



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2003

Ms. Zandra L. Narvaez
Legal Services Division
City Public Service of San Antonio
P.O. Box 1771
San Antonio, Texas 78296-1771

OR2003-6651

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188032.

The City Public Service of San Antonio ("CPS") received a request for the following information:

- 1) Any and all expenses and/or expense reimbursements (including - but not limited to - travel, hotels, conferences, meals, vehicles, cellular phones, etc[.]) for any and all Trustees, Citizens Advisory Committee, Milton Lee, Senior Vice Presidents, and Directors over the past 2 years.
- 2) Any and all records detailing problems and cost overruns relating to the computer system(s) known as SAP and WMIS.

You state that CPS has provided the requestor with a spreadsheet that includes the requested information. You further state, however, that you have redacted certain information from the spreadsheet. You claim that the information you have redacted from the spreadsheet is excepted from disclosure under sections 552.101, 552.104, and 552.133 of the Government

Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have not submitted any information responsive to item two of the request for our review, nor have you raised any exceptions to its disclosure. We therefore assume that CPS has released the information responsive to item two of the request to the requestor. If not, you must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

With respect to the redacted information, the submitted spreadsheet indicates that you seek to withhold portions of the information under sections 552.104 and 552.133 of the Government Code, and portions of the information solely under section 552.104 of the Government Code. We first address your argument under section 552.133. Section 552.133 exempts from disclosure a public power utility's information related to a competitive matter. Section 552.133(b) provides:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Section 552.133(a)(3) defines a "competitive matter" as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. However, section 552.133(a)(3) also provides thirteen categories

¹Subsequent to your original request for a decision, you contacted this office indicating that CPS no longer seeks to withhold a portion of the redacted information pursuant to section 552.133, and is releasing such information to the requestor. Furthermore, as you provide no arguments explaining the applicability of section 552.101 to the information at issue, we assume that CPS no longer intends to assert section 552.101 as an exception to disclosure. *See* Gov't Code §552.301(e)(1)(A) (requiring a governmental body to explain the applicability of a raised exception)

of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. Gov't Code § 552.133(c).

You inform us that the CPS Board of Trustees, a "public power utility governing body," passed a resolution pursuant to section 552.133 in which it defined the information at issue to be within the scope of the term "competitive matter," and you have provided a copy of the resolution for our review. Based on your representations and our review of the submitted information, we determine that the information you seek to withhold pursuant to section 552.133 is related to "competitive matters" as defined in the CPS resolution. Furthermore, the requested information is not clearly among the thirteen categories of information expressly exempted from the definition of competitive matter, and we have no evidence that CPS failed to act in good faith. Consequently, we determine that CPS must withhold the information you have marked on the submitted spreadsheet as information you seek to withhold pursuant to section 552.133 of the Government Code.

We next address your argument under section 552.104 with respect to the remaining redacted information, which you do not claim is excepted from disclosure under section 552.133. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.,* Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

In this case, you explain that pursuant to legislative authority, CPS competes in the wholesale energy industry and the gas industry, and anticipates competing with other utilities in the

retail electric industry. Based on your arguments, we find that you have generally demonstrated that CPS has marketplace interests analogous to those of a private entity. Thus, we agree that CPS may be considered a competitor for purposes of section 552.104. *See* Open Records Decision No. 593 (1991). However, while you argue that release of the information you seek to withhold under section 552.104 would reveal the strategic agenda and legislative strategy of CPS to competitors, you have not demonstrated that CPS is presently engaged in a particular competitive situation. Thus, we find you have not explained how the release of the information at issue would harm the specific marketplace interests of CPS in a particular competitive situation. Consequently, we determine that CPS has not established the applicability of section 552.104 to the information at issue. We therefore conclude that the information you seek to withhold under section 552.104, which we have marked, must be released to the requestor.

In summary, we have marked the portions of the redacted information in the submitted spreadsheet that are not excepted from disclosure under section 552.104 of the Government Code and must be released to the requestor. The remainder of the redacted information must be withheld from disclosure under section 552.133 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free,

at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 188032

Enc: Submitted documents

c: Mr. Brian Collister
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(w/o enclosures)