



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 24, 2012

Mr. Kipling D. Giles
Senior Counsel
CPS Energy
P.O. Box 1771
San Antonio, Texas 78296

OR2012-05844

Dear Mr. Giles:

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# 451513.

The City Public Service Board of the City of San Antonio d/b/a CPS Energy ("CPS") received a request for five categories of information pertaining to CPS expenditures, two named individuals, Lincoln University, and the requestor or the requestor's requests under the Act. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503.¹ We have considered the exceptions you claim and reviewed the submitted information, portions of which are representative samples.²

Initially, we note some of the submitted information, which CPS has indicated, was specifically excluded from the request, or is not responsive to the request. Thus, this information is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and CPS need not release any such information.

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision No. 676 at 1-2 (2002).

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Next, we note portions of the responsive information are subject to section 552.022(a) of the Government Code, which provides in part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(2), (3). In this instance, the responsive information includes employee name, title, and salary information, and information in an account, voucher, or contract relating to the expenditure of public funds by CPS. Thus, CPS must release this information pursuant to subsections 552.022(a)(2) and 552.022(a)(3) unless the information is confidential under the Act or other law. *Id.* § 552.022(a)(2), (3). Although you raise section 552.107(1) and the deliberative process privilege in section 552.111 for this information, these are discretionary exceptions to disclosure and do not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 677 at 10-11 (2002) (deliberative process privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). Therefore, CPS may not withhold the information at issue under these sections. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also consider your arguments under section 552.107(1) and the deliberative process privilege in section 552.111 for the information that is not subject to section 552.022.

Texas Rule of Evidence 503 encompasses the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert some of the information subject to section 552.022 documents privileged attorney-client communications between the attorneys in CPS's legal department and CPS employees that was made for the purpose of the rendition of legal services to CPS. You state the communications at issue were intended to be confidential and have remained confidential. Based on these representations and our review of the information at issue, we conclude CPS may withhold the information at issue, which we have marked, under Texas Rule of Evidence 503.

Next, we consider your argument under section 552.107 of the Government Code for the remaining information at issue not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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 some of the remaining responsive information also pertains to the rendition of legal services to CPS by the CPS legal department. You also state the communications at issue were intended to be confidential and have remained confidential. Based on these representations and our review, we conclude the remaining responsive information you have marked constitutes privileged attorney-client communications. Accordingly, CPS may withhold this information under section 552.107(1) of the Government Code.³

Section 552.111 of the Government Code excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You contend the remaining e-mail correspondence and attachments you have marked under section 552.111 consist of communications between CPS employees regarding responses to requests for information under the Act. Based on your arguments and our review, we find you have demonstrated some of the remaining information at issue pertains to CPS’s policymaking processes, including the classification of employees. We also find portions of this information contain the advice, recommendations, and opinions of CPS employees

³As our ruling is dispositive, we need not address your remaining argument against disclosure for portions of this information.

regarding these policy issues. Based on your arguments and our review, we find you have established the deliberative process privilege is applicable to most of the remaining information at issue. However, CPS has failed to establish how the information we have marked for release consists of advice, recommendations, or opinions pertaining to policy making processes of CPS. Rather, the remaining information at issue consists of administrative matters related to responding to requests for information under the Act. Accordingly, CPS may not withhold this remaining information at issue, which we have marked for release, under section 552.111 of the Government Code on that basis. Therefore, with the exception of the information we have marked for release, CPS may withhold the remaining information at issue under section 552.111 of the Government Code.

In summary, CPS may withhold the information subject to section 552.022 under Texas Rule of Evidence 503. CPS may withhold the remaining information it has marked under section 552.107(1) of the Government Code. With the exception of the information we have marked for release, CPS may withhold the remaining information it has marked under section 552.111 of the Government Code. CPS must release the remaining information.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 451513

Enc. Submitted documents

c: Requestor
(w/o enclosures)