



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 27, 2007

Ms. Sarah Irwin Swanson  
Deputy Director of General Law  
Public Utility Commission of Texas  
P.O. Box 13326  
Austin, Texas 78711

OR2007-08091

Dear Ms. Swanson:

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# 282698.

The Public Utility Commission (the "commission") received a request for "correspondence of any nature regarding the investigation of the wholesale market activities of TXU from June 1 to September 30, 2005, correspondence of any nature regarding any proposed sanctions concerning the investigation, and any documentation supporting the imposition of sanctions against TXU as a result of the investigation." You state that some responsive information has been released to the requestor. You have submitted information that you claim is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>1</sup> You have also submitted responsive information in Exhibit C-3 that you state may be subject to a third party claim by TXU Portfolio Management Company LP ("TXU"). You state that you notified TXU of the commission's receipt of the request for information and of TXU's right to submit arguments to this office as to why the requested information should not be released to the requestor.<sup>2</sup> We have considered the arguments and have reviewed the submitted information.

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<sup>1</sup>We note that in its correspondence of May 1, 2007, the commission withdrew its claim under section 552.111.

<sup>2</sup>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 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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, TXU has not submitted to this office any reasons explaining why the information in Exhibit C-3 should not be released. We thus have no basis for concluding that any portion of the information at issue constitutes proprietary information of TXU, and the commission may not withhold any portion of the information in Exhibit C-3 on that basis. *See* 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).

The commission asserts that the information in Exhibits C-1 and C-2 is excepted from disclosure under section 552.103 of the Government Code which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the city received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a).

For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation." *See* Open Records Decision No. 588 (1991). You state, and provide documentation showing, that the commission filed a notice of violation against TXU for

failure to comply with the Public Utility Regulatory Act and commission rules relating to Oversight of Wholesale Market Participants. Furthermore, you inform us that TXU requested a hearing on the matter and, accordingly, a contested case governed by the APA was pending on the date the commission received this request for information. Based on your representations and our review, we determine that litigation in this matter, in the form of a contested case under the APA, was pending prior to the date the commission received the present request. We further find that the information at issue relates to the pending litigation for purposes of section 552.103(a). Thus, we find that you have demonstrated the applicability of section 552.103. Accordingly, the commission may withhold the information in Exhibits C-1 and C-2 pursuant to section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We also note that some of the information in Exhibit C-3 is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in Exhibit C-3. Therefore, the commission must withhold the e-mail addresses we have marked in Exhibit C-3 under section 552.137. The commission must release the remaining information in Exhibit C-3.

In summary, the commission may withhold the information in Exhibits C-1 and C-2 under section 552.103 of the Government Code. With the exception of the e-mail addresses we have marked under section 552.137, the commission must release the information in Exhibit C-3 to the requestor. As our ruling is dispositive, we do not address the remaining arguments against disclosure.

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,



Heather Pendleton Ross  
Assistant Attorney General  
Open Records Division

HPR/mcf

Ref: ID# 282698

Enc: Submitted documents

c: Mr. John C. Wray  
Heather E. Kraft  
Wray & Willett  
200A North Rogers Street  
Waxahachie, Texas 75165-3694  
(w/o enclosures)

Mr. Bill Moore  
TXU Energy  
1601 Bryan Street, 12<sup>th</sup> Floor  
Dallas, Texas 75201  
(w/o enclosures)