



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 3, 2008

Ms. Catherine Zellers
City Attorney's Office
City of Weatherford
P.O. Box 255
Weatherford, Texas 76086

OR2008-16462

Dear Ms. Zellers:

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# 329083.

The City of Weatherford (the "city") received a request for all responses to a specified request for proposals involving supplying electricity to the city. You claim the submitted resolution, request for proposals, bid proposals, and contract are excepted from disclosure under section 552.133 of the Government Code. Furthermore, you claim the submitted bid proposals may contain proprietary information subject to exception under the Act. Accordingly, you state you notified American Energy Partners ("AEP"), Bryan Texas Utilities ("Bryan"), Calpine Central; L.P. ("Calpine"), Constellation Power Source, FPL Energy Origination, Garland Power & Light, Integrys Energy Services, Inc., LCRA, Morgan Stanley Capital Group, Inc., NRG Power Marketing, Inc., and TXU Portfolio Management Company, L.P. of the city's receipt of the request for information and of the companies' right to submit arguments to this office as to why their information should not be released to the requestor. *See* Gov't Code § 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 AEP, Bryan, and Calpine. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you seek to withhold, among other things, a copy of resolution 2000-11, which was adopted by the Weatherford Municipal Utility Board of Trustees (the "board"), the submitted request for proposals, and the submitted contract. The requestor, however, did not request this information. Accordingly, Exhibits B, C, and P are not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information in response to this request.

Next, you inform us the bid proposals submitted as Exhibits D through O were the subject of a previous open records request in response to which this office issued Open Records Letter No. 2008-14238 (2008). In that ruling, we determined the bid proposals were not responsive to the request for information at issue in that ruling. However, the requestor in this instance is specifically seeking the submitted bid proposals; thus, the proposals are responsive to the present request. Consequently, the circumstances in this instance are different than those in Open Records Letter No. 2008-14238, and we conclude the city may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (describing circumstances in which a governmental body may rely on the first type of previous determination). As such, we will consider the submitted arguments against disclosure for the submitted bid proposals in Exhibits D through O.

Section 552.133 of the Government code excepts from disclosure a public power utility's information related to a competitive matter. Section 552.133(b) provides as follows:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b). Section 552.133(a)(3) defines a "competitive matter" as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. *See id.* § 552.133(a)(3). However, section 552.133(a)(3) also provides thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining the issue, matter, or activity is a competitive matter or the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

You inform us the city owns and operates a municipal electric utility system that is a public power utility for purposes of section 552.133. You also inform us, and provide a copy of resolution 2000-11 showing, the board, as the governing body of a public power utility, adopted a resolution defining "competitive matter" pursuant to section 552.133. This

resolution defines, among other things, purchasing information, including bids, proposals, and contracts, to be within the scope of the term "competitive matter." The submitted bid proposals are not among the thirteen categories of information section 552.133(a)(3) expressly excludes from the definition of a competitive matter. Furthermore, we have no evidence the board failed to act in good faith. *See id.* § 552.133(c). Consequently, we determine the submitted bid proposals in Exhibits D through O relate to a competitive matter in accordance with the board's resolution you have provided and are, therefore, excepted from disclosure pursuant to section 552.133 of the Government Code.¹

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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).

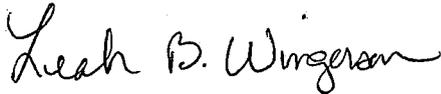
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

¹ As our ruling is dispositive, we need not address AEP's, Bryan's, or Calpine's arguments against disclosure.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 329083

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Constellation Power Source
500 Dallas Street, Suite 3300
Houston, Texas 77002
(w/o enclosures)

AEP Energy Partners
155 West Nationwide Blvd., Suite 500
Columbus, Ohio 43215
(w/o enclosures)

Morgan Stanley Capital Group, Inc.
2000 Westchester Avenue
Purchase, New York 10577
(w/o enclosures)

FPL Energy Origination
1000 Louisiana Street, Suite 6900
Houston, Texas 77002
(w/o enclosures)

NRG Power Marketing, Inc.
1301 McKinney , Suite 2300
Houston, Texas 77010
(w/o enclosures)

TXU Portfolio Management Company, L.P.
Luminant
1601 Bryan
Dallas, Texas 75201
(w/o enclosures)

Integrus Energy Services, Inc.
1716 Lawrence Drive
DePere, Wisconsin 54115
(w/o enclosures)

Calpine Central, L.P.
717 Texas, Suite 1000
Houston, Texas 77002-2743
(w/o enclosures)

LCRA
P.O. Box 220
Austin, Texas 78767-0220
(w/o enclosures)

Garland Power & Light
525 East Avenue B
Garland, Texas 75040
(w/o enclosures)

Bryan Texas Utilities
P.O. Box 1000
Bryan, Texas 77805
(w/o enclosures)