



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 26, 2020

Ms. Stacey Cormican
Attorney
CPS Energy
145 Navarro Street
San Antonio, Texas 78205

OR2020-21468

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# 840765.

The City Public Service Board of San Antonio d/b/a CPS Energy ("CPS Energy") received a request for information related to a specified competitive bidding situation.¹ CPS Energy claims the submitted information is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. Additionally, CPS Energy states release of the submitted information may implicate the proprietary interests of Fremont Industrial Corp.; Alamo Iron Works; Techline, Inc.; MSC Industrial Supply Co.; Graybar; Wesco International, Inc.; HD Supply Solutions; Mountain Valley Supply; and Sunbelt Mill Supply. Accordingly, CPS Energy states, and provides documentation showing, it notified the third parties of the request for information and of the right to submit arguments to this office as to why the submitted 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 reviewed the submitted arguments and the submitted information.

¹ CPS Energy states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Initially, 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) 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 not received comments from any of the third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the third parties have a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring provision of specific factual evidence demonstrating applicability of exception). Accordingly, CPS Energy may not withhold the submitted information on the basis of any proprietary interest any of the third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would "harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future." 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). After review of the information at issue and consideration of the arguments, we find CPS Energy has failed to demonstrate the applicability of section 552.104 to the information at issue. Thus, we conclude CPS Energy may not withhold the information at issue under section 552.104(a) of the Government Code.

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:

(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:

...

(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[.]

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

CPS Energy states it is a municipally owned electric utility. Thus, CPS Energy is a public power entity for purposes of section 552.133. Upon review, we find CPS Energy has failed to demonstrate the submitted information relates to any competitive matter as defined by section 552.133(a-1). Thus, we conclude CPS Energy may not withhold the information under section 552.133 of the Government Code. CPS Energy must release the submitted information.

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,

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jxd

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c: Requestor

9 Third parties