ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 23, 2011

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

OR2011-07186

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# 421618.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received a request for the power purchase agreement and installation agreement between CPS and Duke Energy Generation Services related to the Blue Wing Solar Project. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. You also inform us CPS notified Texas Solar/Juwi Solar Inc., an interested third party, of CPS's receipt 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 to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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). We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us the submitted power purchase agreement was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-17749 (2009). In Open Records Letter No. 2009-17749, we determined CPS must withhold the power purchase agreement at issue under section 552.133 of the Government Code. We have no indication that the law, facts, and circumstances on which the prior ruling

was based have changed. Accordingly, CPS must continue to rely on Open Records Letter No. 2009-17749 as a previous determination and withhold the submitted power purchase agreement in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We must next address CPS's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. You inform us CPS received the request for information on April 4, 2011. Thus, CPS's ten-business-day deadline to request a ruling from this office was April 18, 2011. *See* Gov't Code § 552.301(b). However, you did not request a decision from this office until April 19, 2011. You do not inform us CPS was closed for any of the business days between April 4 and April 19, 2011. Thus, we find CPS 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 id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.104 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests. Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). Thus, CPS's claim under section 552.104 is not a compelling reason to overcome the presumption of openness. Section 552.133 of the Government Code, however, can provide a compelling reason to overcome this presumption; therefore, we will consider whether this section requires CPS to withhold the distributed generation interconnection agreement. We will also consider whether any of this information may be excepted under the Act due to the interests of Texas Solar/Juwi Solar Inc.

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.

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. *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 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, the CPS 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 the distributed generation interconnection agreement comes within the scope of specified provisions within the resolution. Upon review, we find that the information at issue is not clearly among the types of information that section 552.133(a)(3) expressly excludes from the definition of competitive matter. Furthermore, we have no evidence that CPS failed to act in good faith in adopting its resolution under section 552.133. Therefore, based on CPS's representations and its resolution, we conclude CPS must withhold the distributed generation interconnection agreement under section 552.133 of the Government Code.

To conclude, CPS must continue to rely on Open Records Letter No. 2009-17749 as a previous determination and withhold the submitted power purchase agreement in accordance with that ruling. CPS must also withhold the distributed generation interconnection agreement under section 552.133 of the Government Code.

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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 421618

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)