



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2009

Mr. Gabriel Garcia
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2009-17446

Dear Mr. Garcia:

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# 363734 (COSA File No. 09-1175).

The City of San Antonio (the "city") received a request for the reports created by two consulting firms hired by the city, CRA International, Inc. ("CRA") and the Brattle Group ("Brattle"), regarding CPS Energy's nuclear project. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.111, and 552.133 of the Government Code. In addition, you claim release of some of the requested information may implicate the proprietary interests of the Toshiba America Nuclear Energy Corporation ("Toshiba") or Nuclear Innovation North America ("NINA"). Accordingly, you state, and provide documentation showing, that you notified Toshiba and NINA of the city's receipt of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). CPS Energy ("CPS") has also submitted comments to this office objecting to the release of its information. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, you state the city has not submitted any responsive information that was created or provided to the city prior to July 2, 2009, which includes all responsive information regarding CRA, because such information was the subject of two previous requests received by the city, in response to which this office issued Open Records Letter Nos. 2009-13312 (2009) and 2008-02889 (2008). In each of these rulings, we concluded the city must withhold the submitted information in its entirety under section 552.133 of the Government Code. You state there has not been any change in the law, facts, or circumstances on which

these previous rulings were based, and we have no information to the contrary. Thus, we agree the city must rely on Open Records Letter Nos. 2009-13312 and 2008-02889 and continue to withhold the responsive information created prior to July 2, 2009 in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, because the submitted information is not subject to any previous determination, we will consider your arguments against its disclosure.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information related to a competitive matter. Section 552.133(b) provides:

Information or records are excepted from the requirements of Section 552.021 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). Section 552.133(a)(3) defines a "competitive matter" as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. *See id.* § 552.133(a)(3). However, section 552.133(a)(3) also provides thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining the issue, matter, or activity is a competitive matter or the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

You inform us CPS is a city-owned public power utility for purposes of section 552.133. You also inform us, and provide documentation showing, the CPS Board of Trustees (the "board"), as governing body of a public power utility, adopted a policy defining "competitive matter" for purposes of section 552.133. The city and CPS assert the submitted information falls within the scope of this policy. This policy defines "competitive matter" to be, among other things, business plans that include detailed information, analysis, plans, and strategies,

internal consulting reports related to such plans, and consulting project work papers consisting of correspondence, documents, and analysis developed to review otherwise competitive matters. The submitted information consists of e-mails between Brattle employees and city employees and attorneys, the attachments to those e-mails, as well as a contract between the city and Toshiba. Upon review, the e-mails, attachments, and contract directly relate either to Brattle's consulting report analyzing the proposed expansion of a nuclear project involving the city, or to working papers used in Brattle's creation of that report. The information at issue is not among the thirteen categories of information that section 552.133(a)(3) expressly excludes from the definition of "competitive matter." Furthermore, we have no evidence the board failed to act in good faith regarding this matter. *See id.* § 552.133(c). Consequently, we determine that the submitted information reasonably relates to competitive matters in accordance with the submitted policy. Therefore, the city must withhold the submitted information pursuant to section 552.133 of the Government Code.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 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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 363734

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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

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