



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 16, 2010

Ms. Cary Grace  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2010-05403

Dear Ms. Grace:

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# 376173.

The City of Austin (the "city") received a request for several categories of information relating to annual expenditures by Austin Energy. You state most of the responsive information has been released. You claim the submitted information is excepted from disclosure under section 552.133 of the Government Code. We have considered the exception you claim and reviewed the submitted information, a portion of which is a representative sample.<sup>1</sup>

Initially, you acknowledge that the city failed to timely request a ruling from our office. *See* Gov't Code § 552.301(b). A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. *Id.* §552.302. In order to overcome the presumption that the requested information is public information, a governmental body must provide a compelling reason why the information should not be disclosed. *See Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379, 381-

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<sup>1</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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); *see also* Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records Decision No. 150 (1977). Because section 552.133 of the Government Code can provide a compelling reason for non-disclosure, we will consider whether this exception is applicable to the submitted information.

Section 552.133 of the Government Code excepts from disclosure information held by a public power utility that is related to a competitive matter.<sup>2</sup> *See* Gov't Code § 552.133(b). "Competitive matter" is defined as a matter that the public power utility governing body in good faith determines by vote to be related to the utility's competitive activity. *Id.* § 552.133(a)(3). The governing body also must determine, in like manner, that the release of the information would give an advantage to competitors or prospective competitors. *Id.* Section 552.133(a)(3) lists thirteen categories of information that may not be deemed to be competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the information at issue only if, based on the information provided, the attorney general determines that the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c). Moreover, section 552.133(b) provides as follows:

Information or records are excepted from [required public disclosure] 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.

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<sup>2</sup>We note that portions of the submitted information fall within the scope of section 552.022(a)(3) of the Government Code, which requires disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). Section 552.133(d) provides, however, that "[t]he requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under [section 552.133]." *Id.* § 552.133(d).

*Id.* § 552.133(b). You inform us that the Austin City Council, as the governing body of Austin Energy, the city's municipally owned utility, has adopted a resolution that identifies "competitive matters" for the purposes of section 552.133. You have submitted a copy of the resolution. You state that the city council determined in good faith that the items listed in Exhibit A of the resolution are related to Austin Energy's competitive activity and that the release of such information would give advantage to competitors or prospective competitors. You contend that the submitted information falls within the scope of the listed items and thus is subject to section 552.133. We note that the submitted information is not clearly among the thirteen categories of information that section 552.133 expressly excludes from the definition of competitive matter. *See id.* § 552.133(a)(3). Moreover, based on the information provided in connection with this request, we cannot conclude that the city council has failed to act in good faith. *See id.* § 552.133(c). Therefore, based on your representations, the submitted resolution, and our review of the information at issue, we conclude that the city must withhold the submitted information under section 552.133 of the Government Code.

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, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann  
Assistant Attorney General  
Open Records Division

PFW/cc

Ref: ID# 376173

Enc. Submitted documents

c: Requestor  
(w/o enclosures)