



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2007

Mr. F. Keith Good
Lemon, Shearer, Phillips & Good, P.C.
P.O. Box 1066
Perryton, Texas 79070-1066

OR2007-05310

Dear Mr. Good:

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# 279188.

The North Plains Groundwater Conservation District (the "district"), which you represent, received a request for groundwater production reports and drilling or well permits involving Premium Standard Farms, Inc. ("Premium"); information relating to Premium's method of metering and calculations, estimations or other manipulation of data performed by the district; the district's metering and production reporting manual; and the approved minutes of three district board meetings. You claim that some of the submitted information is excepted from disclosure under section 552.110 of the Government Code.¹ You also believe that this request for information implicates the interests of Premium. You notified Premium of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.² We received correspondence from an attorney for Premium. We have considered all of the submitted arguments and have

¹Although you also have directed our attention to section 1901.251 of the Occupations Code, you acknowledge that section 1901.251 is not applicable to the district. Accordingly, we do not address section 1901.251. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why stated exception applies to information at issue).

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

reviewed the submitted information.³ We also have considered the comments that we received from the requestor.⁴ We assume that the district has released any other types of information that are responsive to this request, to the extent that such information existed when the district received the request. If not, then any such information must be released immediately.⁵ See Gov't Code §§ 552.021, 552.221, .301, .302; Open Records Decision No. 664 (2000).

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial 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 information was obtained.” Gov't Code § 552.110(a)-(b).

We understand you to contend that section 552.110(b) is applicable to some of the submitted information. Section 552.110(b) 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 Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). You argue that

[i]f this sensitive information is not exempt from disclosure under the Public Information Act, its release to the public could certainly impair the [d]istrict's ability to obtain accurate and useful well production information in the future. The water producers within the [d]istrict will be very reluctant to provide accurate production reports if such reports are to be made public.

In invoking the district's interests in the information at issue, you appear to rely on the test announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency. 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) (commercial information exempt from disclosure

³This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁴See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

⁵We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* standard under 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.*

Accordingly, we will consider only the interests of Premium in withholding the submitted information under section 552.110(b). Neither the district nor Premium has demonstrated that the release of any of the submitted information would be likely to cause Premium any substantial competitive harm.⁶ We therefore conclude that the district may not withhold any of the submitted information under section 552.110 of the Government Code.

We note, however, that section 552.136 of the Government Code is applicable to some of the submitted information.⁷ Section 552.136(b) states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). We have marked an account number that the district must withhold under section 552.136.

In summary, the district must withhold the marked account number under section 552.136 of the Government Code. The rest of the submitted information must be released.

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

⁶Premium states that it “hereby adopts the [d]istrict’s response to the open records request . . . and requests a ruling that groundwater production reports and/or related documents are not subject to public disclosure under the Public Information Act.”

⁷Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large loop at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jb

Ref: ID# 279188

Enc: Submitted documents

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