



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 9, 2015

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

OR2015-21282

Dear Mr. Giles:

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# 582664.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS Energy") received a request for the price schedules submitted for a specified request for quotations. Although CPS Energy takes 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 certain third parties. Accordingly, you state you notified Texas ReExcavation, LC ("T-Rex"); Badger Daylighting ("Badger"); Delta Daylighting ("Delta"); and Bexar Pipeline ("Bexar") 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 Delta and T-Rex. We have considered the submitted arguments and reviewed the submitted information.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Badger or Bexar explaining why the submitted information should not be released. Therefore, we have no basis to conclude Badger or Bexar has a protected proprietary interest

in the submitted information. *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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, CPS Energy may not withhold the submitted information on the basis of any proprietary interest Badger or Bexar may have in the information.

Delta argues 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).

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*, No. 12-1007, 2015 WL 3854264, at \*7 (Tex. June 19, 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 \*9. T-Rex states it has competitors. In addition, T-Rex seeks to withhold the terms of the contract because releasing its pricing information would provide its competitors an unfair advantage in future bidding processes. 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*, 2015 WL 3854264, at \*1, \*8. After review of the information at issue and consideration of the arguments, we find T-Rex has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude CPS Energy may withhold the submitted information under section 552.104(a).<sup>1</sup>

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<sup>1</sup>As our ruling is dispositive, we need not address T-Rex's remaining arguments against disclosure of its information.

Delta states its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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 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.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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* Open Records Decision No. 552 at 5 (1990). 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

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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).

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 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

Delta argues its pricing information consists of commercial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Delta has demonstrated its pricing information constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, CPS Energy must withhold Delta’s pricing information under section 552.110(b) of the Government Code.

Delta further argues its remaining information constitutes trade secrets. Upon review, we find Delta has failed to establish a *prima facie* case any of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORD 402. Therefore, the CPS Energy may not withhold any of the remaining information under section 552.110(a).

In summary, CPS Energy may withhold T-Rex’s information under section 552.104(a). CPS Energy must withhold Delta’s pricing information under section 552.110(b) of the Government Code. The remaining information must be released.

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,



Katelyn Blackburn-Rader  
Assistant Attorney General  
Open Records Division

KB-R/akg

Ref: ID# 582664

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Robert F. Johnson III  
For T-Rex Services  
Gardere  
600 Congress Avenue  
Austin, Texas 78701  
(w/o enclosures)

Mr. William J. Moran  
Delta Daylighting  
24 Greenway Plaza, Suite 1110  
Houston, Texas 77046  
(w/o enclosures)

Mr. Ryan Lambert  
Badger Daylighting  
c/o Kipling D. Giles  
Senior Counsel  
CPS Energy  
P.O. Box 1771  
San Antonio, Texas 78296  
(w/o enclosures)

Mr. Ronald Schwarz  
Bexar Pipeline  
c/o Kipling D. Giles  
Senior Counsel  
CPS Energy  
P.O. Box 1771  
San Antonio, Texas 78296  
(w/o enclosures)