



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2008

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

OR2008-08693

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# 314032.

The City Public Service Board for the City of San Antonio d/b/a/ CPS Energy (the "CPS"), received three requests for information pertaining to the vendors selected for a specified contract and the prices submitted by all vendors that responded to the RFP. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. You also state that releasing the submitted information may implicate the interests of third parties. Accordingly, you have notified ten third parties of the request and each company's opportunity to submit arguments to this office.¹ See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have

¹You notified Gila Corp. d/b/a Municipal Services Bureau; The Affiliated Group; CMC Commercial and Medical Credit; Credit Systems International; Inc.; Recoverys Unlimited East, Inc. d/b/a RUI Credit Services ("RUI"); Account Services Collections, Inc.; NCO Financial Systems, Inc.; Management Concepts, Inc; On-Line Connections; and Credit Bureau Collections Services, Inc.

received comments from NCO and RUI.² We have considered the submitted arguments and reviewed the submitted information.

Next, CPS acknowledges, and we agree, that CPS failed to comply with the procedural requirements of section 552.301(b) of the Government Code in requesting a ruling with respect to the January 30, 2008 request. *See* Gov't Code § 552.301(b) (governmental body must ask for decision from this office and state exceptions that apply within ten business days of receiving written request for information). You seek to withhold the information responsive to this request under section 552.104 of the Government Code. However, section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and is generally waived by the governmental body's failure to comply with section 552.301 of the Government Code. Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). Therefore, CPS has waived its claim under section 552.104 for the information responsive to the January 30, 2008 request, and it may not withhold this information on that ground. However, because section 552.133 and the interests of third parties can provide compelling reasons for non-disclosure will address these arguments along with the arguments submitted with respect to the information responsive to the April 7, 2008 and April 26, 2008 requests.

CPS claims that the submitted information is subject to section 552.133 of the Government Code. Section 552.133 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 of 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.

²RUI seeks to withhold six categories of information related to its proposal under sections 552.101 and section 552.110 of the Government Code. However, none of this information was submitted by CPS to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by CPS. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested):

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. *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. You inform us, and provide 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." You assert that the submitted information comes within the scope of specified provisions within the resolution. Having reviewed those provisions of the resolution and considered the submitted arguments, we find that the resolution encompasses the information at issue in its entirety. We therefore conclude that CPS must withhold the submitted information under section 552.133 of the Government Code.³

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). If the governmental body does not file suit over 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

³As our ruling is dispositive, we need not address the remaining arguments against withholding the submitted information.

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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 314032

Enc. Submitted documents

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