



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2008

Ms. Zandra L. Pulis
Senior Counsel
CPS Energy
P.O. Box 1771
San Antonio, Texas 78296

OR2008-07246

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# 310912.

The City Public Service Board of the City of San Antonio ("CPS Energy") received a request for letters from members of the public opposing CPS Energy's participation in proposed new nuclear units 3 and 4 at the South Texas Project. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 bears the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and that the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

In demonstrating that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. *See Open Records Decision No. 518 at 5 (1989).* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be "realistically contemplated"). Conversely, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See Open Records Decision No. 331 (1982).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).*

You state that on September 20, 2007 the South Texas Project Nuclear Operating Company ("STPNOC") filed with the U.S. Nuclear Regulatory Commission ("NRC") a combined license application ("COL Application") for two proposed nuclear units on behalf of CPS Energy and NRG South Texas, L.P. You explain that pursuant to NRC regulations, a mandatory hearing will be held on STPNOC's COL Application. You claim that a hearing on a combined license application is quasi-judicial, and therefore constitutes litigation for purposes of section 552.103, as it is subject to the procedural requirements of Part 2 of Title 10 of the Code of Federal Regulations.

This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g., Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982).* For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g., Open Records Decision Nos. 588 (1991) (proceeding of former State Board of Insurance), 301 (1982) (proceeding of Public Utilities Commission).* In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are

resolved, d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588. You explain that at a hearing before the NRC, the parties may do the following: (1) subpoena witnesses or evidence, (2) use experts to examine and cross-examine expert witnesses, (3) exchange discovery, and (3) present evidence. *See* 10 C.F.R. §§ 2.702, 2.703, 2.704-2.708, 2.711. You state that at the conclusion of the hearing, the presiding officer issues a written decision. *See* 10 C.F.R. § 2.713.

You explain that the NRC accepted the STPNOC's COL Application for docketing on November 29, 2007 and published a Notice of Hearing and Opportunity to Petition for Leave to Intervene. You explain that in response to this notice, several groups, including the requestor's, submitted a petition to suspend the hearing notice which alleges, in part, that STPNOC's COL Application is incomplete and therefore the petitioners are unable to timely file the required written petition to intervene. In response, on February 13, 2008, the NRC issued an order withdrawing the hearing notice regarding the STPNOC's COL Application. However, the order further states that the NRC will republish a notice of opportunity for hearing on the application when it is informed that STPNOC is prepared to support a review of the complete COL application.

Having reviewed your arguments and information at issue, we find that a hearing before the NCR on a combined license application is conducted in a quasi-judicial forum. We also find that CPS Energy reasonably anticipated, on the date it received the instant request, that the requestor will intervene in the proceedings regarding the modified application. Furthermore, we find that the submitted information is related to the anticipated litigation. Accordingly, CPS Energy may withhold the information at issue under section 552.103 of the Government Code.¹

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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

¹As our ruling is dispositive, we need not address your remaining argument against disclosure.

governmental body wants to challenge this ruling, the governmental body must file suit in 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,



Benjamin A. Diener
Assistant Attorney General
Open Records Division

BAD/mcf

Ref: ID# 310912

Enc. Submitted documents

c: Mr. Matthew Johnson
Public Citizen
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Austin, Texas 78703
(w/o enclosures)