



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2010

Ms. Linda M. Champion  
Assistant City Attorney  
City of Victoria  
P.O. Box 1758  
Victoria, Texas 77902-1758

OR2010-19317

Dear Ms. Champion:

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# 402689.

The City of Victoria (the "city") received a request for each final proposal in response to the Landfill Gas to Energy Project, RFP# 32410-S-1, including proposals from six specified companies.<sup>1</sup> You state you will release some information to the requestor. You claim the requested information may be excepted from disclosure under sections 552.101 and 552.110 of the Government Code, but take no position on the applicability of these exceptions. However, you indicate the release of the information at issue may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, pursuant to section 552.305 of the Government Code, the city has notified Element Markets, L.L.C. ("Element"); Enerdyne Power Systems, Inc. ("Enerdyne"); Landfill Energy Systems, L.L.C. ("Landfill"); Montauk Energy Capital, L.L.C. ("Montauk"); Renovar Energy Corp. ("Renovar"); and Toro Energy of Texas, L.L.C. ("Toro") of the request and of their right to submit arguments to this office explaining why their companies' information should not be

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<sup>1</sup>You inform us one of the companies named in the request, E.S. Alternatives, L.P., did not submit a proposal. We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos.605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from Element and Enerdyne. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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, Landfill, Montauk, Renovar, and Toro have not submitted any comments to this office explaining how release of the submitted information would affect its proprietary interests. Accordingly, none of the information at issue may be withheld on the basis of the proprietary interests of these companies. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating business enterprise claiming exception for commercial or financial information under section 552.110(b) must show by specific factual evidence release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret).

Enerdyne argues the requestor "does not request information from Enerdyne . . . thus, we should not be required to supply any of our information." We note a governmental body must make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at (1990) (construing statutory predecessor). Although the requestor does not seek information directly from Enerdyne, the city has submitted Enerdyne's information that the city possesses, and which the city deems responsive to this request for information. Upon review of the submitted information, we conclude the city has made a good-faith effort to relate the request to responsive information. Therefore, we will determine whether Enerdyne's information, as well as the remaining submitted information, must be released to the requestor.

Enerdyne also states its information may not be released because it was marked confidential and was only intended to be reviewed by the city. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless Enerdyne's information falls within an exception to disclosure, it must

be released, notwithstanding any expectations otherwise. As Enerdyne does not raise any exception to disclosure, the city may not withhold any of the company's information on the basis of Enerdyne's proprietary interests.

Element claims portions of its information are excepted from disclosure under section 552.110(b) of the Government Code. 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." 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. *See* ORD 661 at 5-6.

Having considered Element's arguments and reviewed the information at issue, we conclude Element has established its pricing information constitutes commercial or financial information, the release of which would result in substantial competitive injury; therefore, the city must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Element has not made the specific factual or evidentiary showing required by section 552.110(b) establishing that the release of any of its remaining information would cause the company substantial competitive harm. *See* ORD 661. Therefore, the city may not withhold any of Element's remaining information under section 552.110 of the Government Code.

Next, we note a portion of Landfill's information is subject to section 552.136 of the Government Code.<sup>2</sup> Section 552.136 states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Accordingly, the city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.<sup>3</sup>

In summary, the city must withhold Element's pricing information, which we have marked, under section 552.110(b) of the Government Code. The city must withhold the bank account and routing numbers we have marked in Landfill's information under section 552.136 of the Government Code. The city must release the remaining information.

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/tf

Ref: ID# 402689

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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