



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2008

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

OR2008-07816

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# 312124.

The City Public Service Board of the City of San Antonio, d/b/a CPS Energy ("CPS") received a request for approximately fifteen categories of information pertaining to pole attachment.¹ You state that you have released a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.104, and 552.133 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹We note, and you acknowledge, that the requestor has asked CPS to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume CPS has made a good faith effort to do so.

²Although you raise section 552.101 of the Government Code in conjunction with section 552.133 of the Government Code, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, although you also initially raised section 552.110 of the Government Code, you did not submit to this office written comments stating the reasons why section 552.110 would allow the information to be withheld. Thus, we assume that you no longer claim this exception. *See* Gov't Code §§ 552.301, .302.

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. *Id.* § 552.022(a)(1). Although you seek to withhold the information that is subject to section 552.022 under section 552.103, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(1). Therefore, CPS may not withhold any of the information that is subject to section 552.022 under section 552.103. But section 552.022 does not apply to information that is subject to section 552.104 or 552.133 of the Government Code. *See* Gov’t Code §§ 552.104(b), 552.133(d).

Therefore, we will consider your arguments under sections 552.104 and 552.133 with respect to all of the information that you seek to withhold under these exceptions, including the information that is encompassed by section 552.022. We also will consider your claim under section 552.103 of the Government Code with respect to the information that is not subject to section 552.022.

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 [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). 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. *See id.* § 552.133 (a)(3). 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. *Id.* § 552.133(c).

CPS is a public power utility for purposes of section 552.133. CPS informs us, and provides documentation showing, that the CPS Energy Board of Trustees (the "board"), as governing body of CPS, passed a resolution by vote pursuant to section 552.133 in which the board defined the information considered to be within the scope of the term "competitive matter." CPS asserts that the information at issue comes within the scope of the resolution. The information at issue is not among the thirteen categories of information that section 552.133(a)(3) expressly excludes from the definition of competitive matter. Furthermore, we have no evidence that the board failed to act in good faith. *See id.* § 552.133 (c). Consequently, we determine that the information at issue relates to a competitive matter in accordance with the submitted resolution. Therefore, CPS must withhold the submitted information pursuant to section 552.133 of the Government Code. As this ruling is dispositive, we need not address your remaining arguments against disclosure.

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 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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 312124

Enc. Submitted documents

c: Mr. J.D. Thomas
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(w/o enclosures)