



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

October 2, 2017

Mr. Adam Aldrete  
Legal Counsel  
City Public Service Energy  
P.O. Box 1771  
San Antonio, Texas 78296

OR2017-22443

Dear Mr. Aldrete:

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# 678178.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS Energy") received a request for information pertaining to the request for proposals for CPS Energy's Demand Response Management System ("DRMS"). You claim the submitted information is excepted from disclosure under sections 552.101 and 552.139 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Alstom; Auto-Grid; Itron Distributed Energy Management, Inc. f/k/a Comverge, Inc. ("Itron"); Landis + Gyr; Lockheed Martin Corporation ("LMC"); OATI; and Omnetric. Accordingly, you state you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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 Auto-Grid, Itron, LMC, OATI, and Omnetric.<sup>1</sup> We have reviewed the submitted information and considered the submitted arguments.

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<sup>1</sup>Although Auto-Grid raises sections 552.101, 552.104, 552.110, 552.133, and 552.139 of the Government Code, it provides no arguments explaining the applicability of these exceptions to the information at issue. Therefore, we assume Auto-Grid no longer asserts these exceptions. *See* Gov't Code §§ 552.305.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the remaining third parties have submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of these third parties. *See* 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, 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 Energy may not withhold the submitted information on the basis of any proprietary interests the remaining notified third parties may have in it.

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). You state the information at issue contains “technical details of CPS Energy’s [DRMS] architecture” and relates to the security of communications and data within the DRMS. You assert release of this information would have “devastating effects on CPS Energy’s [DRMS.]” Based on these representations and our review, we find the information you have marked relates to computer network security, and the design, operation, or defense of CPS Energy’s computer network. Accordingly, CPS Energy must withhold the information you have marked under section 552.139 of the Government Code.<sup>2</sup>

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Itron, LMC, OATI, and Omnetric state they have competitors. In addition, Itron, LMC, OATI, and Omnetric state release of the information at issue would give an advantage to their respective competitors. After review of the information at issue and consideration of the arguments, we find these third parties have established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude CPS Energy may withhold the information we have indicated under section 552.104(a) of the Government Code.<sup>3</sup>

We note some of the remaining information appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, 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.

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

In summary, CPS Energy must withhold the information you have marked under section 552.139 of the Government Code and may withhold the information we have indicated under section 552.104(a) of the Government Code. CPS Energy must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/sb

Ref: ID# 678178

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

7 Third Parties  
(w/o enclosures)

REF: 678178

EDWARD HAMMOND  
3103 POWELL CIR  
AUSTIN TX 78704