



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 31, 2011

Mr. Kipling D. Giles
Senior Counsel
Legal Services Division
CPS Energy
P.O. Box 1771
San Antonio, Texas 78296

OR2011-06580A

Dear Mr. Giles:

This office issued Open Records Letter No. 2011-06580 (2011) on May 12, 2011. We have examined this ruling and determined that we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 12, 2011. Your request was assigned ID# 424959.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received a request for the proposals submitted in response to CPS's "2008 AMI RFP." You do not take a position as to whether the submitted information is excepted from disclosure under the Act. However, you state, and provide documentation showing, you notified the following interested third parties of CPS's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: Aclara Tech ("Aclara"); Elster Solutions, LLC ("Elster"); Itron, Inc. ("Itron"); Landis & Gyr; Motorola Solutions, Inc. ("Motorola"); Sensus Metering

Systems ("Sensus"); and Silver Springs Network ("Silver Springs").¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (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 correspondence from Aclara, Elster, Itron, Motorola, Sensus and Silver Springs, considered the submitted arguments, and reviewed the submitted information.

Initially, we note Aclara and Sensus seek to withhold from public disclosure certain information that CPS did not submit to this office.² This ruling does not address information that was not submitted by CPS and is limited to the information submitted as responsive by CPS. See Gov't Code § 552.301(e)(1)(D). Therefore, we do not address the arguments of Aclara and Sensus against disclosure of this information.

We also 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 requested information falls within an exception to disclosure, CPS must release it, notwithstanding any expectations or agreement specifying otherwise.

We must next address CPS's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. See Gov't Code § 552.301(e)(1)(D). CPS received the request for information on February 28, 2011, but did not submit some of the responsive information pertaining to Itron and Sensus until April 27, 2011. Thus, CPS failed to comply with the procedural requirements mandated by section 552.301 for the information submitted on April 27, 2011.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See *id.*

¹You inform us Landis & Gyr was the winning bidder.

²CPS informs us it made a good faith effort to relate the request to information it holds. See Open Records Decision No. 561 at 8 (1990).

§ 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); see also Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake. Open Records Decision No. 150 (1977). Accordingly, because third-party interests are at stake, will consider whether the information at issue must be withheld under the Act.

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, Landis & Gyr has not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of this company, and CPS may not withhold any portion of the information pertaining to Landis & Gyr on that basis. 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, 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.

Aclara argues some of its information is excepted from disclosure under section 552.104 of the Government Code. Sensus also argues some of its information is privileged under the attorney work product privilege found in Texas Rule of Civil Procedure 192.5, which is encompassed by section 552.111 of the Government Code. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). Sections 552.104 and 552.111, however, are discretionary exceptions that protect only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991), 522 (1989) (discretionary exceptions in general). CPS did not assert section 552.104 or 552.111. Therefore, CPS may not withhold any of the information at issue pursuant to either of those sections. See ORD 592 (governmental body may waive section 552.104).

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the RESTATEMENT OF TORTS. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); see also Open Records Decision No. 552 at 2 (1990). 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.

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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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).

Section 552.110(b) excepts from disclosure "[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." Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

We find Aclara, Elster, Itron, Motorola, Sensus, and Silver Springs have established the release of their pricing information at issue would cause these companies substantial competitive injury. Therefore, CPS must withhold this information, which we have marked, under section 552.110(b). We note, however, Sensus has made some of the information it seeks to withhold publicly available on its website. Because Sensus itself published this information, we are unable to conclude such information is proprietary. We also find Aclara, Elster, Itron, Motorola, Sensus, and Silver Springs have made only conclusory allegations that release of the remaining information at issue would cause these companies substantial

³The following are the six factors that the Restatement gives 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 others 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).

competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110(b). In addition, we conclude Aclara, Elster, Itron, Sensus, and Silver Springs have failed to establish a *prima facie* case that any of the remaining information at issue is a trade secret. *See See* Gov't Code § 552.110(a); ORD 402. Thus, CPS may not withhold any of the remaining information under section 552.110.

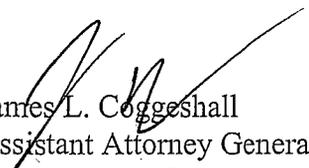
Finally, you assert some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection 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.

To conclude, CPS must withhold the information we have marked under section 552.110(b) of the Government Code. CPS must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.⁴

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, toll free, at (888) 672-6787.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

⁴In this case, the requestor has a right to the information of the company he represents.

Ref: ID# 424959

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. CarolAnn Giovando
Aclara Tech
945 Hornet Drive
Hazelwood, Missouri 63042
(w/o enclosures)

Sensus Metering Systems
c/o Ms. Paige Arnette Amstutz
Scott, Douglass & McConnico, L.L.P.
600 Congress Avenue, 15th Floor
Austin, Texas 78701-2589
(w/o enclosures)

Ms. Kelly Dennehy
Silver Springs Network
555 Broadway
Redwood City, California 94063
(w/o enclosures)

Mr. Charles Pellissier
Landis & Gyr
30000 Mill Creek Avenue, Suite 100
Alpharetta, Georgia 30022
(w/o enclosures)

Mr. Ralph F. Salgado
Elster Solutions, LLC
Two West Liberty Boulevard, Suite 180
Malvern, Pennsylvania 19355
(w/o enclosures)

Ms. Holly Peterson
Itron, Inc.
2111 North Molter Road
Liberty Lake, Washington 99019
(w/o enclosures)

Mr. Richard K. Brancale
Motorola Solutions, Inc.
1 Motorola Plaza, A-6
Holtsville, New York 11742
(w/o enclosures)