



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 5, 2022

Mr. W. Logan Lewis
Director, Legal Services Division
CPS Energy
500 McCullough
San Antonio, Texas 78215

OR2022-12849

Dear Mr. Lewis:

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# 943478.

The City Public Service Board of San Antonio d/b/a CPS Energy ("CPS Energy") received a request for specified employment records and complaints relating to the requestor. You state CPS Energy will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.152 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed investigation that is subject to section 552.022(a)(1). CPS Energy must release the

completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* Although you raise sections 552.107 and 552.111 of the Government Code for the submitted information, we note these are discretionary exceptions and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). As such, CPS Energy may not withhold any portion of the submitted information under section 552.107 or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and your attorney work product privilege claim under rule 192.5 of the Texas Rules of Civil Procedure. Additionally, because sections 552.101 and 552.152 of the Government Code can make information confidential under the Act, we will address the applicability of these exceptions to the submitted information.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. Rule 192.5 defines work product as:

- (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. *Id.* 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 claim the submitted information consists of privileged attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state the submitted information consists of materials prepared by CPS Energy attorneys or employees under the direction of CPS Energy attorneys in anticipation of litigation. Upon review, we find you have demonstrated the information at issue was prepared in anticipation of litigation. Therefore, we conclude CPS Energy may withhold the submitted information under Texas Rule of Civil Procedure 192.5.¹

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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/mo

Ref: ID# 943478

c: Requestor

¹ As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.