



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 22, 2016

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

OR2016-01704

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# 597573.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS Energy") received a request for communications among two named employees and others addressing the financial aspects of CPS Energy's Smart Grid project. You indicate CPS Energy has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments stating why information should or should not be released).

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, 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). Additionally, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

Initially, we note you have marked some information as not responsive to the present request for information. This ruling does not address the public availability of non-responsive information, and CPS Energy need not release it to the requestor.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). CPS Energy states it has specific marketplace interests in the information in Exhibit C because CPS Energy is “in competition with other electric energy suppliers in the wholesale power market, and could be in competition with other utilities for electric customers in the future.” In addition, you state release of the information at issue would significantly impede CPS Energy’s chances of negotiating favorable agreements with clean energy companies. After review of the information at issue and consideration of the arguments, we find CPS Energy has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude CPS Energy may withhold the information in Exhibit C under section 552.104(a).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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* ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate 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, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 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).

CPS Energy states the responsive information in Exhibit A consists of communications between a CPS Energy attorney and other CPS Energy employees and officials. CPS Energy states the communications were made for the purpose of facilitating the rendition of professional legal services to CPS Energy and these communications have remained confidential. Upon review, we find CPS Energy has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, CPS Energy may withhold the responsive information in Exhibit A under section 552.107(1) of the Government Code.<sup>2</sup>

In summary, CPS Energy may withhold the information in Exhibit C under section 552.104(a) of the Government Code and may withhold the responsive information in Exhibit A 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](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,



Kristi L. Godden  
Assistant Attorney General  
Open Records Division

KLK/bw

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Ref: ID# 597573

Enc. Submitted documents

c: Requestor  
(w/o enclosures)