



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 3, 2009

Ms. Zandra L. Pulis
Senior Counsel
Legal Services Division
CPS Energy
P.O. Box 1771
San Antonio, Texas 78296

OR2009-04396

Dear Ms. Pulis:

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# 338925.

The City Public Service Board of the City of San Antonio, dba CPS Energy ("CPS") received requests from four requestors for the bid tabulation for a request for qualifications for fencing installation. You take no position on the public availability of the requested information. You believe, however, that the requested information may implicate the interests of third parties. You notified the interested parties of these requests for information and of the parties' right to submit arguments to this office as to why the information should not be released.¹ We received correspondence from Border Construction Services ("Border"), which objects to disclosure of its information, and from Dorazio Enterprises, which does not object to disclosure. We have considered Border's arguments and reviewed the submitted information.

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

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 decision, this office has received no correspondence from B&R Fencing, Construction Rent-A-Fence, De La Garza Fence & Supply Company, H&S Construction, Paloma Blanca Enterprises, San Antonio Fence Company, or Viking Fence. Therefore, because none of those parties has demonstrated that any of the submitted information is proprietary for the purposes of the Act, CPS may not withhold any of their information on that basis. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Border claims exceptions to disclosure under sections 552.101 and 552.110 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 is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In this instance, Border has not directed our attention to any law under which any of the submitted information is considered to be confidential for the purposes of section 552.101. We therefore conclude that CPS may not withhold any of the submitted information under section 552.101 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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(a)-(b).

The Texas Supreme Court has adopted the definition of a "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 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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the trade secrets aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* ORD 552 at 5. We cannot conclude that section 552.110(a) is applicable, however, 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).

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 information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having considered Border's arguments, we find that the company has not demonstrated that any of its information constitutes a trade secret under section 552.110(a). Likewise, Border has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of Border's information would cause the company substantial competitive harm. We therefore conclude that CPS may not withhold any of Border's information under section 552.110 of the Government Code. *See* Open Records Decision Nos. 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 was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

In summary, none of the interested parties has demonstrated that any of the submitted information is excepted from disclosure. Therefore, because CPS does not claim an exception, the submitted information must be released.

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

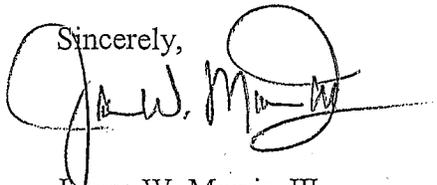
- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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, 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 at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large, looped initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 338925

Enc: Submitted documents

c: Requestors
(w/o enclosures)

Mr. Ricci Pozzi
Border Construction Services
15943 Bulverde Road
San Antonio, Texas 78247
(w/o enclosures)

Mr. Mark E. Dorazio
Dorazio Enterprises
143 North Tower Drive
San Antonio, Texas 78232
(w/o enclosures)

Mr. Gabriel Villarreal
B&R Fencing
11844 Bandera Road
Helotes, Texas 78023
(w/o enclosures)

Mr. Jose M. Garcia
De La Garza Fence & Supply Company
6475 Old Highway 90 West
San Antonio, Texas 78227
(w/o enclosures)

Mr. Mark Williams
Viking Fence
9602 Gray Boulevard
Austin, Texas 78758
(w/o enclosures)