



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 15, 2010

Ms. Janis K. Hampton  
City Attorney  
City of Bryan  
P.O. Box 1000  
Bryan, Texas 77805

OR2010-08722

Dear Ms. Hampton:

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# 382760.

The City of Bryan (the "city") received a request for the answers to six questions pertaining to Bryan Texas Utilities ("BTU"). You provide documentation reflecting you have provided answers to two of the questions. 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 representative sample of information.<sup>1</sup>

Initially, you ask whether the city is required to create information responsive to one of the questions. The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the governmental body. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). However, a

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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.

governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 (1990). Thus, if the city does not possess or have access to information responsive to any portion of the request, the city need not create responsive information. However, because you submitted responsive information, we will address your claimed exception to its disclosure.

Next, you claim the information submitted in Exhibit E is not responsive to the request for information because it was not included in the city's 2009 Comprehensive Annual Financial Report ("CAFR"). You claim that, because the requestor references the 2009 CAFR in the subject line of her request for information, she only seeks information contained in that report. However, upon review of the request, we disagree the requestor intended to limit her request to information found in the city's 2009 CAFR. Thus, we address the public availability of Exhibit E along with the other submitted information.

We must address the city's procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You state the city received the instant request for information on March 25, 2010. Accordingly, the city's ten-business-day deadline was April 8, 2010. However, your request for a decision from this office was faxed to this office on April 9, 2010. You do not inform us the city was closed for business on any dates between March 25, 2010, and April 8, 2010. Thus, we conclude the city failed to comply with the requirements mandated by subsection 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (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. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). 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 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 that 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 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).

You state the submitted information pertains to BTU, which you state is a city-owned public power utility for purposes of section 552.133. In addition, you inform us, and provide documentation showing, the Bryan City Council (the "council"), as governing body of BTU, passed a resolution by vote pursuant to section 552.133 in which the council defined the information considered to be within the scope of the term "competitive matter." You assert the submitted records come within the scope of the resolution, which you have provided to this office. Upon review, we agree the submitted financial analyses and projections relate to a competitive matter as defined in these items. We also find the information at issue is not among the thirteen categories of information section 552.133(a)(3) expressly excludes from the definition of competitive matter. Furthermore, we have no evidence the council failed to act in good faith. *See id.* We therefore conclude the city must withhold the submitted information pursuant to 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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/eeg

Ref: ID# 382760

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)