



September 9, 2002

Mr. W. Lane Lanford
Executive Director
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2002-5006

Dear Mr. Lanford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168327.

The Public Utility Commission of Texas (the "commission") received a request for all documents received from NewPower Holdings Inc./The New Power Company ("NewPower") by the commission from May 7, 2002 to the present, as well as records of all meetings between NewPower and their representatives with commission members and staff from May 2, 2002. You inform us that the commission provided the requestor with access to certain responsive information, with portions redacted. You state that subsequently, the requestor orally amended his request to exclude the information redacted from the documents released. Therefore, you assert that one document, which you have submitted as Exhibit L, is excepted from disclosure under sections 552.101, 552.107, 552.110, and 552.136 of the Government Code. In addition, you notified NewPower of the request for information and invited it to submit arguments to this office against release of the information.¹ NewPower responded and asserts the same exceptions as the commission. We have considered the commission's arguments as well as the arguments submitted by NewPower and have reviewed the submitted information. We have also considered the comments submitted to

¹See 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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

this office by the requestor. *See* Gov't Code § 552.304 (permitting interested party to submit reasons why requested information should or should not be released).

We first note that both the commission and NewPower point out that the information at issue is designated as being "highly sensitive confidential." Information may not be withheld from the public, however, simply because a person anticipated or requested confidentiality for the information in submitting it to the governmental body. *See Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d at 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld from the requestor. We will therefore address NewPower's arguments under section 552.110.

Section 552.110(b) protects "[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[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

We note in addressing NewPower's arguments under section 552.110(b) that the requestor asserts in his letter to this office that NewPower has ceased all marketing operations in Texas and is in the process of switching all customers to TXU and Reliant Energy Companies. The requestor further asserts that NewPower is in bankruptcy, and that therefore its financial records are widely available to creditors and stockholders. On this basis, the requestor asserts that NewPower has no competitive interest in the information at issue. NewPower states that the information at issue is not in the public domain and is maintained by NewPower as confidential. Therefore, we have a question of fact as to whether the information at issue is in fact available to the public. If it is in the public domain, New Power would not have a competitive interest in withholding the information from the requestor. *See* Open Records Decision No. 669 (2000) (to extent entity permits information to be publicly disclosed under terms of its licensing agreements or otherwise, such information is not excepted from public disclosure by section 552.110). We note, however, that disputed questions of fact are not resolvable in the open records process, and therefore, we must rely on the representations of the governmental body or third parties. Open Records Decision Nos. 554, 552 (1990). Thus, as NewPower maintains that the information at issue is not publicly available, we will address New Power's arguments against disclosure.

NewPower in its brief to this office confirms that it has filed for reorganization under Chapter 11 of the Federal Bankruptcy Code, but asserts that it continues to operate in the retail market in Texas and other states where it has customers. NewPower states that while it expects to transition out of those markets, and while it expects to stop serving Texas customers by the fall of 2002, it will continue to serve customers in other states after its Texas exit. NewPower argues that release of the information at issue to the requestor would damage NewPower's interests in those other markets.

Upon review of these assertions by NewPower, as well as their arguments for how release of the information would harm the company competitively, we conclude that NewPower has shown that release of the commercial or financial information the commission has submitted to this office as Exhibit L would cause NewPower substantial competitive injury. Therefore, the commission must withhold the information in submitted Exhibit L in its entirety under section 552.110(b). As we are able to make this determination, we need not address the parties' other raised exceptions.

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 Department of Public 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 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 168327

Enc. Submitted documents

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