ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2008

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

OR2008-11877

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# 320127.

The City Public Service Board of the City of San Antonio, d/b/a CPS Energy ("CPS") received a request for (1) all e-mails from January 1, 2006 to the present between a named employee and a named individual, and (2) telephone records for all calls made between January 1, 2006 and the present by the same named employee on his or any other CPS-issued cellular telephone. You claim the submitted e-mails and part of the telephone records are not subject to the Act. Alternatively, you claim the submitted e-mails and telephone records are excepted from disclosure under sections 552.101, 552.104, 552.117, and 552.137 of the Government Code. We have considered your claims and reviewed the submitted information, some of which is a representative sample.[1]

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we address your contention the e-mails and some telephone numbers on the telephone records are not public information subject to the Act. The Act applies to "public information," which is defined under section 552.002 of the Government Code as:

> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002; *see also id.* § 552.021. Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body, or is used by a public official or employee in the performance of official duties. You assert the content of the e-mails does not relate to the official business of CPS. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Upon review, we find the e-mails do not pertain to the official business of CPS, and therefore do not constitute public information as defined by section 552.002 of the Government Code. Thus, CPS is not required to disclose this information under the Act.[2] You also contend some of the telephone numbers listed in the telephone records may reflect calls that did not relate to CPS official business. You explain CPS allows employees to use their CPS-issued cellular telephones for limited personal use, if the employees agree to pay for the call charges. You inform us the named employee whose information is at issue agreed to pay for his personal call charges. As you acknowledge, however, you have not marked, or otherwise indicated, any information in the submitted telephone records as pertaining to personal calls because the records are voluminous and spending time indicating the personal calls would interfere with CPS's daily operations. Consequently, you have failed to establish any portion of the submitted telephone records is related to personal calls and thus not subject to the Act. *See* Gov't Code § 552.301(e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the information); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (the administrative inconvenience of providing public records is not a ground for refusal to comply with the Act). Accordingly, we find the telephone records are subject to the Act, and we will consider the applicability of your claimed exceptions to disclosure for this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrines of common-law and

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[2]As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

constitutional privacy. Common-law privacy protects information that (1) contains highly intimate and embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found, however, the names, addresses, and telephone numbers of members of the public are not excepted from required public disclosure under common-law privacy, unless there is a showing of special circumstances. *See* Open Records Decision Nos. 455 (1987) (absent special circumstances, the home addresses and telephone numbers of private citizens are generally not protected under the Act's privacy exceptions), 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." ORD 167 at 5. Such "special circumstances" do not include "a desire for privacy or a generalized fear of harassment or retribution." *Id.* at 4-5.

You contend the telephone numbers pertaining to personal calls listed in the submitted telephone records are protected under section 552.101 in conjunction with common-law privacy. Although you acknowledge telephone numbers of private citizens are generally not protected by common-law privacy, you argue special circumstances exist to bring the telephone numbers within the protection of common-law privacy because the requestor wants the information for purposes of his client's divorce proceedings. You assert "[d]ivorce proceedings are personal in nature and do not implicate matters of public interest." However, you have not provided any arguments regarding how release of the information would cause someone to face an imminent threat of physical danger. Thus, you have failed to establish special circumstances exist in this instance, and no part of the telephone records may be withheld under section 552.101 in conjunction with common-law privacy.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. ORD No. 455 at 4. The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

You assert the submitted telephone records fall within the zones of privacy pertaining to marriage and family relationships because the requestor intends to use the records in the context of divorce proceedings involving the named employee whose telephone records are at issue. You further assert the named employee's privacy interest in the personal calls listed in the telephone records outweighs any public interest in the information. We note, however, your arguments are based solely on the requestor's intended use of the requested

information. This office has determined the Act does not permit the consideration by a governmental body or this office of a requestor's intended use of information when responding to open records requests. *Cf.* Gov't Code §§ 552.222(b) (stating governmental body may not inquire into purpose for which information will be used), .223 (requiring uniform treatment of all open records requests); *see* Open Records Decision Nos. 508 (1988) at 2 (motives of a person seeking information under the Act are irrelevant), 51 (1974). Moreover, you have not explained how the content of the telephone records pertains to the zones of privacy or implicates the named employee's privacy. Thus, we find you have not demonstrated how any portion of the submitted telephone records falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, no part of the submitted telephone records may be withheld under section 552.101 in conjunction with constitutional privacy.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state CPS is in competition with other electric energy suppliers in the wholesale power market. You also state CPS competes with other electric energy suppliers for customers. Based on these representations, we find you have established CPS has legitimate marketplace interests in the purchase and sale of electricity for the purposes of section 552.104. You argue disclosure of the submitted telephone records could harm CPS's competitive interest "because such disclosure would allow third parties, in this case a divorce attorney, to contact CPS . . . vendors, contractors, suppliers, and all other entities or individuals who [the named employee] called in the course of his employment with CPS." You further argue that such disruptive calls to CPS business contacts "could lead to hesitation on the part of such entities and individuals to conduct business with CPS . . . in future transactions." Based on your representations and our review, we find you have made only general allegations of a remote possibility of harm and have not established release of the submitted telephone records would cause the possibility of specific harm to CPS. Accordingly, you may not withhold the submitted telephone records under section 552.104 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117. Additionally, section 552.117 also encompasses personal cellular telephone numbers, provided the cellular phone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). Therefore, CPS may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. You state some of the telephone numbers listed in the submitted telephone records may be home telephone numbers of CPS employees who timely elected confidentiality under section 552.024. However, you have not marked, or otherwise indicated, any telephone numbers in the submitted telephone records as belonging to CPS employees. Consequently, you have failed to establish that any portion of the submitted telephone records is excepted under section 552.117(a)(1). *See* Gov't Code § 552.301(e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the information). Thus, CPS may not withhold any of the submitted telephone records under section 552.117(a)(1) of the Government Code. As you have claimed no further exceptions to disclosure for the telephone records, they must be released.

In summary, CPS need not release the submitted e-mails, which are not subject to the Act. The submitted telephone records must be released.

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

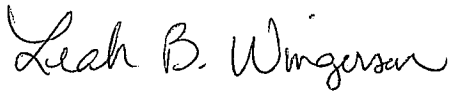
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental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



Leah B. Wingerson
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LBW/jh

Ref: ID# 320127

Enc. Submitted documents

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(w/o enclosures)