



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 22, 2019

Mr. Adam Aldrete  
Legal Counsel  
CPS Energy  
P.O. Box 1771  
San Antonio, Texas 78296-1771

OR2019-01871

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# 746907.

The City Public Service Board of San Antonio d/b/a CPS Energy ("CPS Energy") received a request for information pertaining to two specified requests for proposals, including the contracts awarded to two specified companies.<sup>1</sup> You state CPS Energy has released some information to the requestor. Although you take no position as to whether the submitted information is excepted from disclosure under the Act, you state release of this information may implicate the proprietary interests of CLEAResult Consulting, Inc. ("CLEAResult") and Franklin Energy Services, LLC ("Franklin"). Accordingly, you state, and provide documentation showing, you notified the third parties of the requests 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 the Act in certain circumstances). We have received comments from CLEAResult and Franklin. We have reviewed the submitted information and considered the submitted arguments.

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<sup>1</sup>We note CPS Energy sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Initially, we note portions of the information at issue may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-22310 (2016). CLEAResult filed a lawsuit against the Office of the Attorney General challenging Open Records Letter No. 2016-22310 over the release of some of its information at issue. A settlement agreement was reached among the parties regarding the disposition of certain documents and was adopted by the court in an Agreed Final Judgment in *Clearesult Consulting, Inc. v. Paxton*, Cause No. D-1-GN-16-005480 (53rd Dist. Ct., Travis County, Tex. July 6, 2017). Accordingly, with respect to CLEAResult's information that is identical to the information at issue in Open Records Letter No. 2016-22310, CPS Energy must continue to rely on the Agreed Final Judgment to release or withhold CLEAResult's information at issue. With respect to Franklin's information at issue, we concluded in Open Records Letter No. 2016-22310 that CPS Energy may withhold the information Franklin indicated under section 552.104(a) of the Government Code. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2016-22310 was based have changed with respect to Franklin's information. Accordingly, to the extent Franklin's information at issue is identical to the information previously requested and ruled upon by this office, CPS Energy must continue to rely on Open Records Letter No. 2016-22310 as a previous determination and withhold Franklin's identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent CLEAResult's information is not subject to the Agreed Final Judgment and Franklin's information is not subject to the previous ruling, we will consider the arguments against disclosure of the information at issue.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 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. CLEAResult and Franklin state they have competitors. In addition, CLEAResult and Franklin state the release of the information at issue would provide an unfair advantage to their competitors. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to

*Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 842. After review of the information at issue and consideration of the arguments, we find CLEAResult and Franklin have established the release of the information at issue would give advantage to a competitor or bidder. Accordingly, CPS Energy may withhold the information CLEAResult indicated, which we have marked, and the information Franklin marked under section 552.104(a) of the Government Code.<sup>2</sup>

In summary, to the extent CLEAResult's information is identical to the information at issue in Open Records Letter No. 2016-22310, CPS Energy must continue to rely on the Agreed Final Judgment to release or withhold this information. To the extent Franklin's information at issue is identical to the information previously requested and ruled upon by this office, CPS Energy must continue to rely on Open Records Letter No. 2016-22310 as a previous determination and withhold Franklin's identical information in accordance with that ruling. To the extent the submitted information is not identical to the information at issue in Open Records Letter No. 2016-22310, CPS Energy may withhold the information CLEAResult indicated, which we have marked, and the information Franklin marked under section 552.104(a) of the Government Code. CPS Energy must release the remaining information.

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,



Blake Brennan  
Attorney  
Open Records Division

BB/eb

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

Ref: ID# 746907

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)