



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 24, 2009

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701

OR2009-08718

Dear Ms. Alexander:

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# 346937.

The Texas Department of Transportation (the "department") received a request for "correspondence between [the department] or its representatives and any utility company or its representatives, legal counsel, or otherwise regarding layout or relocation of services" related to certain property. The requestor limited the portion of the request pertaining to Atmos Energy Corporation ("Atmos") to "documents subsequent to 12/15/2008[.]" You indicate that the department will release a responsive minute order. You claim that the remaining requested information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code. You also state that some of the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you have notified the interested third parties of the request for information and their right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> 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

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<sup>1</sup>The third parties that received notice pursuant to section 552.305 are the following: Atmos, Cherokee County Electric Cooperative ("Cherokee"), Southern Utilities Water Company, and Southwestern Bell Telephone d/b/a AT&T.

exception in the Act in certain circumstances). We have received comments from Cherokee. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

We begin by noting that some of the submitted Atmos documents are not responsive to the instant request for information, as they were created outside of the requested date range. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release that information in response to this request.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third party other than Cherokee. Thus, we have no basis for concluding that any portion of the submitted information constitutes the proprietary information of the remaining companies, and none of their information may be withheld on that basis. *See id.* § 552.110; 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).

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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

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<sup>2</sup>We 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.

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(3), (5). Contracts fall within the scope of subsection (3) of section 552.022(a), while the information used to estimate the need for or expenditure of public funds is made public pursuant to section 552.022(a)(5). Therefore, the department may only withhold this information if it is confidential under "other law." You seek to withhold the information at issue under sections 552.105 and 552.111 of the Government Code. However, sections 552.105 and 552.111 are discretionary in nature and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Thus, none of the information subject to section 552.022 may be withheld under these exceptions. As no other exception to disclosure of this information has been raised, we conclude that the information we have marked must be released pursuant to section 552.022 of the Government Code.

We now address your claims for the information not subject to section 552.022 of the Government Code. Section 552.105 of the Government Code excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564, 357 (1982), 310 (1982). Information protected by section 552.105 that pertains to such negotiations may be withheld for so long as the transaction is not complete. *See* ORD 310. Under section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You explain that the utilities must be relocated from the department's right of way and the department plans to reimburse the utilities "for the eligible expenses including purchase of property by the eligible utilities." You state the department has made a good-faith determination that the requested information relates to the appraisal or purchase price of real property pertaining to a road project that the department "intends to pay for." Further, we understand you to assert that release of the requested information would harm the department's negotiating position when purchasing the property at issue. Based on your representations and our review, we conclude the department may withhold the remaining information under section 552.105 of the Government Code.

In summary, the information subject to section 552.022 of the Government Code must be released. The department may withhold the remaining information under section 552.105 of the Government Code. As our ruling is dispositive, we do not address the remaining arguments.

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](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 346937

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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