



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 29, 2004

Ms. Noelle C. Letteri  
Staff Attorney  
Texas General Land Office  
P.O. Box 12873  
Austin, Texas 78711-2873

OR2004-10027

Dear Ms. Letteri:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213853.

The Texas General Land Office (the "GLO") received three requests from the same requestor for several categories of information related to the GLO's State Energy Market Program. You state that a portion of the requested information will be provided to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You make no argument as to whether the submitted information is excepted from disclosure under section 552.110. However, the GLO has notified interested third party Reliant Energy, Inc. ("Reliant") of the requests for information pursuant to section 552.305 of the Government Code. *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 that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act ("Act") in certain circumstances). We have considered all of the submitted arguments and reviewed the submitted information. We have also considered comments submitted by a representative of the requestor. *See Gov't Code* § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we understand that the GLO has previously received a similar request for some of the information in which you requested an opinion from this office. In response, this office issued Open Records Letter No. 2004-9330 (2004). We have no indication that the law, facts, and circumstances on which the prior ruling was based have changed. Therefore, in regard to information in the current request that is identical to the information previously

requested and ruled upon by this office, we conclude that the GLO may continue to rely on the prior ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, the first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure).

In regard to the remaining submitted information, section 552.104 of the Government Code exempts 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 that 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 that 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 assert that the GLO has specific marketplace interests in the information at issue because the GLO is authorized by statute to “utilize royalties taken in kind to convey power directly to its public retail customers.” Tex. Util. Code § 35.102. You inform us that under this authority, the GLO has created the State Power Program through which it competes in the electrical energy marketplace to supply electrical energy to public retail customers. You also inform us that the GLO “competes with other private companies for the awards of these contracts.” Based on these representations, we conclude that the GLO has demonstrated that it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. *See* ORD 593.

You also assert that release of the remaining submitted information would harm the GLO’s marketplace interests. You inform us that the remaining submitted information includes a list of customers with which the GLO contracts for the provision of electrical energy. You assert that “if the list of customers were released, [the GLO’s] competitors could use the list to market their services to the GLO’s customers.” Further, you explain that the GLO does not have the reciprocal right to access their competitors’ list of customers. You also explain that the information at issue includes the GLO’s pricing formulas, which “represent[] the unique services the GLO offers its customers.” You assert that the GLO would lose its competitive edge in this marketplace if this information is released because the “GLO’s competitors will be able to use this information [to] include more advantageous prices in

their proposals for future bidding situations.” Based on your representations and arguments, we conclude that the GLO has shown that release of the remaining submitted information will bring about specific harm to its marketplace interests. *See* ORD 593. Accordingly, under section 552.104 of the Government Code, the GLO may withhold the remaining submitted information.

In summary, we conclude that: 1) the GLO may continue to rely on Open Records Letter No. 2004-9330 (2004) as a previous determination; and 2) the GLO may withhold the remaining submitted information under section 552.104 of the Government Code.<sup>1</sup>

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).

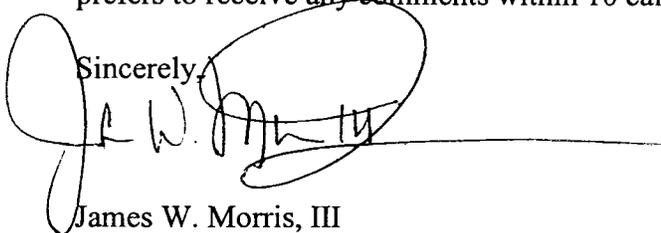
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<sup>1</sup>As we are able to make these determinations, we need not address the arguments we received from Reliant.

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III", written over a horizontal line. The signature is stylized and somewhat cursive.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 213853

Enc: Submitted documents

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