



January 14, 2015

Mr. David E. Wynne
Counsel for the Sam Rayburn Municipal Power Agency
Wynne & Wynne
1021 Main Street, Suite 1275
Houston, Texas 77002

OR2015-00784

Dear Mr. Wynne:

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# 550217.

The Sam Rayburn Municipal Power Agency (the "agency") received a request for (1) all agency meeting notices, agendas, minutes, and resolutions from a specified time period, (2) all annual audits and bond indenture compliance materials, including monthly summaries, from a specified time period, (3) all filings made with federal or state agencies during a specified time period, (4) all public information pertaining to a named individual's employment with the agency, (5) all public information presented to bond rating agencies during a specified time period, (6) all economic development rate contracts entered into by the agency for the City of Livingston, (7) all information relating to a specified agreement from a specified time period, (8) all public information showing the agency's expenditures for attorneys and consultants during a specified time period, and (9) all depository contracts of the agency with any bank. We understand you do not have information responsive to the sixth category of the request.¹ You claim the submitted information is excepted from

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

disclosure under sections 552.103, 552.107(2), and 552.133 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note a portion of the submitted information consists of resolutions and ordinances adopted by the agency. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). A resolution is analogous to an ordinance. Accordingly, the agency must release the information we have marked.

Next, we note the remaining information contains notices and minutes of public meetings of the agency. The notices, agendas, and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under sections 552.103 and 552.107(2) of the Government Code, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the agency must release the notices and minutes we have marked pursuant to chapter 551 of the Government Code.

²Although you also raise section 552.101 of the Government Code in conjunction with a court order, we note the proper exception to raise in this instance is section 552.107(2) of the Government Code. *See* Gov't Code § 552.107(2). Although you raise section 552.133 of the Government Code, you did not assert this exception until after the ten-business-day deadline had passed. However, because section 552.133 is a mandatory exception to disclosure and may not be waived, we will consider the applicability of section 552.133, as well as the timely-raised exceptions, to the submitted information. *See* Gov't Code §§ 552.007, .133, .301, .302, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

³We assume 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 those records contain substantially different types of information than that submitted to this office.

Next, we note portions of the remaining information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Portions of the remaining information, which we have marked, are subject to subsection 552.022(a)(1) or subsection 552.022(a)(3) of the Government Code. We understand you to raise section 552.107(2) of the Government Code against disclosure of the information subject to section 552.022. Section 552.107(2) allows a governmental body to withhold information if "a court by order has prohibited disclosure of the information." *Id.* § 552.107(2). However, section 552.022(b) provides a court may not order a governmental body to withhold from public inspection any category of information described by section (a) unless the category of information is expressly made confidential under the Act or other law. *Id.* § 552.022(b). Because section 552.022(b) prohibits a court from ordering documents subject to section 552.022 be withheld, we conclude the agency may not withhold the information subject to section 552.022, which we have marked, under section 552.107(2) of the Government Code. You also seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.103 of the Government Code. However, section 552.133 of the Government Code makes information confidential for purposes of section 552.022. *See* Gov't Code § 552.133(c). Thus, we will consider the applicability of this exception to the information at issue subject to section 552.022. Further, we will consider your arguments under sections 552.103, 552.107(2), and 552.133 of the Government Code for the remaining information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides, in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). The agency has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The agency must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You inform us, and provide documentation showing, at the time the agency received the present request for information, the agency was a party to pending litigation styled *Sam Rayburn Municipal Power Agency v. Ralph J. Gillis and Gillis*, in the United States District Court for the Eastern District of Texas, Beaumont Division. You state, and provide documentation showing, the requestor represents the defendants in the pending litigation, and the present request directly overlaps with the requestor's discovery requests to the agency in the pending litigation. Thus, you argue the remaining information not subject to section 552.022 is related to the pending litigation. Based on your representations and our review, we find the agency was a party to pending litigation when it received the present request for information. Further, we find the remaining information relates to the pending litigation. Accordingly, the agency may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.⁴

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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:

(A) generation unit specific and portfolio fixed and variable costs, including forecasts of those costs, capital improvement plans for generation units, and generation unit operating characteristics and outage scheduling;

(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;

(C) effective fuel and purchased power agreements and fuel transportation arrangements and contracts;

...

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

We understand the agency is a power consortium jointly owned by the cities of Liberty, Livingston, and Jasper. Thus, we understand the agency is a public power utility for purposes of section 552.133. You state disclosure of portions of the information subject to section 552.022 would be highly prejudicial for the agency in the conduct of its business. Upon review, we find the remaining information at issue is not clearly among the fifteen categories of information expressly excluded from the definition of "competitive matter" by section 552.133(a-1)(2). Further, we find the remaining information at issue consists of information related to a competitive matter. Thus, we conclude the agency must withhold the information we have marked under section 552.133 of the Government Code.

In summary, the agency must release (1) the resolution we have marked and (2) the notices and minutes we have marked pursuant to chapter 551 of the Government Code. The agency may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The agency must withhold the information we have marked under section 552.133 of the Government Code. The remaining information must be released.

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,



Alley Latham
Assistant Attorney General
Open Records Division

AKL/dls

Ref: ID# 550217

Enc. Submitted documents

c: Requestor
(w/o enclosures)