



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 9, 2020

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

OR2020-00935

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# 805370.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS Energy") received a request for all records pertaining to a specified incident, including certain information regarding utilities at specified property on a specified date. You state CPS Energy will release some responsive information to the requestor. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code.<sup>1</sup> We have considered the claimed exception and reviewed the submitted information.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 (2002). Rule 192.5 defines work product as:

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<sup>1</sup> Although you also raise section 552.101 of the Government Code, you provide no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume CPS Energy no longer asserts this exception. See Gov't Code §§ 552.301, .302.

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You assert the submitted information consists of attorney work product under section 552.111 of the Government Code. You explain the information at issue consists of materials prepared by an attorney for CPS Energy in the course of an investigation in anticipation of litigation. You state CPS Energy reasonably anticipated litigation pertaining to the information at issue. Upon review, we find you demonstrated the information at issue was prepared in anticipation of litigation. Accordingly, CPS Energy may withhold the submitted information under the attorney work product privilege of section 552.111 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 <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,

A handwritten signature in black ink, appearing to read "James M. Graham". The signature is fluid and cursive, with the first name being the most prominent.

James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/gw

Ref: ID# 805370

Enc. Submitted documents

c: Requestor  
(w/o enclosures)