



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 8, 2007

Ms. Zandra L. Pulis  
Senior Counsel  
CPS Energy  
P.O. Box 1771  
San Antonio, Texas 78296

OR2007-00269

Dear Ms. Pulis:

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# 268600.

The City Public Service Board of the City of San Antonio, d/b/a CPS Energy ("CPS"), received a request for any grievances filed by or on behalf of a named individual. You claim that you have no responsive information regarding the request. In the alternative, you claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code and Rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted information.

We begin by addressing your claim that the submitted information is not responsive to the request. The Act requires a governmental body to release *only information that it believes to be responsive to a request*. However, in determining whether information is responsive, a governmental body has a duty to make a good faith effort to relate the request to information that it holds. Open Records Decision No. 590 at 1 n. 1 (1991). We have reviewed the submitted information and conclude that it is responsive to the request. We will therefore address whether the exceptions you claim apply.

Next, we must address CPS's obligations under section 552.301 of the Government Code. In accordance with section 552.301(b), a governmental body seeking a ruling from this office must assert the exceptions to disclosure that apply to the requested information no later than the tenth business day after receiving the written request. *See* Gov't Code § 552.301(b). You state that CPS received the present request for information on October 12, 2006. You did not, however, raise rule 503 of the Texas Rules of Evidence until November 2, 2006. You assert that some of the submitted information is protected under section 552.101 of the Government Code in conjunction with the attorney-client privilege pursuant to rule 503. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section does not encompass rule 503 because it is not constitutional law, statutory law, or a judicial decision. Open Records Decision No. 676 at 1-2 (2002). Thus, your claim under rule 503 is not made timely by your original claim under section 552.101 of the Government Code. Consequently, you failed to comply with the ten-business-day deadline mandated in section 552.301(b) with respect to your claim under rule 503.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). This office has determined that discovery privileges, such as rule 503 of the Texas Rules of Evidence, do not constitute compelling reasons to overcome the presumption of openness under section 552.302. *See, e.g.*, Open Records Decision No. 676 at 11 (2002) (assertion of rule 503 does not demonstrate "compelling reason" under section 552.302 to prohibit governmental body's release of information). Therefore, none of the submitted information may be withheld from disclosure under rule 503 of the Texas Rules of Evidence.

Next, you claim that the submitted information is excepted from disclosure by section 552.103 of the Government Code. Section 552.103 provides, in pertinent part, as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents to show that the exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body received the request for information and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990); Gov't Code § 552.103(c). To establish the applicability of section 552.103(a) to information it seeks to withhold, CPS must meet both prongs of this test. Furthermore, we note that once all parties to litigation have obtained information through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). You state that the submitted information consists of an employee grievance form and attachments sent to CPS by the opposing party in the pending litigation. As these documents were obtained from the opposing party in the pending litigation, no section 552.103(a) interest exists with respect to this information. Therefore, we conclude that CPS may not withhold any of the requested documents under section 552.103 of the Government Code.

We note, however, that a portion of the submitted information may be protected by section 552.117 of the Government Code.<sup>1</sup> Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. In this case, you do not inform us nor provide documentation showing that the employee at issue timely elected confidentiality under section 552.024. Thus, if the employee timely elected to keep his personal information confidential, you must withhold this information, which we have marked, under section 552.117(a)(1). CPS may not

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

withhold this information under section 552.117(a)(1) if this employee did not make a timely election to keep the information confidential. The remaining submitted information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

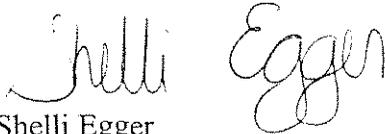
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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 cursive script that reads "Shelli Egger". The signature is written in black ink and is positioned above the typed name.

Shelli Egger  
Assistant Attorney General  
Open Records Division

SE/sdk

Ref: ID# 268600

Enc. Submitted documents

c: Ms. Elizabeth Albanese  
Southwest Bureau Chief  
The Bond Buyer  
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(w/o enclosures)