



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 26, 2010

Mr. Kipling D. Giles
Senior Counsel
Legal Services Division
CPS Energy
P.O. Box 1771
San Antonio, Texas 78296

OR2009-01202

Dear Mr. Giles:

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# 368465.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received a request for correspondence during a specified period of time pertaining to the cost estimate for a proposed nuclear plant expansion at the South Texas Project facility and the postponed decision by the city council to invest more money in the development of the project. You state some of the requested information will be released. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.104, 552.107, 552.111, and 552.133 of the Government Code.¹ You also state that portions of the submitted information may implicate the proprietary interests of Toshiba America Nuclear Energy Corporation ("Toshiba"). Accordingly, you state that you notified Toshiba of the request for information and of its right to submit arguments to this office as to why its information should not be released. *See Gov't Code § 552.305(d); see also Open*

¹Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).* You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503. ORD 676 at 3.

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). Pursuant to section 552.305(d), we have received comments from Toshiba objecting to the release of its information. We have considered the submitted arguments and reviewed the submitted information.²

Initially, you state that portions of the submitted information, which you have marked, are not responsive to the request. We agree such information is not responsive to the present request for information. CPS need not release non-responsive information in response to this request, and this ruling will not address that information.

Section 552.133 of the Government Code exempts 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

²We 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.

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).

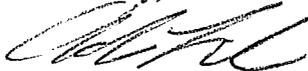
CPS is a public power utility for purposes of section 552.133. You inform us, and provide documentation showing, that the CPS Energy Board of Trustees (the "board"), as governing body of CPS, passed a resolution by vote pursuant to section 552.133 in which the board defined the information considered to be within the scope of the term "competitive matter." You assert that the entirety of the responsive information comes within the scope of specified provisions within the resolution. Upon review, we determine that the responsive information relates to competitive matters in accordance with the submitted resolution. The responsive 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). Therefore, CPS must withhold the responsive information pursuant to section 552.133 of the Government Code. As our ruling is dispositive, we need not address the remaining arguments against disclosure.

Finally, you request that this office issue a previous determination that would permit CPS in the future to withhold the same type of information in response to future requests without the need of requesting a ruling from this office about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 368465

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Mr. Robert Temple
Toshiba America Nuclear Energy Corporation
CPS Legal Department
145 Navarro Street
San Antonio, Texas 78205
(w/o enclosures)