



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2007

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2007-15972

Dear Ms. Valkavich:

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# 296770.

The City of San Antonio (the "city") received a request for copies of all correspondence directed to the mayor's office related to CPS Energy's ("CPS") plans to invest in nuclear power from January 1, 2007 through September 25, 2007. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that the submitted information in Attachment 3 is excepted under section 552.107 of the Government Code.¹ Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental

¹Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that Attachment 3 contains a confidential memorandum from CPS’s general counsel and finance director to CPS’s board of trustees and executives. You state that this communication was made in furtherance of the rendition of professional legal services. You also assert that it was intended to be confidential and that its confidentiality has been maintained. Based on these representations, we agree that the city may withhold the information in Attachment 3 under section 552.107.

You assert that the remaining submitted information in Attachment 4 is excepted under section 552.133 of the Government Code, which excepts from disclosure a public power utility’s information related to a competitive matter. Section 552.133(b) provides as follows:

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 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). A "competitive matter" is defined 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. *Id.* § 552.133(a)(3). Section 552.133(a)(3) lists 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. *Id.* § 552.133(c).

The city informs us that CPS is a public power utility for purposes of section 552.133. The city has also submitted a copy of CPS's competitive matters policy delineating categories of information that the board has determined to be competitive matters for purposes of section 552.133. The city asserts that the submitted information at issue comes within the scope of CPS's policy and therefore is protected from public disclosure under section 552.133. After reviewing the CPS's arguments and the submitted information, we cannot conclude that CPS failed to act in good faith. *See id.* Furthermore, we conclude that this information is reasonably related to a competitive matter as defined by the policy at issue. Therefore, based on your representations and our review, we conclude that the city must withhold the remaining submitted information under section 552.133 of the Government Code.²

In summary, the city may withhold the information in Attachment 3 under section 552.107 of the Government Code. The city must withhold the remaining submitted information 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 file suit in

²As our ruling is dispositive, we do not address your remaining argument against disclosure.

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

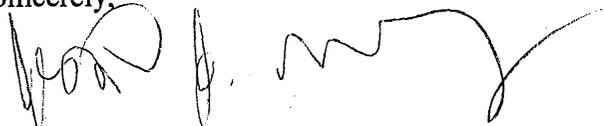
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 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 challenge 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,



Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 296770

Enc. Submitted documents

c: Mr. Greg Harman
San Antonio Current
1500 North St. Mary's
San Antonio, Texas 78215
(w/o enclosures)