



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2013

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

OR2013-10861

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# 491425.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received a request for e-mails sent to or received by four named individuals concerning Nexolon Co., Ltd., and Nexolon America, L.L.C. (collectively "Nexolon"), or Brooks City Base or the Brooks Development Authority since January 1, 2012. You claim that the requested information is excepted from disclosure under sections 552.104, 552.107, 552.110, and 552.133 of the Government Code.¹ You also state the requested documents may implicate the proprietary interests of third parties. Accordingly, you state and provide documentation showing CPS notified OCI Solar Power L.L.C. ("OCI") and Nexolon of the request for information and of their 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). We have received comments from OCI and from an attorney representing Nexolon. We have considered the submitted arguments and reviewed the submitted information.

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, 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). Furthermore, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code.

Initially, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-05560 (2013). In Open Records Letter No. 2013-05560, we ruled, among other things, CPS must withhold the responsive information 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. 2013-05560. *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. 2013-05560, we will consider the arguments against its release.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." Gov't Code § 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; [and]

(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 contractual negotiations with OCI, terms, factors considered, and components of the actual power purchase agreement that resulted from these negotiations. 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 information you have marked relates to a competitive matter as defined under section 552.133(a-1). Thus, we conclude CPS must withhold the information you have marked from disclosure under section 552.133 of the Government Code.²

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a

²As our ruling is dispositive, we need not address the remaining arguments against disclosure.

communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The remaining information consists of an e-mail which you state is a communication between CPS's Legal Department, CPS's outside counsel, and other CPS employees, in their capacity as clients. You state this communication was made in furtherance of the rendition of professional legal services to CPS. You further state the communication has been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, CPS may withhold the remaining information under section 552.107(1) of the Government Code.

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. 2013-05560, 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 information you have marked under section 552.133 of the Government Code. CPS may withhold the remaining information under section 552.107(1) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 491425

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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