



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2008

Ms. Melissa C. Killen
Tuggey, Rosenthal, Pauerstein, Sandoloski, Agather LLP
755 East Mulberry, Suite 200
San Antonio, Texas 78212

OR2008-14053

Dear Ms. Killen:

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# 324823.

The City of Hondo (the "city"), which you represent, received a request for "a copy of the Master Power Purchase and Sale Agreement w/ CPS Energy, to include the city's annual cost and the fuel charge amount." You state that you have released the Master Power Purchase & Sale Agreement between CPS and the city that will be effective on October 1, 2008.¹ Although you take no position as to the disclosure of the remaining submitted information, consisting of the Cover Sheet and Confirmation Letter to the 2008 agreement, as well as the Power Supply Agreement in effect at the time of the request, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the city notified CPS Energy ("CPS") of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). CPS asserts that a portion of the submitted information is excepted under section 552.104 and 552.133 of the

¹The city states that it interpreted the request to be for the Master Power Purchase & Sale Agreement, Cover Sheet, and Confirmation letter approved by the city council on August 4, 2008. However, the city notes that CPS interpreted the request to be for the Power Supply Agreement between [CPS] and the [city] ("Power Supply Agreement") which was in effect at the time of the request. The city did not release the Power Supply Agreement and has submitted it for our review.

Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the city's obligation under section 552.301 of the Government Code. Within fifteen business days of receiving a request for information, a governmental body that wishes to withhold information from public disclosure must submit to this office a copy of the specific information requested or representative samples. *See* Gov't Code § 552.301(e)(1)(D). The city received the request for information on August 5, 2008, but did not submit a portion of the information at issue until September 2, 2008. Thus, the city failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977). Because the proprietary interests of a third party can provide a compelling reason against the presumption of openness we will consider whether any of the submitted information can be withheld on that basis.

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 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 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.

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 states that it 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 the 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 Power Supply Agreement comes within the scope of the resolution. This information 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 Power Supply Agreement relates to a competitive matter in accordance with the submitted resolution. Therefore, the city must withhold the Power Supply Agreement pursuant to section 552.133 of the Government Code.² As CPS raises no other exception to disclosure for the remaining information, it must be released to the requestor.

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

²As our ruling is dispositive for this information, we need not address CPS’s remaining argument.

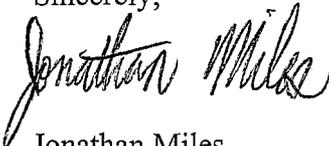
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 324823

Enc. Submitted documents

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