



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 24, 2006

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2006-09797

Dear Ms. Alexander:

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# 257845.

The Texas Department of Transportation (the "department") received two requests for information pertaining to the Crash Records Information System. You claim that release of the requested information may implicate the proprietary interests of International Business Machines Corporation ("IBM"). Accordingly, you inform us, and provide documentation showing, that you notified IBM of the request and of its right to submit arguments to this office as to why the requested information should not be released. See Gov't Code § 552.305(d) (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 that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have reviewed the submitted arguments and the submitted information.<sup>1</sup>

IBM contends that the submitted information is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) protects "[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

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<sup>1</sup>We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

In this instance, the submitted information consists of a settlement agreement between IBM and the Texas Department of Public Safety. IBM contends that the submitted information is excepted from disclosure under section 552.110(b) because its disclosure would harm both IBM’s and the department’s commercial interests. IBM’s argument expressing the commercial interests of the department relies on the test announced in *National Parks* pertaining to the applicability of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. *See Nat’l Parks*, 498 F.2d 765; *see also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (commercial information is excepted from required public disclosure if information is voluntarily submitted to government and information is of a kind that the provider would not customarily make available to the public). Although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, *pet. denied*). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will only consider IBM’s claims regarding its own commercial interests.

In asserting its own commercial interests, IBM argues that the submitted information could be used to “improve the bargaining positions of IBM’s competitors . . . during similar future negotiations with” the department. We note, however, that IBM has not provided this office with specific factual evidence that substantial competitive injury would result from release of the submitted information. *Id.* Therefore, we find that IBM has not demonstrated the applicability of section 552.110(b) in this instance, and none of the submitted information may be withheld on that basis. As IBM raises no other exceptions to disclosure, the department must release the submitted information to the requestors.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James A. Person III  
Assistant Attorney General  
Open Records Division

JAP/dh

Ref: ID# 257845

Enc. Submitted documents

cc: Mr. Todd Spivak  
Staff Writer  
Houston Press  
1621 Milam, Suite 100  
Houston, Texas 77002  
(w/o enclosures)

Ms. Sarah Viren  
820 North Lower Broadway  
Corpus Christi, Texas 78401  
(w/o enclosures)

Ms. Wendy C. Wang  
Staff Attorney  
IBM  
1507 LBJ Freeway, 7<sup>th</sup> Floor  
Dallas, Texas 75234  
(w/o enclosures)