



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2009

Mr. Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2009-11988

Dear Mr. Martinez:

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# 353493 (TCEQ ID No. 09.06.08.09).

The Texas Commission on Environmental Quality (the "commission") received a request for information relating to the application for a low-level radioactive waste ("LLRW") disposal license made by Waste Control Specialists, LLC ("WCS").¹ You state release of portions of the submitted information may implicate the proprietary interests of WCS. You inform us you have notified WCS of this request for information and its right to submit arguments to this office as to why the company's information should not be released. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have received correspondence from WCS.² We

¹You inform us the commission received clarification of the request. *See Gov't Code* §552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Although the requestor asserts WCS failed to comply with section 552.305(e), we note a violation of section 552.305 does not result in the legal presumption that the requested information is public under section 552.302 of the Government Code.

have also received correspondence from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered all of the submitted arguments and have reviewed the submitted representative sample of information.³

WCS objects to the release of portions of the submitted information based on section 552.110(b) of the Government Code. Section 552.110(b) protects the proprietary interests of third parties by excepting from disclosure 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. *See* Gov't Code § 552.110(b). 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. *Id.*; *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No: 661 (1999).

WCS explains the submitted information was provided to the commission in its LLRW disposal license application, which will allow WCS to construct and operate a commercial LLRW facility. WCS explains the facility will consist of a compact waste facility and a federal waste facility. WCS claims release of a portion of its information would reveal the financial health of WCS, its business model, costs, pricing structures, and details of WCS's financing of the disposal project at issue. It claims this information could be used by its competitors to obtain unfair negotiating positions and to enhance relationships with their current clients, thereby limiting WCS's market share in a highly competitive and limited market. However, the requestor notes the WCS facility for which the license at issue was sought will be disposing of LLRW, in part, pursuant to the Texas Low-Level Radioactive Waste Disposal Compact (the "compact"). The requestor states pursuant to section 401.202 of the Health and Safety Code, the commission may only issue one license for a compact waste disposal facility. *See* Health & Safety Code § 401.202(b). The requestor also asserts the prices for the disposal of compact waste will be set by the commission; thus, the prices are not competitor driven or market based. The requestor argues that, because WCS was issued the one allowed license for the disposal of compact waste, and pricing is set by the commission, WCS faces no competition for the disposal of compact waste, and release of the information pertaining to compact waste will not cause WCS competitive harm. The requestor also argues that release of the requested information pertaining to the federal waste facility will not cause WCS competitive harm.

³We assume 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.

The requestor acknowledges, however, section 3.05(7) of the compact allows waste generators, upon petition, to export LLRW from a compact state to a disposal facility located outside of the compact states. *See id.* § 403.006. Further, WCS states it intends to import LLRW from non-compact states, where it may face competition from non-compact state LLRW disposal companies. WCS acknowledges the pricing for the compact waste facility will be set by the commission. WCS states it will file a ratemaking application with the commission and that it has began negotiations with interested third parties to establish rates in an informal manner. We note rates are set by the commission after notice and opportunity for a contested case hearing have passed. *See* 30 T.A.C. § 336.1309(b). We also note the rate set by the commission is the maximum disposal rate and WCS may provide a disposal rate lower than the maximum disposal rate. *See* 30 T.A.C. § 336.1317. Finally, the requestor acknowledges that another licensee is currently operating a facility that is licensed to dispose of LLRW.

Upon review of the submitted arguments and the submitted information, we conclude WCS has made a specific factual or evidentiary showing that release of some of the information at issue would cause it substantial competitive harm. Therefore, the commission must withhold the information we have marked pursuant to section 552.110(b) of the Government Code. Upon review, however, we find WCS has not made the specific factual and evidentiary showing required by section 552.110(b) that release of the remaining information at issue, which includes national market price information and financial information related to WCS's holding company, would cause it substantial competitive harm. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.⁴ Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find portions of the remaining information are highly intimate and of no legitimate public interest. Therefore, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the commission must withhold the information we have marked under section 552.110(b) of the Government Code. It must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,


Karen E. Stack
Assistant Attorney General
Open Records Division

KES/jb

Ref: ID# 353493

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Mr. Clay Nance
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