



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2012

Ms. Elaine Nicholson
Assistant City Attorney
City of Austin Law Department
P.O. Box 1088
Austin, Texas 78767-8828

OR2012-08042

Dear Ms. Nicholson:

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# 454876.

Austin Energy received a request for information related to Austin Energy's district energy systems, including the downtown cooling system, Domain cooling system, and Mueller energy system; capital outlay, annual operating and maintenance costs, annual revenues, and annual net profit and loss information for each district energy system for the last ten years; and information related to offers or negotiations to purchase any or all of the district energy systems, including negotiations with two named companies. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note you have not submitted any information related to offers or negotiations to purchase any or all of Austin Energy's district energy systems. To the extent any information responsive to the request for information related to offers or negotiations to purchase any or all of the district energy systems existed on the date Austin Energy received the request for information, we assume Austin Energy has released it. If Austin Energy has not released any

¹We 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.

such information, it must do so at this time. *See id.* §§ 552.301-.302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release information as soon as possible).

Section 552.104 excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

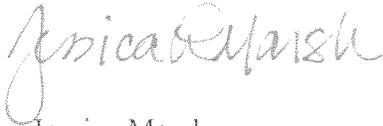
You contend Austin Energy has specific marketplace interests in the information at issue because chiller operations are an unregulated commodity currently open to competition within Austin Energy’s service area. You inform us the wholesale electric market is a highly competitive market in which Austin Energy operates as both a buyer and a seller, and the use of on-site energy resources is a part of Austin Energy’s long-term strategic objectives. You explain each service agreement is individually negotiated based on Austin Energy’s system-wide cost of service and the incremental cost of extending service to the prospective customer. You argue releasing the submitted information would inhibit Austin Energy’s ability to negotiate profitable agreements, would provide information to competitors that gives insight into the competitiveness of the competitor’s offerings, and would harm Austin Energy’s interests. You also argue disclosure of this information would put Austin Energy at a disadvantage in future negotiations for the sale of these services because companies purchasing the service, as well as competitors offering the service, would know Austin Energy’s minimum revenue requirements. Based on these representations and our review, we find you have established Austin Energy has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. Therefore, we find you have demonstrated release of the submitted information would cause specific harm to Austin Energy’s marketplace interests in a particular competitive situation. Accordingly, the submitted information may be withheld under section 552.104 of the Government Code.²

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.

²As our ruling is dispositive, we do not address your remaining argument against disclosure.

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,

A handwritten signature in cursive script that reads "Jessica Marsh".

Jessica Marsh
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 454876

Enc. Submitted documents

c: Requestor
(w/o enclosures)