



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2004

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

OR2004-4407

Dear Ms. Pulis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202794.

The City Public Service of the City of San Antonio ("CPS") received a request for the costs and expenses relating to eleven categories of the proposed capital budget for fiscal year 2004-2005 and any documents reflecting comparisons to the current budget year for those same categories. You claim that the requested information is excepted from disclosure under section 552.133 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we must address a dispute between the requestor and CPS regarding whether the submitted information should have been released in response to a previous request. The requestor states that, in response to his previous request for this same information, "CPS provided a one-paged document entitled 'Budget Comparisons.'" The requestor asserts that CPS's providing him with this single document instead of the documents that CPS now seeks to withhold "is not only inadequate, but suggests a lack of good faith on the part of CPS." CPS informs us that it originally received a request for this same information, along with other records, on December 29, 2003. CPS indicates that it met with the requestor on January 14, 2003 and informed him that the information at issue here "was competitive and would not be provided without an opinion from your office directing CPS to do so." CPS

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

further states that the requestor agreed to accept "certain non-competitive information in response to the above request with the understanding that the requestor would inform CPS if additional information was desired of CPS. CPS did not receive any communication from the requestor until the above request was hand-delivered to the undersigned on March 17, 2004."

In essence, the issue here is whether or not the requestor narrowed the scope of his original request by agreeing to accept the non-confidential "Budget Comparisons" document in lieu of the records that are currently at issue. *See* Gov't Code § 552.222 (allowing governmental body to ask requestor to clarify or narrow request for information); Open Records Decision No. 663 at 2-5 (1999) (discussing requests to clarify or narrowing request for information). Whether or not the requestor narrowed his request is a question of fact. This office is unable to make factual determinations or resolve factual disputes in the opinion process. *See* Attorney General Opinions GA-0087 at 1, GA-0003 at 1 n. 2, JC-0534 at 1; Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). We therefore must rely on a governmental body's representations with regard to such issues. Based on CPS's representations, we conclude that CPS believed that the requestor had narrowed his prior request and that the submitted documents were not responsive to the narrowed request.

We turn now to CPS's arguments for the submitted information. Section 552.133 of the Government Code excepts 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.

Gov't Code § 552.133(b). 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 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).

Section 552.133 allows the public utility to determine which utility matter constitutes a competitive matter by taking a vote on such matters and then passing a resolution setting forth such competitive matters. This office must determine if the submitted information relates to the competitive matter as defined by the resolution passed by the public power utility governing body. This office must also ensure that requested information does not fall within any of the thirteen categories of information that may not be deemed competitive matters. See Gov't Code § 552.133(a)(3).

In this case, CPS states that “[t]he CPS Board of Trustees, acting pursuant to section 552.133 of [the] Act, passed a resolution determining in good faith that certain types [of] information are ‘competitive matters’” and has submitted a copy of the resolutions for our review. CPS asserts that the requested information it seeks to withhold falls into several different categories of information determined in good faith by the board to be competitive. After reviewing CPS’s arguments and the submitted information, we conclude that this information is reasonably related to a competitive matter as defined by the resolutions. The requested information is not among the thirteen categories of information expressly exempted from the definition of competitive matter, and based on the information provided in connection with this request, we cannot conclude that the board failed to act in good faith. Thus, because we cannot conclude, based on the information provided in connection with this request, that the board failed to act in good faith in determining that the categories of information responsive to the present request constitute a “competitive matter,” and because the responsive information is reasonably related to the competitive matters in accordance with the board’s resolutions, we conclude that this information is excepted from disclosure pursuant to 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).

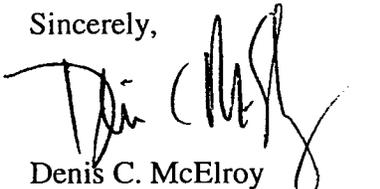
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/SIS/krl

Ref: ID# 202794

Enc. Submitted documents

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