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ATTORNEY GENERAL OF TEXAS

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Ms. Stacey Cormican  
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OR2019-36495

Dear Ms. Cormican:

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# 803444.

The City Public Service Board of the City of San Antonio ("CPS Energy") received a request for six categories of information pertaining to CPS Energy's purchases during a specified time period. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of numerous interested third parties. Accordingly, you state, and provide documentation showing, you notified these interested 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 the Act in certain circumstances).* We have received comments from Alliance for Cooperative Energy Services Power Marketing L.L.C. (ACES); Acqueon Technologies, Inc. ("Acqueon"); Alterra Central, Inc., f/k/a North American Western Data Systems, Inc. ("Alterra"); Arvos Ljungstrom, L.L.C. ("Arvos"); Black & Veatch Corporation ("Black"); Capital Precast, Inc. ("Capital"); Chain Electric Company ("Chain"); Fossil Energy Research Corporation ("FERCo"); Holt Companies ("Holt"); High Temperature Technolges, Inc. ("HTT"); KUBRA Data Transfer Ltd. ("KUBRA"); Metso; Navigant Consulting, Inc. n/k/a Guidehouse Inc. ("Navigant"); Siemens Industry, Inc. ("Siemens"); Structural Engineering Associates, Inc. ("SEA"); Southern Tire Mart, LLC ("Southern");

and Versa Integrity Group (“Versa”). We have considered the submitted arguments and reviewed the submitted information.

Initially, HTT argues its information is confidential pursuant to an agreement with the CPS Energy. We note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, 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 section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, CPS Energy must release it, notwithstanding any expectations or agreement specifying otherwise.

Next, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-29995 (2019). In Open Records Letter No. 2019-29995, we concluded, in part, CPS Energy (1) may withhold a portion of Chain’s information under section 552.104 of the Government Code and (2) must release the remaining information pertaining to Chain. We note Chain seeks to withhold a portion of its information under sections 552.104 and 552.110 of the Government Code. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See Gov’t Code § 552.007*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, CPS Energy may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although Chain raises section 552.104 of the Government Code for its information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, CPS Energy may not now withhold any of Chain’s previously released information under section 552.104 of the Government Code. However, because section 552.110 makes information confidential by law, we will address Chain’s arguments under this section for the information that was previously released. Additionally, with regard to the submitted information that was not previously released, there is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Additionally, with regard to the submitted information that was not previously released, there is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude CPS Energy must rely on Open Records Letter

No. 2019-29995 as a previous determination and withhold the identical information that was not previously released in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 information is or is not excepted from disclosure). With respect to the information that was not at issue in the previous ruling, we will consider Chain's argument under section 552.104 of the Government Code.

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 ruling, we have only received comments from ACES, Acqueon, Alterra, Arvos, Black, Capital, Chain, FERCo, Holt, HTT, KUBRA, Metso, Navigant, Siemens, SEA, Southern, and Versa. Thus, we have no basis to conclude any of the remaining interested third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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 Energy may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining interested third parties may have in the information.

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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, 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. ACES, Alterra, Arvos, Black, Capital, Chain, Holt, KUBRA, Metso, Navigant, Siemens, Southern, and Versa state they have competitors. In addition, ACES, Alterra, Arvos, Black, Capital, Chain, Holt, KUBRA, Metso, Navigant, Siemens, Southern, and Versa state the release of the information at issue would provide a competitive advantage to their competitors. ACES, Alterra, Arvos, Black, Capital, Chain, Holt, KUBRA, Metso, Navigant, Siemens, Southern, and Versa further seek to withhold their pricing information. 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 (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, 842. After review of the information at issue and consideration of the arguments, we find ACES, Alterra, Arvos, Black, Capital, Chain, Holt, KUBRA, Metso, Navigant, Siemens, Southern, and Versa have established the release of some of the information at issue would give advantage to a competitor or bidder. Thus, to the extent Chain's information at issue was not previously ordered released in Open Records Letter No. 2019-29995, CPS Energy may withhold the portions of Chain's information we indicated under section 552.104(a) of the Government Code. Further, we conclude CPS Energy may withhold the additional information we have indicated under section 552.104(a) of the Government Code.<sup>1</sup> However, we find Arvos, Capital, Chain, Holt, and Versa have failed to establish the release of the remaining information would give advantage to a competitor or bidder. Thus, we conclude CPS Energy may not withhold any of the remaining information at issue under section 552.104(a) of the Government Code.

Acqueon, Arvos, Chain, FERCo, HTT, SEA, and Versa claim portions of their information are excepted under section 552.110 of the Government Code, which 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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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.

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

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>2</sup> 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. *See* 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 Record Decision Nos. 255, 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, 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 (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).

As mentioned above, Chain's information was subject to Open Records Letter No. 2019-29995. In the prior ruling, some of Chain's information was ruled to be released. Since the issuance of the previous ruling on October 23, 2019, Chain has not disputed this office's conclusion regarding the release of the information at issue. Accordingly, we find Chain has not taken any measures to protect its information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information,

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

the release of which would cause Chain substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Additionally, with respect to the remaining information, we conclude Chain has not shown any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.110(a); ORD 402 at 2-3. Furthermore, we find Chain has failed to demonstrate the release of any of the remaining information would result in substantial harm to its competitive position. *See* Gov't Code § 552.110(b). Thus, we conclude CPS Energy may not withhold any portion of Chain's remaining information under section 552.110 of the Government Code.

Further, Arvos, HTT, SEA, and Versa assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Arvos, HTT, SEA, and Versa have failed to establish a *prima facie* case that any portion of their information at issue meets the definition of a trade secret. We further find Arvos, HTT, SEA, and Versa have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of the information at issue may be withheld under section 552.110(a).

Acqueon, Arvos, Black, FERCo, HTT, SEA, and Versa argue some of their information consists of commercial or financial information, the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. We note Acqueon, Arvos, Black, FERCo, HTT, SEA, and Versa were winning bidders in this instance. 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* ORD 514; *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). In addition, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3); ORD 541 at 8. Accordingly, we find Acqueon, Arvos, Black, FERCo, HTT, SEA, and Versa have not established any of their information at issue constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Therefore, none of the information at issue may be withheld under section 552.110(b) of the Government Code.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude CPS Energy must rely on Open Records Letter No. 2019-29995 as a previous determination and withhold or release the identical information in accordance with that ruling. To the extent the information at issue was not subject to Open Records Letter No. 2019-29995, CPS Energy may withhold Chain's information we indicated and the additional information we indicated under section 552.104(a) of the Government Code. CPS Energy must release the remaining information.

Accordingly, 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Sean McCormick  
Attorney  
Open Records Division

SMC/mo

Ref: ID# 803444

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

17 Third Parties  
(w/o enclosures)