



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 2, 2004

Mr. Brad Norton  
Assistant City Attorney  
City of Austin - Law Department  
P.O. Box 1546  
Austin, Texas 78767-1546

OR2004-2679

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198635.

The City of Austin (the "city") received a request for the contract between Austin Energy and Kinder Morgan South Texas Pipeline, L.P. and Kinder Morgan Texas Pipeline, L.P. (collectively, "Kinder Morgan") that was approved by the city council on May 22, 2003. The requestor also asks for:

[A]ny and all records within the possession of Austin Energy, produced prior to and after May 22 2003, that includes information about or that makes reference to: a) this Kinder Morgan contract[;] b) the converted crude oil pipeline in question; c) Rancho Pipeline; d) Kinder Morgan Texas Pipeline, L.P.[;] e) Kinder Morgan Energy Partners, L.P.; f) Kinder Morgan, Inc.; g) any Kinder Morgan subsidiary; h) Plains All American Pipeline L.P.; and [i)] TEPPCO (Texas Eastern Products Pipeline Company).

You state that the city has released some responsive information to the requestor. You claim that portions of the remaining information are excepted from disclosure pursuant to a previous determination of this office, and under section 552.133 of the Government Code. You also indicate that release of other portions of the information relating to Kinder Morgan may implicate the company's proprietary interests. Accordingly, you state that the city notified Kinder Morgan of the request and of the company's right to submit arguments to this

office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the exceptions raised by the city and by Kinder Morgan and reviewed the submitted representative sample of information.<sup>1</sup>

As a preliminary matter, you indicate that the requested contract between Austin Energy and Kinder Morgan is the subject of a previous determination of this office issued as Open Records Letter No. 2003-8556 (2003), on November 25, 2003. In that ruling, we determined that the contract at issue is excepted from disclosure pursuant to section 552.133 of the Government Code. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Public Information Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We determine that the present request arises under the same facts and circumstances at issue in Open Records Letter No. 2003-8556. Consequently, we determine that the city may withhold the contract at issue pursuant to our previous determination in Open Records Letter No. 2003-8556.

Next, the city claims that portions of the remaining information at issue are excepted from disclosure pursuant to section 552.133 of the Government Code. 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

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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.

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. Gov't Code § 552.133(c).

The city council passed a resolution by vote pursuant to section 552.133 in which it defined the information within the scope of the term "competitive matter." Upon review, we find that the information the city seeks to withhold in this instance is within the scope of competitive matters as defined in the resolution. Furthermore, we note that the information at issue in this case is not among the thirteen categories of information expressly exempted from the definition of competitive matter. *See* Gov't Code § 552.133(a)(3). Based on the information provided, we have no basis to determine that the city council failed to act in good faith. *See id.* § 552.133(c). Consequently, we determine that the portions of the submitted information the city seeks to withhold under section 552.133 are competitive matters in accordance with the city's resolution and are therefore excepted from disclosure pursuant to section 552.133 of the Government Code.

We next address the arguments submitted by Kinder Morgan with respect to the submitted information that the city has identified as proprietary information of Kinder Morgan. Kinder Morgan asserts that this information is excepted under section 552.133; we note, however, that the city does not seek to withhold this information under section 552.133 of the Government Code. Section 552.133 protects the competitive interests of a public power utility. This exception does not protect the proprietary interests of third parties. As the city does not seek to withhold the information identified as proprietary information of Kinder Morgan under section 552.133, we have no basis to determine that section 552.133 is applicable to this information. Thus, we determine the information at issue may not be withheld under section 552.133.

Kinder Morgan also raises section 552.110 of the Government Code. Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the

disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

This office must accept a claim that information subject to the Public Information Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

In this case, upon review of the comments submitted by Kinder Morgan, we determine that Kinder Morgan has not demonstrated that any portion of the information at issue meets the

definition of a trade secret, nor has Kinder Morgan demonstrated the necessary factors to establish a trade secret claim for the information. Furthermore, we find that Kinder Morgan has made a conclusory assertion that release of the information at issue would result in competitive harm to the company, and has not make a specific factual or evidentiary showing to substantiate its claim. We therefore determine that none of the information that the city has identified as proprietary information of Kinder Morgan may be withheld pursuant to section 552.110 of the Government Code. Accordingly, the city must release this information, which we have marked, to the requestor.

In summary, the city may withhold the submitted contract between Austin Energy and Kinder Morgan pursuant to the previous determination of this office in Open Records Letter No. 2003-8556. We agree that the information the city seeks to withhold under section 552.133 of the Government Code is excepted pursuant to section 552.133 and may be withheld. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 198635

Enc: Submitted documents

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