



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2013

Mr. William P. Chesser
Counsel for City of Coleman
Messer, Rockefeller & Fort, PLLC
4400 Buffalo Gap Road, Suite 2800
Abilene, Texas 79606

OR2013-12349

Dear Mr. Chesser:

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# 493504.

The City of Coleman (the "city"), which you represent, received a request for the totals of charges from American Electric Power Energy Partners, Inc. ("AEP") during a specified period of time.¹ You claim the submitted information is excepted from disclosure under sections 552.110 and 552.133 of the Government Code. Additionally, you state the submitted information may implicate the proprietary interests of AEP. Accordingly, the city notified AEP of the request for information and of its right to submit arguments stating why its information should not be released. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from AEP. We have also received comments from the requestor. *See Gov't Code* § 552.304

¹You state the city received clarification of the request for information. *See Gov't Code* § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

(interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, you request to rely on Open Records Letter Nos. 2013-00209 (2013) and 2013-01141 (2013) as previous determinations and withhold the submitted information in accordance with those rulings. However, we note, and you acknowledge, that the information addressed in Open Records Letter No. 2013-01141 is not the same information that is at issue in the present request. Thus, the city may not rely on Open Records Letter No. 2013-01141 as a previous determination for the submitted information. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

However, we agree some of the submitted information was the subject of the previous request for information that resulted in the issuance of Open Records Letter No. 2013-00209. In that prior ruling, we held the city must withhold the information at issue under section 552.133 of the Government Code. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in that prior ruling, the city must continue to rely on Open Records Letter No. 2013-00209 as a previous determination and withhold the identical information in accordance with that ruling. *See id.* To the extent the submitted information is not encompassed by Open Records Letter No. 2013-00209, we will consider the arguments against its disclosure.

Next, we address the requestor's assertion that she was not timely notified of the city's request for a ruling as required by section 552.301(d) of the Government Code. *See* Gov't Code § 552.301(d) (governmental body must provide requestor with copy of governmental body's written communication to attorney general asking for decision). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Therefore, regardless of whether the city failed to meet its section 552.301(d) burden, because sections 552.110 and 552.133 of the Government Code and the interests of a third-party such as AEP can provide compelling reasons to withhold information, we will consider the submitted arguments.

Section 552.133 of the Government Code exempts from disclosure a public power utility's information that is "reasonably related to a competitive matter." Gov't Code § 552.133(b). Section 552.133 provides in relevant part:

(a) In this section, "public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, "competitive matter" means a utility-related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

...

(B) bidding and pricing information for purchased power, generation and fuel, and Electric Reliability Council of Texas bids, prices, offers, and related services and strategies;

...

(F) customer billing, contract, and usage information, electric power pricing information, system load characteristics, and electric power marketing analyses and strategies[.]

Id. § 552.133(a), (a-1)(1)(B), (F). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *Id.* § 552.133(a-1)(2).

You state the city owns and operates a municipal electric utility system that is a public power utility subject to section 552.133. You assert the submitted information pertains to the city's competitive activity because it includes pricing information for purchased power subject to section 552.133(a-1). You explain release of this information would give competitors an advantage. You indicate, and we agree, the information at issue is not among the fifteen categories of information expressly excluded from the definition of "competitive matter" by section 552.133(a-1)(2). Based on your representations and our review, we find the submitted information relates to competitive matters as defined by section 552.133(a-1). Thus, we conclude the city must withhold the submitted information under section 552.133 of the Government Code.²

²As our ruling is dispositive, we need not address the remaining arguments against disclosure.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2013-00209, the city must continue to rely on that prior ruling as a previous determination and withhold the identical information in accordance with it. To the extent the submitted information is not encompassed by Open Records Letter No. 2013-00209, 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 493504

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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