homestead Dev  
P.O. Box 196  
Boerne, Texas 78006  
(w/o enclosures)

Mr. Jarrett Finger  
Border Construction Services  
32808 Claire Cove  
Bulverde, Texas 78163  
(w/o enclosures)

Mr. Brian Dalland  
National Tree Expert Company  
311 Industrial Drive  
Burnet, Texas 78611  
(w/o enclosures)