



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 14, 2004

Ms. Noelle C. Letteri  
Legal Services Division  
Texas General Land Office  
P.O. Box 12873  
Austin, Texas 78711-2873

OR2004-10585

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# 215153.

The Texas General Land Office (the "GLO") received a request for twelve categories of information pertaining to the GLO's State Energy Market Program. You seek to withhold information responsive to items 1, 2, and 5 of the request, which consist of the following:

1. Any and all documents relating to the request for proposal made by the GLO to [Public Power Pool ("P<sup>3</sup>")] for providing services to clients of P<sup>3</sup>
2. Any and all documents relating to any relationship by and between the GLO and Reliant Energy or any of its affiliates
- ...
5. All contracts by and between GLO and Reliant Energy or any of its affiliates

You claim that the information you seek to withhold is excepted from disclosure under section 552.104 of the Government Code. You also indicate that release of this information may implicate the proprietary interests of Reliant Energy, Inc. ("Reliant"), and you have

notified Reliant of its right to submit arguments to this office as to why the information at issue 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). You state that the GLO will release the remainder of the requested information to the requestor. We have considered the exception you claim and reviewed the submitted information.

As a preliminary matter, we note that the Energy Supply and Services Agreement information you have submitted as Attachment C is the subject of a prior ruling of this office, issued as Open Records Letter No. 2004-9330 (2004) on November 2, 2004. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as 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 Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). Upon review, we find that the information in Attachment C is identical to records determined to be excepted from disclosure pursuant to section 552.104 of the Government Code in Open Records Letter No. 2004-9330. Furthermore, based on your representations and our review, we find that the pertinent facts and circumstances have not changed. We therefore determine the GLO may rely on Open Records Letter No. 2004-9330 as a previous determination for the information at issue pertaining to the GLO's Energy Supply and Services Agreement with Reliant.<sup>1</sup> With respect to the remaining submitted information, Attachments D and E, we address your present claim under section 552.104.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." 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 claim section 552.104 to protect a competitive advantage in the marketplace, provided the governmental body demonstrates that it has specific marketplace interests and demonstrates a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* A governmental body seeking to avail itself of the "competitive advantage" aspect of the section 552.104 exception must demonstrate the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general

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<sup>1</sup> As we are able to make this determination, we need not address Reliant's arguments against disclosure of this information.

allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The GLO is authorized by statute to “sell or otherwise convey power generated from royalties taken in kind.” Tex. Util. Code § 35.102. You advise that under this authority, the GLO has created the State Power Program through which it bids on contracts for the right to sell electrical energy to public retail customers. The GLO competes with other private companies for the awards of these contracts. Based on your representations, we find that the GLO has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. *See* Open Records Decision No. 593 (1991).

You contend that release of the submitted information would harm the GLO’s marketplace interests, indicating that the submitted information represents the method by which the GLO will provide and charge for electric energy to its electrical energy customers. You assert that, if the GLO’s competitors had access to this information, they would “be able to use the GLO’s methods of delivery of electrical services and its pricing formula for such services as their own.” Thus, you contend that allowing competitors access to this information will undermine the GLO’s ability to compete in this marketplace. Based on your representations and arguments, we conclude that you have shown that release of the remaining submitted information would cause specific harm to the GLO’s marketplace interests. *See* Open Records Decision No. 593 (1991). We therefore conclude you may withhold the remainder of the submitted information under section 552.104 of the Government Code.<sup>2</sup>

In summary, to the extent the submitted information is identical to the information at issue in Open Records Letter No. 2004-9330, the GLO may rely on that ruling as a previous determination for such information. We determine the GLO may withhold the remaining submitted information under section 552.104 of the Government Code.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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

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<sup>2</sup> As this ruling is dispositive, we need not reach Reliant’s arguments regarding the remainder of the submitted information.

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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 215153

Enc: Submitted documents

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