



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 15, 2007

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

OR2007-05978

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# 278814.

The City Public Service Board of the City of San Antonio, d/b/a CPS Energy ("CPS"), received a request for contract prices pertaining to a contract between InfraSource Underground Installation, L.L.C ("InfraSource") and CPS. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. You claim that release of the requested information may implicate the proprietary interests of InfraSource. Pursuant to section 552.305, you state, and provide documentation showing, that you notified InfraSource of the request and of its right to submit arguments to this office as to why the information should not be released. *See Gov't Code § 552.305(d). See also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from InfraSource. *See Gov't Code § 552.304* (interested third party may submit comments stating why requested information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address CPS's obligations under section 552.301 of the Government Code. In accordance with section 552.301(b), a governmental body seeking a ruling from this office must assert the exceptions to disclosure that apply to the requested information no later than

the tenth business day after receiving the written request. You state that CPS received the present request for information on February 27, 2007. However, you did not raise section 552.104 as an exception to disclosure until March 20, 2007. Consequently, in regards to this exception, you failed to comply with the ten business day deadline in section 552.301.

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* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Section 552.104 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived by the governmental body. Thus, section 552.104 is not a compelling reason to withhold information from the public. *See* Open Records Decision Nos. 592 (1991) (governmental body may waive section 552.104), 522 (1989) (discretionary exceptions in general). Accordingly, CPS may not withhold any portion of the submitted information under section 552.104 of the Government Code.

Section 552.133 of the Government Code excepts from public disclosure information held by a public power utility that is related to a competitive matter. *See* Gov't Code § 552.133(b). "Competitive matter" is defined as a matter that the public power utility governing body in good faith determines by vote to be related to the utility's competitive activity. *Id.* § 552.133(a)(3). The governing body also must determine, in like manner, that the release of the information would give an advantage to competitors or prospective competitors. *Id.* Section 552.133(a)(3) lists thirteen categories of information that may not be deemed to be competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the information at issue only if, based on the information provided, the attorney general determines that 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. *Id.* § 552.133(c). Furthermore, section 552.133(b) provides as follows:

Information or records are excepted from [required public disclosure] 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.

*Id.* § 552.133(b). You inform us that CPS is a public power utility for purposes of section 552.133. You assert that the submitted information is reasonably related to a competitive matter and, if released, would give a competitor or prospective competitor an unfair advantage. You have provided a copy of a resolution adopted by CPS's board of trustees that delineates categories of information that have been determined to be competitive matters for purposes of section 552.133. You assert that the information at issue falls within the scope of the board's resolution. We note that the information at issue is not clearly among the types of information that section 552.133(a)(3) expressly excludes from the definition of a competitive matter. Based on the information provided in connection with this request, we cannot conclude that CPS has failed to act in good faith. *See id.* § 552.133(c). Furthermore, we conclude that this information is reasonably related to a competitive matter as defined by the resolution at issue. Therefore, based on your representations, the submitted resolution, and our review of the submitted information, we conclude that this information is excepted from public disclosure under section 552.133 of the Government Code.<sup>1</sup>

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

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<sup>1</sup>As our ruling is dispositive, we need not address InfraSource's arguments.

Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



M. Alan Akin  
Assistant Attorney General  
Open Records Division

MAA/jb

Ref: ID# 278814

Enc. Submitted documents

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