



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 15, 2016

Mr. Robert Davis  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767

OR2016-09623A

Dear Mr. Davis:

This office issued Open Records Letter No. 2016-09623 (2016) on April 28, 2016. We have examined this ruling and determined that an error was made in its issuance. When this office determines an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on April 28, 2016. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 618507.

The City of Austin's (the "city") municipally-owned electric utility, Austin Energy, received a request for 120 categories of information. You state you will release some information to the requestor. You claim portions of the requested information are excepted from disclosure under section 552.133 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Moody's Investors Service, Inc. ("Moody"). Accordingly, you state, and provide documentation showing you notified Moody of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Moody. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be

released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Moody states it has competitors. In addition, Moody states it participates in a highly competitive market and release of the information it has indicated would cause Moody to suffer serious competitive harm. Thus, Moody seeks to withhold the terms of the contract it has indicated. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 832. After review of the information at issue and consideration of the arguments, we find Moody has established the release of the information at issue, which we have marked, would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information we have marked under section 552.104(a) of the Government Code.

Section 552.133 of the Government Code excepts 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 the following:

(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.

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<sup>1</sup>We 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.

(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;

(D) risk management information, contracts, and strategies, including fuel hedging and storage;

(E) plans, studies, proposals, and analyses for system improvements, additions, or sales, other than transmission and distribution system improvements inside the service area for which the public power utility is the sole certificated retail provider; and

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

You assert Austin Energy is a municipally-owned electric utility. Thus, Austin Energy is a public power entity for purposes of section 552.133. You inform us the information you have marked pertains to system load characteristics; customer billing, contract and usage information; generation unit specific and portfolio fixed and variable costs; bidding and pricing information for purchased power, generation, and fuel; and, analyses for system improvements. You further explain if this information is released it would place Austin Energy at a competitive disadvantage and cause financial harm to Austin Energy’s customers. You state 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 information at issue relates to competitive matters as defined by section 552.133(a-1). Thus, we conclude the city must withhold the information you have marked under section 552.133 of the Government Code.

In summary, the city may withhold the information we have marked under section 552.104(a) of the Government Code. The city must withhold the information you have marked in its entirety 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](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,



Katelyn Blackburn-Rader  
Assistant Attorney General  
Open Records Division

KBG/bw

Ref: ID# 618507

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)