



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2006

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2006-06807A

Dear Mr. Gambrell:

This office issued Open Records Letter No. 2006-06807 (2006) on June 27, 2006. In that letter ruling, we found no basis for concluding that the requested information constituted proprietary information because no interested third party submitted a brief explaining why the requested information should be excepted from disclosure. As a consequence, we concluded that the requested information must be released to the requestor. Star Electricity, L.L.C. ("Star") has since informed this office in a written affidavit, that it timely mailed its brief objecting to the release of the information at issue under sections 552.110 and 552.133 of the Government Code. Where this office determines that an error was made in the decisional process under sections 552.301 and 552.306, 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 June 27, 2006. *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 the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 258842.

The City of Houston (the "city") received a request for information related to the Houston Consumer Choice Initiative Website. You contend that the requested information may contain proprietary information subject to exception under the Act. Pursuant to section 552.305(d) of the Government Code, you inform our office that you have notified the interested third parties of the request and of their opportunity to submit comments to this

office.¹ *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 to disclosure in certain circumstances). We have reviewed the submitted information. We have also received and reviewed comments submitted by Star.

Initially, we note that Star seeks to withhold financial information that the city did not submit to this office for review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the commission. *See* Gov't Code § 552.301(c)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Star has submitted arguments to this office objecting to the release of its information under section 552.110. Section 552.110(b) excepts from disclosure "[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." Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999).

Star argues that all of its information is protected under section 552.110(b) of the Government Code. However, upon review of the arguments and the information at issue, we determine that Star has not demonstrated that any portion of the submitted information constitutes commercial or financial information, the release of which would cause it substantial competitive harm. *See* Open Records Decision Nos. 552 at 5-6 (1990), 661 (1999) (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). As such, we conclude that Star's information may not be withheld under section 552.110 of the Government Code.

Star also contends that the submitted information is excepted from disclosure under section 552.133 of the Government Code. Section 552.133 of the Government Code excepts from public disclosure information held by a public power utility that is related to a competitive matter. *See* Gov't Code § 552.133(b). "Competitive matter" is defined as a matter that the public power utility governing body in good faith determines by vote to be

¹The notified third parties are as follows: Cirro Energy Corporation; Vega Resources, L.L.C.; Gexa Energy, L.P.; First Choice Power Special Purpose Entity, L.P.; Reliant Energy, Inc.; Stream Gas & Electric, Ltd. d/b/a Stream Energy; Star; Spark Energy, L.P.; and Commerce Energy, Inc.

related to the utility's competitive activity. *Id.* § 552.133(a)(3). The governing body also must determine, in like manner, that the release of the information would give an advantage to competitors or prospective competitors. *Id.* Section 552.133(a)(3) lists thirteen categories of information that may not be deemed to be competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the information at issue only if, based on the information provided, the attorney general determines that 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. *Id.* § 552.133(c). Upon review of the arguments and submitted information, we find that Star has not demonstrated that any portion of the submitted information "reflects receipts and expenditure of funds," protected under section 552.133.

Finally, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the remaining third parties have submitted comments to this office explaining why their information should be withheld from disclosure. Thus, none of these companies have demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the city may not withhold any of the information at issue on the basis of any proprietary interest. Therefore, the city must release the submitted information.

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

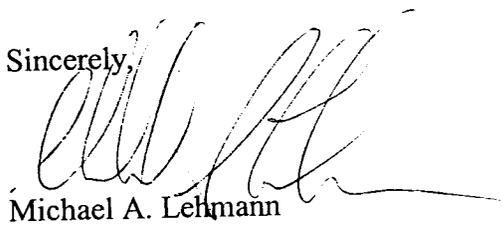
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/ir

Ref: ID# 258842

Enc. Submitted documents

c: Mr. Ted Oberg
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(w/o enclosures)

Cirro Energy Corporation
Attn: Pete Wright, CFSO
501 West Bush Expressway, Suite 350
Richardson, Texas 75080
(w/o enclosures)

Vega Resources, L.L.C.
Attn: Javier Vega, President
2650 Fountain View, Suite 416
Houston, Texas 77057
(w/o enclosures)

Gexa Energy, L.P.
Attn: T.J. Tuscai, President
20 Greenway Plaza, Suite 600
Houston, Texas 77046
(w/o enclosures)

First Choice Power Special Purpose Entity, L.P.
Attn: John Menichini, VP of Operations
4100 International Plaza
Fort Worth, Texas 76109
(w/o enclosures)

Reliant Energy, Incorporated
Attn: Tracy Carmen Jones, VP of Community Marketing
1000 Main Street
Houston, Texas 77002
(w/o enclosures)

Stream Gas & Electric, Ltd.
d/b/a Stream Energy
Attn: Pierre Koshakji, Managing Director of Administration
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Star Electricity, L.L.C.
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Spark Energy, L.P.
Attn: Mike Osowski, Managing Director
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