



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 19, 2021

Mr. Jay B. Stewart
Managing Partner
Hance Scarborough, LLP
400 West 15th Street, Suite 950
Austin, Texas 78701

OR2021-13253

Dear Mr. Stewart:

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# 878503.

You inform us following winter storm "Uri", the Electric Reliability Council of Texas ("ERCOT"), which you represent, received multiple requests for information, to include communications and data. In response, you have submitted briefing to this office in which you assert ERCOT is not subject to the Act. In the alternative, you have sought a ruling from this office pursuant to section 552.301 of the Government Code with respect to certain responsive information. *See* Gov't Code § 552.301(a) (governmental body that receives written request for information that it wishes to withhold from public disclosure must ask for a decision from the Office of the Attorney General "OAG"). We have considered your comments.¹ We have also considered comments submitted by requestors and interested third parties. *See id.* §§ 552.304, .305.

Initially, we note that generally, the Act authorizes the OAG to render decisions and opinions in two situations. The first occurs when a governmental body receives a written request for information from an individual or entity acting as a member of the public and requests a ruling from this office because the governmental body wishes to withhold responsive information in accordance with one of the Act's exceptions to disclosure. *See id.* §§ 552.301, .306. The second situation occurs when this office issues "materials, including detailed and comprehensive written decisions and opinions, that relate to or are

¹ We note our letter does not address any information held by the Public Utility Commission of Texas or any other governmental body.

based on [the Act]" in order to "maintain uniformity in the application, operation, and interpretation of [the Act.]" *Id.* § 552.011.

In 1999, the Texas Legislature enacted Chapter 39 of the Texas Public Utility Regulatory Act, entitled "Restructuring of Electric Utility Industry." Pursuant to section 39.151 of the Utilities Code, the Public Utility Commission of Texas (the "PUC") was required to certify an independent organization to, among other functions, "ensure the reliability and adequacy of the regional electrical network." *See* Util. Code § 39.151(a)–(c). The PUC certified ERCOT, a membership-based 501(c)(4) Texas non-profit corporation, as the independent organization. You state that "all of ERCOT's operations are subject to the PUC's plenary control," and that "ERCOT is 'directly responsible and accountable to the [PUC],' which in turn 'has complete authority' over ERCOT." *See id.* § 39.151(d); *see also Elec. Reliability Council of Tex., Inc. v. Panda Power Infrastructure Fund, LLC*, 552 SW3d 297, 303 (Tex. App. – Dallas 2018, pet. granted).

You inform us the PUC, which directly oversees ERCOT, "has established specific information-disclosure regulations that take into account the unique nature of ERCOT's role and ERCOT's and the PUC's expertise." *See* Util. Code. § 39.151(d) (providing PUC shall adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization responsibilities for establishing or enforcing such rules). You assert that "in its comprehensive statute creating and defining ERCOT's role, the Legislature did not explicitly subject ERCOT to the [Act]. However, recognizing that ERCOT performs a public function, the PUC has established a public-information regime that accounts for the unique nature of the information ERCOT holds. *See* 16 Tex. Admin. Code § 25.362(e). Under PUC Rule 25.362(e)(1), ERCOT must 'adopt and comply with procedures that allow persons to request and obtain access to records' possessed by ERCOT." Thus, you explain that although ERCOT is not subject to the Act, ERCOT is subject to the information disclosure rules adopted by the PUC.²

Based on the foregoing, you conclude that "subjecting ERCOT to the [Act] would interfere with the PUC's 'direct' and 'complete' authority over ERCOT and would subject ERCOT to inconsistent regulatory regimes. ... The Legislature granted the PUC authority over ERCOT because it has expertise in the complicated subject matter for which ERCOT is responsible. This expertise is necessary to resolve disputes about whether records in ERCOT's possession are confidential or should be disclosed."

Accordingly, upon review, we agree the appropriate disclosure procedures for resolving the information requests at issue received by ERCOT are those provided for in section 25.362 of title 16 of the Texas Administrative Code, rather than the Act. Thus, although you have alternatively sought a ruling from this office to determine the applicability of claimed exceptions to disclosure pursuant to section 552.301 of the Government Code, we find this

² Our office is not aware of any judicial determination that ERCOT is a governmental body for purposes of the Act, and our office has never issued a determination to ERCOT as a governmental body pursuant to the Act.

situation is beyond the scope of this office's authority to render a decision under the Act.³ Therefore, we consider this matter closed. If you have any questions with regard to this letter, please refer to ID # 878503.

Sincerely,

Michael Pearle
Assistant Attorney General
Open Records Division

MAP/eb

Ref: ID# 878503

Enc. Submitted documents

c: 65 Requestor
(w/o enclosures)

69 Third Parties
(w/o enclosures)

³ We note in this regard that ERCOT raised multiple exceptions to disclosure under the Act, to include section 552.103 of the Government Code, in which ERCOT argued the relatedness of much of the requested information to multiple lawsuits pending against ERCOT. In addition, ERCOT argued that: certain communications between ERCOT's attorneys and employees and officers are excepted under section 552.107 as privileged attorney-client communications; certain communications regarding the decision-making process related to winter storm "Uri" are protected by the deliberative process privilege as set out in section 552.111; certain engineering and technical information is confidential by law under the ERCOT nodal protocols, in conjunction with section 552.101; and certain information relating to the electric power grid is excepted from disclosure under section 552.101 in conjunction with section 418.181 of the Government Code, as information revealing the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.