



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 28, 2019

Mr. Adam Aldrete
Legal Counsel
CPS Energy
145 Navarro
San Antonio, Texas 78205

OR2019-02507

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# 747892.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS Energy") received a request for six categories of information pertaining to purchasing records during a specified time period. Although CPS Energy takes no position as to whether the submitted information is excepted under the Act, CPS Energy states release of the submitted information may implicate the proprietary interests of numerous third parties. Accordingly, CPS Energy states, and provides documentation showing, it notified each third party of the request for information and of its 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 Anixter Inc. ("Anixter"); Black & Veatch ("Black"); FMO Inc. ("FMO"); Fossil Energy Research Corporation ("FERCo"); GE Power ("GE"); HJD Capital Electric, Inc. ("Capital"); Johnson March Systems, Inc. ("Johnson"); Mitsubishi Hitachi Power Systems Americas, Inc. ("MHPSA"); Netsync Network Solutions ("Netsync"); North American Western Data Systems, Inc. ("WDS"); Planview, Inc. ("Planview"); and TransCanada Turbines Ltd. ("TCT"). We have reviewed the submitted information and the submitted arguments.

Initially, we note Capital, FERCo, and TCT argue against release of information that was not submitted by CPS Energy. This ruling does not address information that was not submitted by CPS Energy and is limited to the information CPS Energy has submitted as responsive for our review. *See Gov't Code § 552.301(e)(1)(D)* (governmental body requesting decision from attorney general must submit copy of specific information requested).

Next, Johnson and MHPSA argue their information at issue may not be released because they provided the information to CPS Energy with the expectation the information would remain confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why the submitted information should not be released. Although we received comments from FERCo and Johnson, FERCo and Johnson did not raise any exceptions to disclosure under the Act or assert they have a protected proprietary interest in their information at issue. Therefore, we have no basis to conclude FERCo, Johnson, or the remaining third parties have a protected proprietary interest in the submitted information, and CPS Energy may not withhold any portion of it on that basis. *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.

Anixter, Black, Capital, Planview, MHPSA, and WDS claim some of their information at issue is excepted from disclosure under section 552.104 of the Government Code. 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. Anixter, Black, Capital, Planview, MHPSA, and WDS state they have competitors in their respective markets. In addition, each of these third parties state release of the information at issue would give advantage to a competitor or bidder. We note these third parties were the winning bidders with respect to the information at issue, and these third parties seek to withhold pricing information in the information at issue. 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 831, at 831, 839. After review of the information and consideration of the arguments, we find Anixter, Black, Capital, Planview, MHPSA, and WDS have established release of the information at issue would give 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.¹ However, we find Capital, and Planview have failed to demonstrate release of their remaining information at issue would give advantage to a competitor or bidder. Accordingly, CPS Energy may not withhold any of the remaining information at issue under section 552.104(a).

Capital, FMO, GE, Netsync, Planview, and TCT each assert portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code 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, which holds a trade secret to be:

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

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.² RESTATEMENT OF TORTS § 757 cmt. b. 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 section 552.110(a) is applicable unless it has been shown 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). We note pricing information pertaining to a particular 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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,

²The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.

Capital, GE, Netsync, and Planview assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, however, we find Capital, GE, Netsync, and Planview have failed to demonstrate the information at issue meets the definition of a trade secret. Further, we find Capital, GE, Netsync, and Planview have not demonstrated the necessary factors to establish a trade secret claim for this information. *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. Therefore, CPS Energy may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Capital, FMO, GE, Netsync, Planview, and TCT argue section 552.110(b) of the Government Code applies to portions of their information. However, we find Capital, FMO, GE, Netsync, Planview, and TCT have failed to demonstrate the release of any of their remaining information would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, 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). Furthermore, we note Capital, FMO, GE, Netsync, Planview, and TCT were the winning bidders with respect to the information at issue. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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 a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, CPS Energy may not withhold any portion of the remaining information under section 552.110(b) of the Government Code.

GE raises sections 552(b)(3), 552(b)(4), and 552(b)(7) of title 5 of the United States Code, the Freedom of Information Act ("FOIA"). We note FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue is held by a Texas agency, which is subject to the laws of the State of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also Davidson v. Georgia*, 622

F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Open Records Decision No. 561 at 7 n.3 (1990) (noting federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). This office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.*, Attorney General Opinion MW-95; ORD 124 (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under Act when held by Texas governmental body). Thus, CPS Energy may not withhold any portion of GE's information on the basis of FOIA.

GE raises the federal Trade Secrets Act, section 1905 of title 18 of the United States Code, in conjunction with section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. The Trade Secrets Act provides, in pertinent part:

[w]hoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (2008). By its terms, this statute pertains only to employees and agents of the federal government. State employees who are assigned to federal government agencies in some circumstances may be deemed federal employees for certain purposes. 5 U.S.C. § 3374 (2001). However, in this case there is no indication of such an assignment pertinent to the submitted information. The federal courts have held that no basis exists to justify transforming officers and employees of state agencies into federal officers and employees for purposes of the Trade Secrets Act. *St. Michael's Convalescent Hosp. v. State of Cal.*, 643

F.2d 1369 (9th Cir. 1981). We conclude that the Trade Secrets Act does not prohibit CPS Energy from disclosing the information at issue. Accordingly, CPS Energy may not withhold any portion of GE's information under section 552.101 of the Government Code in conjunction with the Trade Secrets Act.

GE raises the Privacy Act of 1974, section 552a of title 5 of the United States Code ("Federal Privacy Act"), pursuant to guidance the authority received from the U.S. Department of Housing and Urban Development ("HUD") in Notices PIH 2010-15 and PIH 2015-06. Section 552a(b) of the Federal Privacy Act provides, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]" 5 U.S.C. § 552a(b). However, our office and the courts have stated the Federal Privacy Act applies only to federal agencies, and not to state or local agencies. *See St. Michael's Convalescent Hosp.*, 643 F.2d at 1373 (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); Attorney General Opinion MW-95 at 2. The courts have also opined that neither the receipt of federal funds nor limited oversight by a federal entity convert state or local governmental bodies into agencies covered by the Privacy Act. *See St. Michael's Convalescent Hosp.*, 643 F.2d at 1373-74; *see also United States v. Orleans*, 425 U.S. 807, 816 (1976) (federal regulations and contract provisions do not convert acts of local and state governmental bodies into federal governmental acts.). Upon review of GE's arguments, we find GE has failed to demonstrate the Federal Privacy Act applies to the information at issue, and CPS Energy may not withhold any of this information under section 552.101 of the Government Code on that basis.

GE argues some of its information meets the definition of a trade secret found in section 134A.002(6) of the Texas Uniform Trade Secrets Act (the "TUTSA"), chapter 134A of the Civil Practice and Remedies Code, which was added by the Eighty-third Texas Legislature. Section 552.101 of the Government Code also encompasses information protected by section 134A.002, which provides, in relevant part, the following:

(6) "Trade secret" means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

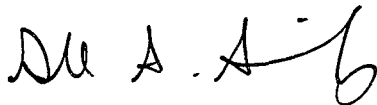
Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of the TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)'s definition of trade secret expressly applies to the TUTSA only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6)); *see also id.* 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act); Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, CPS Energy may not withhold any portion of GE's information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of the TUTSA.

In summary, CPS Energy may withhold the information we have indicated 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, 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,



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Assistant Attorney General
Open Records Division

GAA/eb

Ref: ID# 747892

Enc. Submitted documents

c: Requestor
(w/o enclosures)

12 Third Parties
(w/o enclosures)