



August 4, 1999

Mr. Paul M. Gonzalez  
Matthews and Branscomb, P.C.  
106 South St. Mary's Street, Suite 700  
San Antonio, Texas 78205

OR99-2195

Dear Mr. Gonzalez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 126182.

The City Public Service Board of San Antonio (the "CPS") received a request for information concerning

- 1) the development and execution of the Lignite Mining Lease and Assignment Agreement dated December 28, 1998 between CPS and the Aluminum Company of America ("Alcoa"),
- 2) the development and execution of the Water Rights Acquisition and assignment Contract dated December 31, 1998 between CPS and San Antonio Water System ("SAWS"), and
- 3) the assignment of lignite leases from the Mountaineer Coal Development Company to CPS.

You have released some of the information to the requestor. You have informed the requestor that you have no documents responsive to item 3. For the remainder of the requested information, you argue that it is excepted from disclosure by sections 552.104, 552.105, 552.107, 552.110, 552.111, and 552.113 of the Government Code.<sup>1</sup> You have submitted the documents you seek to withhold.

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<sup>1</sup>You have submitted no arguments showing the applicability of section 552.113 to withhold the requested information. Gov't Code § 552.301. Thus, you may not withhold the requested information under section 552.113.

Section 552.104 states that:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). In order to withhold information from disclosure based on section 552.104, a governmental body must show that release of the requested information could cause specific harm to that body's legitimate marketplace interests. *Open Records Decision No. 593 at 9 (1991).*

You argue that Attachment B, the Alcoa Agreement, and Exhibits A and B of Attachment C, a list of CPS properties and the Alcoa Agreement respectively, may be withheld. A municipal utility is authorized by statute to engage in competition. *See* Open Records Letter No. 96-1307 (1996). You explain that CPS has acquired properties with lignite reserves over the years in order to diversify its fuel supplies. You further explain that "[a]s part of that diversification, CPS intensified its efforts to obtain lignite reserves adequate for its future power generation needs. Success in continuing to assemble lignite rights and in preserving the value of the CPS investment requires that CPS protect certain project information."

CPS recently entered into an agreement to lease its fee-owned lignite properties to Alcoa. Under the terms of the agreement, CPS will collect royalties on the lignite produced by Alcoa, and CPS has the right to take lignite for power generation. You contend that although the Alcoa agreement is currently in effect, valid reasons remain to protect the information. Acquiring additional lignite reserves and lignite mining rights continues to be a crucial objective of CPS's project. In order to mine lignite, additional properties, in addition to the currently owned CPS properties will be needed, and a number of tracts continue to be targeted as desirable additions to the lignite project. You explain that either Alcoa or CPS may acquire these additional properties. CPS's principal competitor in this area is the Zeigler Coal Holding Company ("Zeigler"), which also possesses lignite reserves in the area and has contacted Alcoa about mining and developing its reserves. You assert that

[b]ecause Alcoa is not required to mine from CPS's properties under the Alcoa Agreement, the viability of CPS royalties under that agreement are vulnerable to competition. Release of data reflecting the amount of these royalties and related cost data used to develop them could severely impair CPS's competitive position, by allowing competing suppliers such as Ziegler [sic] to undercut the negotiated Alcoa Agreement.

....

Signing the Alcoa Agreement did not eliminate the requirement to protect the CPS position, as additional lignite rights must be acquired by either Alcoa or CPS in order to move forward with a mining project. If commercial terms of the lease, ownership information and the related evaluations and economic studies are publicized, competing interests, such as Zeigler could act to eliminate or diminish CPS's potential benefits under the lease and the ultimate value to CPS of its property interests.

After reviewing your arguments, we conclude that CPS has established that release of most of the information for which it seeks to withhold under section 552.104 could cause specific harm to its marketplace interests in a particular competitive situation. Accordingly, CPS may withhold the Alcoa agreement, submitted as Attachment B and Exhibit B of Attachment C, and Attachments D(2), (3), and (4) under section 552.104.<sup>2</sup> However, you must release Exhibit A of Attachment C, the list of CPS properties, and the same information contained in the submitted attachments. The list contains information that is publicly filed in the deed records of Bastrop and Lee Counties and must be released.<sup>3</sup>

Next, before we consider your section 552.111 claim, we will consider your assertion that the documents in Attachment G are not subject to the Public Information Act because they are the personal notes of an employee. Section 552.021 of the act provides for public access to "public information." Section 552.002 defines "public information" as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. While Open Records Decision No. 77 (1975) found that personal notes made by individual faculty members for their own use as memory aids were not subject to the act, Open Records Decision No. 450 (1986) found that notes of appraisers taken in the course of teacher appraisals were public information. *See also* Open Records Decision Nos. 635 (1995) (public official's or employee's appointment calendar, including personal entries, may be subject to act), 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are public information), 145 (1976) (handwritten notes on university president's calendar not public information), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam

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<sup>2</sup>Because section 552.104 excepts this information from public disclosure, we do not address your claims under sections 552.105 and 552.111 for the same information.

<sup>3</sup>Because the list of CPS properties is a public record, you may not withhold the list under section 552.105 either.

subject to act), 116 (1975) (portions of desk calendar kept by governor's aide and aide's notes made solely for his own informational purposes not public information).

You explain that the notes were created solely for the employee's use and are solely in that employee's possession. You further state that the notes are not maintained in CPS's files, are not required by CPS, and are not controlled by CPS. However, you further state that the notes "represent the basis for advice, opinions and recommendations of the individual recording the notes as provided verbally or otherwise to others during the course of his work." Based on your representations and our review of the records, we believe that the information at issue in Attachment G consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business." See Gov't Code § 552.002. Therefore, we conclude that the notes in Attachment G are subject to the act.

You assert that section 552.111 excepts Attachments D(1) and (5), F(1) and (2), and G from public disclosure. Section 552.111 excepts "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). This exception applies not only to a governmental body's internal memoranda, but also to memoranda prepared for a governmental body by its outside consultant. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).

Section 552.111 also excepts from required public disclosure preliminary *drafts* of documents if those documents are related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final documents. See Open Records Decision No. 559 (1990). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. ORD 615. However, when such factual matter is contained in the final version of the document, the release of the final version satisfies this requirement. *Id.*

CPS manages and controls San Antonio's gas and electric systems. You explain that to "provide a diversified fuel mix and insulate against increases in the cost of the other fuels supplies presently relied upon," CPS must decide on the best use of its utilities and assets and how to develop its properties to "earn revenues for the benefit of its owning city and its ratepayers." We have reviewed the submitted information and conclude that section 552.111

excepts Attachments D(1) and (5) and F(1) and (2) from required public disclosure as draft documents and information consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of CPS, provided any factual information contained in the drafts is also contained in the released final versions.<sup>4</sup> You may also withhold most of the information in Attachment G under section 552.111. However, we have marked the factual information in Attachment G that is not excepted from public disclosure by section 552.111 and must be released.

Lastly, because the property rights of third parties may be implicated by the release of the requested information, this office notified Alcoa and SAWS of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). However, we need not address Alcoa's and SAWS's arguments as the information is otherwise excepted from public disclosure by sections 552.104 and 552.111. The information that must be released does not involve any proprietary information of Alcoa or SAWS.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/nc

Ref: ID# 126182

Encl.: Marked documents

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<sup>4</sup>Because section 552.111 excepts this information from public disclosure, we do not address your section 552.107 claim for the same information.

cc: Ms. Ann Mesrobian  
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