



November 6, 2001

Ms. Zandra L. Narvaez
Legal Services Division
City Public Service of San Antonio
P.O. Box 1771
San Antonio, Texas 78296-1771

OR2001-5123

Dear Ms. Narvaez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154474.

The City of San Antonio Public Service Board ("CPS") received a request for information relating to the City of Kirby, including "[e]ach city owned facility listed separately" and "[t]he electric utility cost of each facility, by month or monthly average, for the past 12 months." You state that CPS does not collect, assemble, or maintain information regarding the ownership of facilities. Chapter 552 of the Government Code does not require a governmental body to make available information that does not exist or to prepare new information.¹ The governmental body must make a good faith effort, however, to relate a request to information that it holds or to which it has access.² You state that CPS has made a good faith effort to relate this request to information that it holds. You claim that the responsive information is excepted from disclosure under section 552.133 of the Government Code. We have considered the exception you raise and have reviewed the representative sample of information you submitted.³

¹ See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. - San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 362 at 2 (1983).

² See Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989).

³ This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes CPS to withhold any responsive information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.133 excepts from disclosure information held by a public power utility that is related to a competitive matter.⁴ See Gov't Code § 552.133(b). The exception defines "competitive matter" as a matter that the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity. *Id.* § 552.133(a)(3). The governing body must also determine, in like manner, that the release of the information would give an advantage to competitors or prospective competitors. *Id.* Section 552.133(a)(3) lists thirteen categories of information that may not be deemed to be competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the information at issue only if, based on the information provided, the attorney general determines that the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c). Furthermore, section 552.133(b) provides:

Information or records are excepted from [required public disclosure] if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. *Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter*, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b) (emphasis added).

You state that CPS is a public power utility for purposes of section 552.133 and that the CPS Board of Trustees is a public power utility governing body under section 552.133(a). You explain that pursuant to section 552.133, the CPS board has determined by resolution that "all information regarding retail customers" constitutes a competitive matter which, if disclosed, would provide an advantage to existing or prospective competitors. You represent to this office that the information at issue "relates to" protected customer information." We have considered your representations and have reviewed the supporting documentation you submitted. We note that the information at issue is not clearly among the thirteen categories of information that are expressly excluded from the definition of competitive matter, and we

⁴The Seventy-seventh Legislature renumbered former section 552.131, "Exception: Public Power Utility Competitive Matters," as section 552.133. The revision was non-substantive. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2812, § 21.001(52) (to be codified at Gov't Code § 552.133).

have no evidence that CPS failed to act in good faith. *See* Gov't Code § 552.133(a)(3), (c). Consequently, we agree that this information relates to a competitive matter in accordance with CPS's resolution and is therefore excepted from disclosure under section 552.133 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

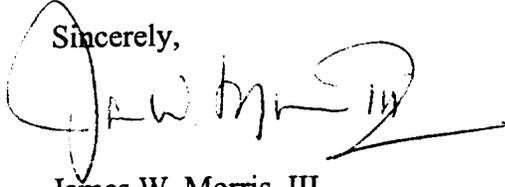
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a large, stylized flourish extending from the end of the signature.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 154474

Enc: Submitted documents

c: Mr. Bill Petersen
Account Executive
Polar Distributors
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San Antonio, Texas 78244
(w/o enclosures)