

<b>DOCKETED</b>	
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<b>Project Title:</b>	Fountain Wind Project
<b>TN #:</b>	254383
<b>Document Title:</b>	2024-02-08 County of Shasta Comments on Application for Confidential Designation
<b>Description:</b>	N/A
<b>Filer:</b>	Kelly Lotz
<b>Organization:</b>	County of Shasta
<b>Submitter Role:</b>	Public Agency
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File No. 55398.00043

February 8, 2024

***VIA E-MAIL AND DOCKET 23-OPT-01***

Drew Bohan  
Executive Director  
California Energy Commission  
715 P Street  
Sacramento, CA 95814

**Re: Fountain Wind Project: County of Shasta Comments on Application  
for Confidential Designation (TN254006)**

Dear Executive Director Bohan:

Best Best & Krieger LLP represents the County of Shasta (“County”) in the Fountain Wind Project proceeding (Docket 23-OPT-01). On January 19, 2024, Fountain Wind LLC (“Applicant”) submitted an Application for Confidential Designation (“Confidentiality Request”) in the docket requesting that the California Energy Commission (“Commission”) keep certain transmission information and reports submitted to the California Independent System Operator (“CAISO”) as part of the Fountain Wind Project confidential under the California Public Records Act (“CPRA”).<sup>1</sup> Commission regulations require you and the agency’s General Counsel to review and act on the confidentiality request.<sup>2</sup> Pursuant to its review and comment obligations under AB 205, the County believes that the information contained in the records subject to the Confidentiality Request are or may be public records under California law, in whole or in part, and pertinent to the County’s review and comment obligations on the Fountain Wind Project application. The County is submitting this comment to you because the applicant is requesting that the Commission keep the entirety of its response confidential despite that one or more cited CPRA exceptions are inapplicable. The Applicant is also asserting that if the CPRA exceptions apply then the entirety of the records should be designated as confidential, which is contrary to the plain language of the CPRA.

The primary CPRA exception cited by the Applicant in the Confidentiality Request is Government Code section 7927.605(a) regarding “corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.” This exception absolutely does not apply. The Applicant has previously and unsuccessfully attempted

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<sup>1</sup> TN254006, *fwp\_confidentiality\_app\_tranmission\_response\_2024-0119* (Jan. 19, 2024).

<sup>2</sup> 20 C.C.R. § 2505(a).

to get the Commission to utilize this exception and is invoking it again for the transmission records that have been submitted to the Commission.

In TN252457 (pp. 2-6), dated September 29, 2023, attached hereto and incorporated herein by reference so as not to duplicate the County's arguments on this issue, the County provided the Commission with definitive information that section 7927.605(a) did not apply to the Applicant's community benefit agreement records that it filed with the Commission. The County notes for the Commission, again, that the exception does not apply to the Applicant's transmission and CAISO records. The CPRA exception located in section 7927.605(a) very clearly applies to corporate financial records given to the State for the purpose of the agency working with a company on "retaining, locating, or expanding a facility within California." The subsection essentially, and only, applies to companies obtaining tax incentives from the State for job growth and business assistance through the Governor's Office of Business and Economic Development. It does not apply to the "siting" of an energy facility (which term "facility" is being used loosely in the Confidentiality Request), facility application records filed with the Commission, or to any record associated with the Commission's review of the Fountain Wind Project. In fact, the California Public Utilities Commission ("CPUC") has issued a comprehensive interpretation of this exception determining that it absolutely does not apply to its agency or records kept by the agency, and, similarly then, to records like the one before the Commission here.

In addition, the County notes that not all of the transmission and CAISO data submitted to the Commission on January 19 is trade secret information or constitutes commercially sensitive transmission planning or cost information or would result in a loss of a competitive advantage. This is also not necessarily the applicable test for trade secrets. Government Code section 7924.510(f) sets forth the specific test for trade secrets. Neither the statute nor the test is analyzed or even cited in the Confidentiality Request, other than a generalized reference that such information may be kept confidential by the CAISO (although there is no demonstration that the specific reports are actually kept confidential).

The Confidentiality Request also states that the entirety of the records should be kept confidential and omitted from the docket. The CPRA, though, says that non-public information needs to be redacted and the rest of the record disclosed.<sup>3</sup> There is a specific test for when information is reasonably segregable from that which is exempt or if it is inextricably intertwined with nonexempt information. This test is not cited or used by the applicant, and there is no delineation or assertion that all of the subject information contained in the various reports are so inextricably intertwined that they cannot be redacted. Therefore, to the extent there are trade secrets in the documents, the Commission must review them and redact those confidential portions while disclosing the non-confidential portions. It is not as simple as saying that the CAISO allows complete omission since a specific state legal test must be satisfied.

The County's concern is that the applicant is filing data into the record that is public, and citing to exceptions that do not apply in order to keep the public from reviewing the information, at least for a period of time. So, while Commission staff gets to immediately review the records,

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<sup>3</sup> *ACLU Foundation v. Deukmejian* (1982) 32 Cal. 3d 440.

the County and the public is prevented from doing so for several days or weeks until a Commission determination is made. This situation occurred with the Community Foundation of the North State community benefits agreement whereby the County objected to the confidentiality request, no Commission determination was made on either the Application for Confidential Designation filed with those records or the County's comments on that application, and the community benefits agreement information was re-submitted in unredacted format some two weeks later. The only purpose that can be ascertained for utilizing improper CPRA exceptions is to forestall review and comment.<sup>4</sup>

Importantly, the County has reviewed the Confidentiality Request and believes that information contained therein is relevant to the County's review and comment rights and the design, construction or operation of the project. The records may also be relevant to the project's compliance with Commission opt-in application and certification requirements, CEQA, or the public convenience and necessity of the project, among other things.

The County respectfully requests that the Commission exercise its due diligence, deny confidentiality for any improper public records exceptions, and post records, or redacted records, to the docket or cause the Applicant to do so.

Sincerely,



Ryan M. F. Baron  
of BEST BEST & KRIEGER LLP

cc: Alan Cox, Acting County Counsel, County of Shasta  
Paul Hellman, Resource Management Director, County of Shasta  
RMB

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<sup>4</sup> Commission staff issued a community benefits data request on September 20, 2023 and a redacted response was submitted by the Applicant on September 28, 2023. The County submitted comments on the confidential designation request the next day on September 29, 2023. The Commission did not act on the application, or at least file its action into the docket, and it did not respond to the County's comments. The Applicant submitted an unredacted response on October 12, 2023 two weeks later.