



March 1, 2021

VIA ELECTRONIC FILING

Justin Gordon

Office of the Attorney General
Chief - Open Government Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

RE: Determination of Applicability of Texas Public Information Act

Dear Mr. Gordon,

Following Winter Storm Uri, ERCOT has received numerous information requests through its online portal and other means. See <http://ercot.com/about/contact/inforequest>. Some of the requests cite the Texas Public Information Act, Tex. Gov't Code ch. 552, as a basis for the records request. Exhibit "A". The requests were received beginning on February 14, 2021.

The Public Utility Commission has implemented ERCOT-specific regulations that govern ERCOT's disclosure of public information. 16 Tex. Admin. Code § 25.362(e). The procedures ERCOT has adopted for handling record requests have similar deadlines and exceptions to disclosure that would be relevant to ERCOT under the PIA. ERCOT is concerned that if it is also subject to the PIA, its disclosure obligations under that statute would conflict with its PUC-implemented disclosure obligations. ERCOT is working expeditiously to respond to the information requests, and it intends to timely disclose as much information as its governing regulations permit. But because there is ambiguity about which disclosure scheme governs, ERCOT seeks a ruling from this office on whether it is subject to the PIA, while preserving its objections to the release of any information that is confidential by law. ERCOT submits this request within ten business days of the first request received. ERCOT has provided the requestors with a copy of this request and has notified each of those parties whose information is the subject of one or more of the information requests.

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. ERCOT, though organized as a nonprofit corporation, performs a critical governmental function while also being directly answerable to the PUC. As the "independent organization" certified by the PUC, ERCOT is responsible for "ensur[ing] the reliability and adequacy of the regional electrical network" and "ensur[ing] access to the transmission and distribution systems

for all buyers and sellers of electricity on nondiscriminatory terms.” Tex. Util. Code § 39.151(a). In short, ERCOT manages the State’s electric grid and wholesale electricity market. All of ERCOT’s operations are subject to the PUC’s plenary control. ERCOT is “directly responsible and accountable to the commission,” which in turn “has complete authority” over ERCOT. *Id.* § 39.151(d).

In its comprehensive statute creating and defining ERCOT’s role, the Legislature did not explicitly subject ERCOT to the PIA. 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. Responsive information must “normally be provided within ten business days.” *Id.* Importantly, “ERCOT’s procedures regarding access to records shall be consistent with this [rule] and commission orders.”

ERCOT must generally disclose information in its possession on request, but it must not disclose information “designated as Protected Information pursuant to ERCOT rules.” *Id.* § 25.362(e)(1)(A). ERCOT’s rules—known as protocols—are themselves binding legal rules enacted using rulemaking authority delegated from the PUC, which also has plenary authority to approve, reject, or modify them. *See* Tex. Util. Code § 39.151(d); *PUC v. Constellation Energy Commodities Grp.*, 351 S.W.3d 588, 595 (Tex. App.—Austin 2011, pet. denied) (ERCOT’s rules “have the force and effect of statutes”). Section 1.3.1.1 of ERCOT’s protocols thus defines, in granular detail, what records in its possession are protected and which are not. Records deemed protected by these PUC-approved rules include Critical Energy Infrastructure Information, the protection of which is vital to the system’s security, and enormous volumes of confidential business information that market participants must provide so that ERCOT can manage the State’s electricity market and grid.

If ERCOT declines, under these rules and protocols, to disclose protected information, the requestor may seek review from the PUC, which “may determine the validity of the asserted claim of confidentiality through a contested-case proceeding.” 16 Tex. Admin. Code § 25.362(e)(1)(C). The process is designed to answer “whether the information is subject to protection from disclosure under law.” *Id.* Rulings by the PUC in contested-case proceedings are subject to judicial review.

Subjecting ERCOT to the PIA would interfere with the PUC’s “direct[.]” and “complete” authority over ERCOT and would subject ERCOT to inconsistent regulatory regimes. ERCOT performs a public function. The system administration fee that funds ERCOT’s operations is collected pursuant to the State’s police power. *See* Tex. Util. Code § 39.151(e). Some requestors may therefore argue that ERCOT is a “governmental body” under the PIA because it “is supported in whole or in part by public funds.” Tex. Gov’t Code § 552.003(1)(A). However, this office need not contend with the PIA’s definition of “public funds,” *see id.* § 552.003(5), in order to determine that ERCOT is not subject to the PIA.

The problem is structural: subjecting ERCOT to the PIA would conflict with ERCOT’s enabling statute. *See City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008) (holding “that a

specific statute will ordinarily prevail over a general statute when the two cannot be reconciled”). That statute gives the PUC “complete authority” over ERCOT, and pursuant to that “complete authority” the PUC has created a specialized public-information regime that accounts for ERCOT’s unique function and the PUC’s oversight role. Were the PIA to apply to ERCOT, the Office of the Texas Attorney General, rather than the PUC, would have authority to determine whether ERCOT holds are subject to disclosure. In that case, the PUC’s authority would no longer be complete—because the PUC’s authority over ERCOT’s records would be subordinate to the Attorney General’s. This would conflict not only with the language of ERCOT’s enabling act, but its purpose. 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. The Attorney General lacks the technical expertise the PUC enjoys.

For example, one category of “protected information” that ERCOT protocols prohibit ERCOT and its market participants from disclosing is “[r]esource-specific costs, design, and engineering data.” Protocols § 1.3.1.1.(1)(m). Determining what information falls within this category requires significant technical expertise and regulatory judgment in balancing the commercial sensitivity of information about individual generators with the needs of the broader market to have access to at least some basic generator parameter information for system modeling and generation development purposes. Similarly, recently approved protocols prohibit disclosure of ERCOT Critical Energy Infrastructure Information, which is defined as certain grid infrastructure information that “could foreseeably be useful to a person planning an attack on ERCOT System Infrastructure.” ERCOT Protocols §§ 1.3.2(1), 2.1 (eff. Apr. 1, 2021). Whether particular information satisfies this test requires expertise in the many possible ways in which this information could be used to compromise the many thousands of components of generators, control centers, transmission lines, and substations that make up the power grid. These interpretations are best overseen by the PUC.

ERCOT’s direct accountability to the PUC, Tex. Util. Code § 39.151(d), is likewise a barrier to the PIA’s application. The PUC has ordered ERCOT to disclose records “consistent with” the PUC’s rules. 16 Tex. Admin. Code § 25.362(e)(1). ERCOT could not comply with the PIA without violating an order from its direct overseer. *See Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 535–36 (Tex. 2016) (holding that “directly” “means ‘without the intervention of a medium or agent’ or ‘immediately’”).

Finally, a 2019 amendment to ERCOT’s enabling act confirms that ERCOT is not subject to the PIA. Because of its critical role, ERCOT must annually “conduct [an] internal cybersecurity risk assessment, vulnerability testing, and employee training” and report to the PUC regarding its compliance with “cybersecurity and information security laws.” Tex. Util. Code § 39.151(o). The Legislature specified that information reported *to the PUC* under this provision “is confidential and not subject to disclosure” under the PIA. *Id.* § 39.151(p). While the Legislature deemed this information confidential, it did not provide that the same information was not subject to disclosure when held by ERCOT, rather than “submitted in a report” to the PUC. This implies that the PIA does not apply to ERCOT.

ERCOT asks this office to issue a ruling that ERCOT is not subject to the PIA. *See Blankenship v. Brazos Higher Educ. Auth., Inc.*, 975 S.W.2d 353, 362 (Tex. App.—Waco 1998, pet. denied) (observing that it is routine for this office to answer such questions). ERCOT emphasizes that it seeks this ruling only to avoid the impossibility of complying with dueling, inconstant disclosure obligations. The ruling will ensure the public’s access to information that the PUC has deemed disclosable, but will guard information that could harm the system or the legally protectable interests of private parties. ERCOT intends to disclose as many records as the law permits. Any non-disclosure may be challenged before the PUC and, ultimately, reviewed in court.

In the event this office determines ERCOT is subject to the PIA, ERCOT objects to the disclosure of any records made confidential by its protocols or other law pursuant to Texas Government Code § 552.101, and further objects to the disclosure of any information otherwise exempted from disclosure under Texas Government Code §§ 552.101, 552.102, 552.103, 552.104, 552.107, 552.110, 552.1101, 552.133, and 552.139.

ERCOT has notified the Requestors that it is seeking a ruling from the Attorney General as to the applicability of the PIA to ERCOT, and if found to be subject to the PIA, a ruling of the Attorney General as to those items it claims should be excepted from disclosure. ERCOT has also notified third parties whose information is the subject of one or more of these requests.

Sincerely,



Jay B. Stewart

Exhibit “A” – Copies of Requests for Information

Exhibit “B” – Third Party Notice