



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2011

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

OR2011-14058

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# 431546.

CPS Energy ("CPS") received a request for information related to a specified memorandum of understanding with Summit Texas Clean Energy ("Summit"), documents related to any contracts or terms that permit San Antonio to cancel the agreement, and communications with the Environmental Protection Agency regarding a specified coal plant. You state CPS has released the information responsive to the third part of the request. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.111, and 552.133 of the Government Code.¹ You also state release of the information at issue may implicate Summit's proprietary interests. Accordingly, you provide documentation showing you have notified Summit of the request and its right to submit arguments to this office. *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).

¹We note you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503. However, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We note section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to required disclosure under section 552.022 of the Government Code. *See* ORD 676 at 1-2, Open Records Decision No. 677 (2002).

We have received comments from an attorney for Summit. We have considered the submitted arguments and reviewed the submitted information.

Section 552.104 of the Government Code excepts from required public disclosure “information which, if released, would give advantage to competitors or bidders.” Gov’t Code § 552.104(a). 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. In particular, you state CPS is currently competing with other cities and electric energy suppliers in attracting clean energy companies as partners. Based on these representations, we find you have established CPS has legitimate marketplace interests in the purchase and sale of electricity and may be considered a “competitor” for the purposes of section 552.104. You state CPS is currently in partnership negotiations with Summit. You state the information at issue reveals negotiating strategies and details regarding pricing, economic incentives being offered to Summit by CPS, cost allocations, fuel management strategies, and other proposed contract terms. You argue release of this information would damage negotiations with other companies by permitting them to demand more favorable terms and permit competing cities and electric companies to undercut CPS by offering more favorable incentives and terms to the clean energy companies. Based on your representations and arguments, we conclude you have shown release of the submitted information would cause specific harm to CPS’s marketplace interests. *See* ORD 593. We therefore conclude CPS may withhold the submitted information under section 552.104 of the Government Code.²

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.

²Because our ruling is dispositive, we do not address the remaining arguments against disclosure.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 431546

Enc. Submitted documents

c: Requestor
(w/o enclosures)