

**GOVERNMENT OF PUERTO RICO  
PUBLIC SERVICE REGULATORY BOARD  
PUERTO RICO ENERGY BUREAU**

**NEPR**

**Received:**

**Apr 11, 2025**

**2:50 PM**

**IN RE: GENERA PR, LLC, ELECTRIC  
COMPANY CERTIFICATE  
APPLICATION**

**CASE NO.: NEPR-CT-2023-0001**

**SUBJECT: REQUEST FOR FTI REPORT**

**ICSE’S REPLY TO PREPA’S APRIL 9 MOTION &  
NOTICE OF P3A POSITION**

**TO THE HONORABLE ENERGY BUREAU:**

Comes now the **Institute of Competitiveness and Economic Sustainability (“ICSE” as its Spanish acronym)**, represented by the undersigned, respectfully states and prays:

On February 27, 2025, PREPA and Genera filed the FTI Report marked as confidential claiming the attorney-client privilege and the existence of trade secrets.

On March 26, 2025, ICSE filed before this Bureau the *ICSE’s Motion Requesting Access to FTI Report (“ICSE’s March 26 Motion”)* in its exercise of its constitutional right to free expression as interpreted and implemented by the Supreme Court of Puerto Rico in *Soto v. Secretary of Justice*, 112 DPR 477 (1982), and its subsequent case law. ICSE also requested the same document directly to PREPA and the Puerto Rico Public-Private Partnerships Authority (“P3A”). See *ICSE’s Informative Motion* of April 3, 2025.

On April 2, 2025, this Energy Bureau entered its Resolution and Order granting PREPA and Genera the opportunity to “provide their respective arguments as to why the Energy Bureau should not order the public release of the [FTI R]eport.”

On April 9, 2025, PREPA filed a motion in compliance with this PREB's April 2 Resolution and Order titled *PREPA's Position to ICSE's Motion Requesting Access to FTI Report*. The public corporation asserts, in direct contradiction of its February 27 filing: "PREPA does not oppose the disclosure of the FTI Report." That is, PREPA has voluntarily waived its alleged attorney-client privilege and has accepted the disclosure of alleged trade secrets. This is enough for this Bureau to rule that the FTI Report should be disclosed. There is no claimed interest in suppressing and harming ICSE and the public's constitutional right to access public information. Nonetheless, strangely enough, PREPA now claims that this Bureau has discretion to withhold the FTI Report on the basis of a purported deliberative process privilege.

On April 10, 2025, counsel to ICSE received a letter dated April 9, 2025 and signed by the Executive Subdirector of the P3A, in which it claimed that given ICSE has presented before this PREB the same request of access to the FTI Report, "The P3 Authority considers it prudent and necessary for the Energy Bureau to resolve the request without interference from the P3 Authority in the process."<sup>1</sup> (translation ours). This confirms that the P3A has chosen not to assert any privilege and has deferred entirely to the Bureau's authority. Just like PREPA, the P3A claims that the FTI Report is deliberative in nature.

PREPA and P3A's positions are very similar. Both entities do not raise any privilege of their own to withhold disclosure of FTI Report. They are instead switching the burden

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<sup>1</sup> A copy of the communication is hereby attached to this motion.

to the PREB under an overbroad interpretation of the deliberative process privilege. These claims fail on two independent grounds.

**First**, as ICSE has previously argued in other administrative proceedings, the Supreme Court of Puerto Rico has recognized the deliberative process privilege exclusively for the *Governor of Puerto Rico* as a category of its executive privilege. Therefore, administrative agencies are not beneficiaries of the privilege. In *Bhatia Gautier v. Gobernador*, 199 DPR 59, 132 (2017), the Court is clear that: “The privilege only applies to the communications that involve advising the Chief Executive.” Thus, this Bureau does not possess a deliberative process privilege. To hold otherwise would ignore its statutory duty of transparency, a guiding principle in the energy sector, as codified in article 1.5(3)(a) of Act 17-2019, 22 LPRA § 1141d.

Aside from the constitutional and Act 57’s transparency mandate, Puerto Rico evidentiary law requires that all privileges be interpreted restrictively. As the Court stated in *Pueblo v. Fernández Rodríguez*, 183 DPR 770, 791 (2011): “This Court has on numerous occasions invoked the concept of restrictive interpretation to limit the scope or disallow the application of a privilege. The restrictive interpretation of the privilege could tip the balance against its recognition.” (emphasis ours) (internal citations omitted).

PREPA invokes as a statutory basis Article 4 (iv) of Act 122-2019, the Puerto Rico Government Open Data Act, 3 LPRA § 9894. This provision is impertinent to ICSE’s claim requesting disclosure of the FTI Report. The statute limits the privilege to the extent “recognized by case law” at the time of enactment — *i.e.*, *Bhatia v. Gobernador*. There are no subsequent cases extending this privilege to agencies. This Bureau therefore has no legal

basis—whether statutory or grounded in *stare decisis*—to self-recognize an evidentiary privilege reserved exclusively for the Chief Executive. Such an act would constitute *ultra vires* conduct and a clear violation of the duties imposed upon this Bureau by its enabling statute.

**Second**, the document is not pre-decisional nor deliberative. The FTI Report is a financial advisory document. The deliberative nature of a document is dependent on whether there is a formulation of public policy. *See Bhatia*, 199 DPR, at p. 156 (Estrella, dissenting) (citing *United States v. Nixon*, 418 U.S. 683 (1974)). The administrative record clearly shows that P3A, PREPA, and Genera have already agreed to amend the GOMA. That decision has been taken and is final from the contracting parties’ perspective.<sup>2</sup>

The PREB’s role in this amendment approval and its “**decision**” is not that of ratifying the amendment, but of simply certifying its compliance with the energy public policy. Certifying compliance with the energy public policy is not a *formulation* of said public policy. It is an act of regulatory oversight.

The situation is aggravated by the fact that the amendment is already a part of the energy rate as a component of the fuel purchase rider. In other words, ratepayers are being burdened with a substantial quarterly rate hike, while being denied access to the very document that purports to justify such a cost.

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<sup>2</sup> The finality we are referring to is not dependent on the formal requirements required by law to uphold the validity of a public contract. If that were the case, the FTI Report could only be disclosed once the amendment is presented to the Comptroller’s Contract Registry. The dispositive element regarding finality is that there is a meeting of minds between P3A, PREPA, and Genera.

Extrapolating this situation to a judicial context is akin to suggesting that a court may restrict access to certain evidence simply because it has not yet ruled on the merits of the controversy, while at the same time ordering the uninformed party to pay for a hypothetical remedy. No reasonable person would recognize such discretion in a court. Why, then, should an administrative agency be afforded such discretion? Particularly, when the party raising the issue has agreed that it has no interest in maintaining the document confidential.

**WHEREFORE**, it is respectfully requested that this Energy Bureau take into account the foregoing and grant *ICSE's Motion Requesting Access to FTI Report* of March 26, 2025.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, April 11, 2025.

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## Contestación ICSE

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**From** Rosario Burgos, Irma J. (AAPP) <Irma.Rosario@p3.pr.gov>

**Date** Thu 4/10/2025 6:39 PM

**To** Licenciado Agrait <agraitfe@agraitlawpr.com>

**Cc** Franco Nogueras, María J. (AAPP) <Maria.Franco@p3.pr.gov>; Montalvo Vázquez, Griselle (AAPP) <Griselle.Montalvo@p3.pr.gov>

 1 attachment (833 KB)

20250409 - P3A - Contestacion ICSE.pdf;

Saludos Lcdo Agrait:

Reciba un cordial saludo. Adjunto contestación a solicitud en representación del Instituto de Competitividad y Sostenibilidad Económica (ICSE), con relación al informe de FTI Consulting sobre los costos-beneficios presentada en la moción conjunta al PREB.

Cordialmente,



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AUTORIDAD PARA LAS  
ALIANZAS PÚBLICO PRIVADAS

# AAPP

GOBIERNO DE PUERTO RICO

## VÍA CORREO ELECTRÓNICO

**AAPP-2025-035**

9 de abril de 2025

**Lcdo. Fernando E. Agrait**

Instituto de Competitividad y  
Sostenibilidad Económica de Puerto Rico  
("ICSE")

### **Asunto: Solicitud de Información o Documentos**

Estimado licenciado Agrait:

Reciba un cordial saludo. La Autoridad para las Alianzas Público-Privadas ("AAPP") recibió su Solicitud de Información o Documentos ("Solicitud") en representación del Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico ("ICSE"), con relación al *Joint Motion to Request Preliminary Approval for Amendments to Genera's Operation and Maintenance Agreement*<sup>1</sup>, presentado ante el Negociado de Energía de Puerto Rico ("Negociado"). En su Solicitud, peticona el acceso al informe de la firma de consultoría FTI Consulting sometido ante el Negociado con relación la referida moción.

Surge del expediente del caso NEPR-CT-2023-0001 que esta misma solicitud fue presentada ante el Negociado, foro que, al presente, no ha emitido una determinación al respecto. Este hecho es particularmente relevante, ya que el Negociado es uno de los entes reguladores encargados de evaluar la enmienda al contrato con Genera PR, LLC, y el documento solicitado forma parte del expediente de dicha evaluación en calidad de documento deliberativo, conforme nuestro ordenamiento jurídico. Una vez culminada la

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<sup>1</sup> NEPR-CT-2023-0001



evaluación por parte del Negociado, la enmienda al contrato también debe ser evaluada y aprobada por la Junta de Supervisión Fiscal.

La AAPP cree firmemente en los principios de transparencia y acceso a la información pública, y toma con la mayor seriedad todas las solicitudes que recibe, especialmente aquellas relacionadas con asuntos de alto interés público. No obstante, toda vez que el ICSE ha sometido su solicitud directamente ante el Negociado, la AAPP entiende prudente y necesario que sea el Negociado quien resuelva la petición, sin que la AAPP interfiera en el proceso.

Una vez el Negociado emita su decisión, la AAPP actuará conforme a lo que corresponda.

Cordialmente,



**Natalia D. Catoni**

Subdirectora Ejecutiva

