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GREG ABBOTT

July 10, 2009

Ms. Anne M. Constantine  
Legal Counsel  
Dallas/Fort Worth International Airport Board  
P.O. Box 619428  
DFW Airport, Texas 75261-9428

OR2009-09544

Dear Ms. Constantine:

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# 348589.

The Dallas/Fort Worth International Airport Board (the "board") received a request for current energy contracts, leases, and permits; the most recent energy procurement proposals and the bids submitted in response; the complete correspondence files for the current electricity provider; and monthly billing statements submitted by the current electricity supplier for a specified time period. You state the board is in the process of releasing some of the requested information. You indicate the board takes no position on the public availability of the remaining requested information. You believe, however, that this request for information may implicate the proprietary interests of Constellation NewEnergy, Inc.; Direct Energy Business Services, L.P.; Dynegy Energy Marketing, L.P.; Retail Energy Partnership; The Texas General Land Office (the "GLO"); TXU Energy; and Utility Choice, L.P. You indicate the board has notified these interested third parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released. We received correspondence from the GLO. We have considered the submitted arguments and reviewed the submitted information.

Although the GLO asserts that the current electrical contract between it and the board is not responsive to the present request for information, we note that the board has not submitted this contract. This ruling does not address information that was not submitted by the board and is limited to the information submitted as responsive by the board. *See Gov't Code*

§ 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

The GLO asserts its proposal is excepted from disclosure under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). 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 seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The GLO states that, in conjunction with Reliant, it submitted a proposal to the board. The GLO contends that it has specific marketplace interests in the proposal because the GLO is authorized by statute to “sell or otherwise convey power or natural gas generated from royalties taken in kind[.]” Util. Code § 35.102. The GLO explains that under its authority, it has created the State Power Program, through which the GLO bids on contracts for the right to sell electrical energy to public retail customers. The GLO states that it competes with private entities for the awards of these contracts. Based on these representations, we conclude that the GLO has demonstrated that it has specific marketplace interests and may be considered a “competitor” for the purposes of section 552.104. *See* ORD 593.

The GLO contends that the release of its proposal would harm its marketplace interests because the proposal reveals the methods by which the GLO will provide electrical energy to its customers and charge for its services. The GLO argues that if its competitors had access to this information, they “will be able to use the GLO’s methods of delivery of electrical services and its pricing formula for such services as their own.” Thus, the GLO contends that allowing competitors access to the information at issue will undermine its ability to compete in this marketplace. Based on the GLO’s representations and arguments, we conclude that the GLO has shown that release of some of the information at issue would cause specific harm to the GLO’s marketplace interests. *See id.* We therefore conclude that the board may withhold the information we have marked under section 552.104.<sup>1</sup> We also

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<sup>1</sup>As our ruling is dispositive, we need not address the GLO’s remaining arguments against disclosure of this information.

conclude that the GLO has not established that release of any of the remaining information at issue would cause specific harm to the GLO's marketplace interests; therefore, the board may not withhold any of that information under section 552.104.

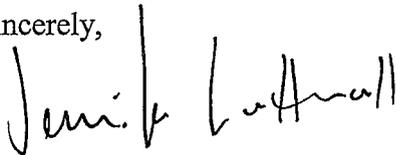
Although the GLO argues that its proposal is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of private third parties, not the interests of a governmental body. Thus, we do not address the GLO's arguments under section 552.110. We note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Constellation NewEnergy, Inc., Direct Energy Business Services, L.P., Dynegy Energy Marketing, L.P., Retail Energy Partnership, TXU Energy, or Utility Choice, L.P. Therefore, these companies have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information, and none of it may be withheld on that basis. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

In summary the board may withhold the information we have marked under section 552.104 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 348589

Enc. Submitted documents

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