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ATTORNEY GENERAL OF TEXAS

October 16, 2019

Ms. Stacey L. Cormican
Attorney
CPS Energy
P.O. Box 1771
San Antonio, Texas 78296-1771

OR2019-28984

Dear Ms. Cormican:

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# 791876.

The City Public Service Board of San Antonio ("CPS Energy") received a request for (1) all e-mails exchanged and electronic files shared between two named CPS Energy employees and two named entities during a stated time period, (2) all e-mails of two named CPS Energy employees that contain four specified key phrases during a stated time period, and (3) information regarding payments made to two named entities during a stated time period. CPS Energy states it will release some responsive information to the requestor. CPS Energy claims some of the submitted information is not subject to the Act. CPS Energy also claims some of the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.111, and 552.133 of the Government Code. Additionally, CPS Energy states release of the submitted information may implicate the proprietary interests of the following third parties: Alamo Area Council of Governments; American Gas Association; American Public Gas Association; American Public Power Association; City of San Antonio (the "city"); Large Public Power Association ("LPPC"); Texas Advanced Energy Business Alliance; Texas Electric Transportation Resources Alliance; and Texas Public Power Association. Accordingly, CPS Energy states, and provides documentation showing, it notified these interested third parties of the request for information and of their 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). We have received

comments from the city and LPPC.¹ We have considered the submitted arguments and reviewed the submitted information.

Initially, CPS Energy argues some of the submitted information is not “public information” subject to disclosure under the Act. Section 552.002(a) of the Government Code defines “public information” as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;
or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Gov’t Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Upon review, we find the information at issue has significance other than its use as a tool for the maintenance, manipulation, or protection of public property. Thus, we conclude the information at issue is “public information” as defined by section 552.002, and it is subject to disclosure under the Act. Therefore, we will address whether the information at issue is otherwise excepted from disclosure under the Act.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from the city and LPPC regarding the information at issue. Thus, we have no basis to conclude the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized

¹ In its letter to our office, the city represents it does not object to the release of the information at issue.

allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Therefore, CPS Energy may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 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 at issue because CPS Energy is competing with other electric energy suppliers in the wholesale energy market and is also competing with other cities attempting to partner with clean energy companies. In addition, CPS Energy states release of the information at issue “would significantly impede CPS Energy’s chances of negotiating favorable agreements . . . and give [CPS Energy’s competitors] a competitive advantage in enticing clean energy companies to their city.” Further, CPS Energy states release of the information at issue “would allow competing cities, city-owned utilities, and private utilities to offer more favorable terms to clean energy associated companies, which would harm CPS Energy’s competitive position in future procurements of clean energy opportunities.” Based upon these representations and our review, we find CPS Energy demonstrated it has specific marketplace interests and release of information at issue would give advantage to a competitor or bidder. Accordingly, CPS Energy may withhold the information it indicated under section 552.104(a) of the Government Code.²

As noted above, section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may also invoke this exception, which is subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. LPPC states it has competitors. In addition, LPPC explains release of the information it indicated would give its competitors an advantage. After review of the information at issue and consideration of the arguments, we find LPPC has established the release of the information at issue, which we marked, would give an advantage to a competitor or bidder. Accordingly, we conclude CPS Energy may withhold the information we marked under section 552.104(a) of the Government Code.³

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). Section 552.133 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.

² As our ruling is dispositive, we need not address CPS Energy’s remaining arguments against disclosure of this information.

³ As our ruling is dispositive, we need not address LPPC’s remaining argument against disclosure of this information.

(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:

(A) generation unit specific and portfolio fixed and variable costs, including forecasts of those costs, capital improvement plans for generation units, and generation unit operating characteristics and outage scheduling;

(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;

(D) risk management information, contracts, and strategies, including fuel hedging and storage;

(E) plans, studies, proposals, and analyses for system improvements, additions, or sales, other than transmission and distribution system improvements inside the service area for which the public power utility is the sole certificated retail provider; and

(F) customer billing, contract, and usage information, electric power pricing information, system load characteristics, and electric power marketing analyses and strategies[.]

Id. § 552.133(a)-(a-1)(1). We note section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *See id.* § 552.133(a-1)(2). We understand CPS Energy is a municipally-owned utility. Thus, CPS Energy is a public power entity for purposes of section 552.133. CPS Energy states release of the information it indicated would negatively impact CPS Energy’s competitive position within the wholesale energy market and would cause financial harm to CPS Energy and its customers. 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 upon CPS Energy’s representations and our review, we find the information at issue relates to a competitive matter as defined by section 552.133(a-1). *See id.* § 552.133(a-1)(1)(A)-(F). Accordingly,

we conclude CPS Energy must withhold the information it indicated under section 552.133 of the Government Code.⁴

Section 552.110 of the Government Code protects (1) trade secrets obtained from a person and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 552.110(a)-(b). Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” *Id.* § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6. LPPC asserts a portion of its remaining information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find LPPC has established the release of its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury to LPPC. Accordingly, CPS Energy must withhold the pricing information pertaining to LPPC, which we marked, under section 552.110(b) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees or officials of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.⁵ Gov’t Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Accordingly, if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, CPS Energy must withhold the cellular telephone numbers we indicated under section 552.117(a)(1) of the Government Code. Conversely, if the individuals at issue did not timely request confidentiality under section 552.024 or the

⁴ As our ruling is dispositive, we need not address CPS Energy’s remaining arguments against disclosure of this information.

⁵ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

cellular telephone service is paid for by a governmental body, CPS Energy may not withhold the indicated information under section 552.117(a)(1) of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find CPS Energy must withhold the conference call telephone numbers and access codes it indicated under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body[.]” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). However, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or a personal e-mail address belonging to a CPS Energy employee or official used to conduct official government business. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). We are unable to determine whether the e-mail addresses within the remaining information belong to CPS Energy employees or officials or fall within the scope of section 552.137(c). Accordingly, we must rule conditionally. To the extent the e-mail addresses within the remaining information belong to employees or officials of CPS Energy or to the extent subsection (c) applies, the e-mail addresses may not be withheld under section 552.137 of the Government Code. However, to the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of employees or officials of CPS Energy and subsection (c) does not apply, CPS Energy must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See Gov’t Code § 552.137(b).*

We note some of the remaining information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, CPS Energy may withhold the information it indicated under section 552.104(a) of the Government Code. CPS Energy may withhold the information pertaining to LPPC we marked under section 552.104(a) of the Government Code. CPS Energy must withhold the information it indicated under section 552.133 of the Government Code. CPS Energy must withhold the pricing information pertaining to LPPC, which we marked, under section 552.110(b) of the Government Code. If the individuals whose information is at

issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, CPS Energy must withhold the cellular telephone numbers we indicated under section 552.117(a)(1) of the Government Code. CPS Energy must withhold the conference call telephone numbers and access codes it indicated under section 552.136 of the Government Code. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of employees or officials of CPS Energy and subsection (c) does not apply, CPS Energy must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. CPS Energy must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/mo

Ref: ID# 791876

Enc. Submitted documents

c: Requestor
(w/o enclosures)

11 Third Party
(w/o enclosures)