



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 25, 2013

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

OR2013-01465

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# 476971.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received a request for five categories of information pertaining to a solar energy project: (1) the final score sheet; (2) specified proposals; (3) information that describes the evaluating team; (4) any protests filed by a losing vendor; and (5) specified voice mails. You state CPS does not have information responsive to items four and five of the request.<sup>1</sup> You state CPS will release information responsive to item three of the request. You claim the submitted information is excepted from disclosure under section 552.133 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of certain third parties. Accordingly, you notified Emerald Infrastructure, L.L.C. ("Emerald"), juwi solar, Inc., OCI Solar Power, L.L.C. ("OCI"), and SunPower Corporation ("SunPower") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should

---

<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from OCI and SunPower.<sup>2</sup> Thus, we have considered the arguments and reviewed the submitted information.

Initially, we must address CPS's responsibilities under the Act. Section 552.301 of the Government Code 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) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Additionally, under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). You state you received the request for information on October 22, 2012. You note the United States Post Office was closed on November 12, 2012; however, you have not informed this office that November 12, 2012 was not a business day for CPS. Thus, CPS was required to request a decision from this office by November 5, 2012, and to submit the information required by section 552.301(e) by November 12, 2012. However, the envelope in which CPS submitted the request for a decision and the information at issue bears a meter mark date of November 13, 2012. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude CPS has failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630

---

<sup>2</sup>We note Emerald and SunPower submitted a joint proposal and SunPower states its arguments against disclosure are for that information.

at 3, 325 at 2 (1982). Because section 552.133 of the Government Code can provide a compelling reason to withhold information and because third-party interests are involved in this instance, we will consider whether the submitted information must be released under the Act.

Next, we note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-00891 (2013). In Open Records Letter No. 2013-00891, we ruled CPS must withhold the requested bid tabulation from disclosure under section 552.133 of the Government Code. We have no indication that the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office in the prior ruling, CPS must continue to rely on that ruling as a previous determination and withhold the previously ruled upon information in accordance with Open Records Letter No. 2013-00891. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the requested information is not encompassed by Open Records Letter No. 2013-00891, we will consider the arguments against its release.

We note you have not submitted for our review any information responsive to item one of the request. To the extent any such information was maintained by CPS on the date CPS received the request and is not subject to the prior ruling, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." *Id.* § 552.133(b). The Texas Legislature amended section 552.133, which now provides in relevant part the following:

(a) In this section, "public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, "competitive matter" means a utility-related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

...

(B) bidding and pricing information for purchased power, generation and fuel, and Electric Reliability Council of Texas bids, prices, offers, and related services and strategies;

(C) effective fuel and purchased power agreements and fuel transportation arrangements and contracts[.]

*Id.* § 552.133(a), (a-1)(1)(B), (C). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *Id.* § 552.133(a-1)(2).

You state CPS is a city-owned utility. You inform us the submitted information consists of selection criteria for a power purchase agreement and pricing structure details for the solar-generated energy to be purchased. Further, you state the submitted information includes terms that were included in a current power purchase agreement. You assert release of the submitted information would result in competitive harm to CPS by providing its competitors with an advantage in the wholesale market and harm CPS's ability to obtain solar energy at the best value. The information at issue is not among the fifteen categories of information expressly excluded from the definition of "competitive matter" by section 552.133(a-1)(2). Based on our review of the arguments and the submitted information, we find the submitted information relates to a competitive matter as defined under section 552.133(a-1). Thus, we conclude CPS must withhold the submitted information from disclosure under section 552.133 of the Government Code.<sup>3</sup>

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2013-00891, CPS must continue to rely on that ruling as a previous determination and withhold the previously ruled upon information in accordance with that ruling. CPS must withhold the submitted information from disclosure 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

---

<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure.

responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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,



Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/som

Ref: ID# 476971

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Karen E. Jones  
Assistant General Counsel  
SunPower Corporation  
1331 Northwest Lovejoy Street, Suite 700  
Portland, Oregon 97209  
(w/o enclosures)

Mr. Matt Lowry  
Senior Counsel  
OCI Solar Power, LLC  
300 Convent Street, Suite 2460  
San Antonio, Texas 78205  
(w/o enclosures)

Mr. Michael Martin  
Managing Director  
juwi solar Inc.  
1805 29<sup>th</sup> Street, Suite 2054  
Boulder, Colorado 80301  
(w/o enclosures)

Mr. Robert L. Shemwell  
Project Executive  
Emerald Infrastructure, LLC  
5101 Broadway  
San Antonio, Texas 78209  
(w/o enclosures)