



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2009

Mr. Geoffrey M. Gay
General Counsel
Cities Aggregation Power Project, Inc.
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2009-07317

Dear Mr. Gay:

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# 344383.

The Cities Aggregation Power Project, Inc. ("CAPP"), which you represent, received a request for the following information: (1) CAPP check registers covering a specified time period, (2) CAPP meeting minutes during a specified time period, (3) auditor reports received by CAPP, and (4) bank deposits by CAPP during a specified time period. You state that all of the responsive information pertaining to categories 1, 3, and 4, and a portion of the information responsive to category 2, have been released to the requestor. You claim that portions of the submitted minutes are excepted from disclosure under sections 552.104 and 552.107 of the Government Code. You additionally state that release of marked portions of the minutes would implicate the proprietary interests of third parties. Thus, pursuant to section 552.305 of the Government Code, you were required to notify the interested third parties of the request and of their opportunity to submit comments to this office explaining why their information should be withheld from disclosure. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

You first assert that portions of the submitted minutes are excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the marked information reveals communications between members of the CAPP board, its representatives, and its attorney that were made in furtherance of the rendition of professional legal services to CAPP. You have identified the CAPP board members, representatives, and attorneys who are parties to these communications. You state that these communications have remained confidential and have not been revealed to any third party. Based on your representations and our review of the submitted information, we agree that most of the information you have marked reveals confidential communications between privileged parties. Accordingly, this information, which we have marked, is protected by the attorney-client privilege and may be withheld under section 552.107(1). However, the remaining information you marked as privileged attorney-client communication is from the minutes of a meeting in which CAPP met jointly with the Board of Directors of South Texas Aggregation Project, Inc. (“STAP”). You do not inform this office of the nature of CAPP’s relationship with STAP or whether STAP’s board members are privileged parties. Thus, you

have failed to establish how this information constitutes a communication between or among CAPP representatives and attorneys for the purposes of section 552.107, and it may not be withheld on this basis.

Next, you assert portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code, which applies to "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You indicate that CAPP competes in Texas' deregulated wholesale electric energy market on behalf of its member municipalities. Based on this representation, we find you have established CAPP has legitimate marketplace interests in the purchase and sale of electricity for the purposes of section 552.104. You state that the majority of information you seek to withhold under section 552.104 relates to a contract negotiated between CAPP and a third party, Luminant. You further explain that this contract was subsequently abandoned by CAPP. Although you generally argue that release of the marked information could harm CAPP's future negotiations on the wholesale electricity market, section 552.104 requires a governmental body to demonstrate harm in connection with a specific competitive situation. You have not, however, provided any arguments explaining how the release of the marked portions of the minutes would harm CAPP's interests in a specific competitive situation. Thus, we conclude you have not established the applicability of section 552.104 to the information you marked, and none of it may be withheld on that basis.

You finally assert that release of some of the marked information would significantly affect the financial interests of CAPP member municipalities and their taxpayers, and thus should be withheld under section 552.110 of the Government Code. This exception protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110 (a), (b). However, section 552.110 only protects the interests of private parties that submit information to governmental bodies. *Id.* As of the date of this letter, we have not received comments from any third party explaining why the marked information should not be released. *See id.*; Open Records Decision Nos. 661 at 5-6 (1999)

(to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that CAPP may not withhold any of the information you marked under section 552.110.

In summary, CAPP may withhold the information we have marked under section 552.107(1). The remaining information must be released.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 344383

Enc. Submitted documents

cc: Requestor
(w/o enclosures)