



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2011

Mr. R. Brooks Moore
Assistant General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845

OR2011-00046

Dear Mr. Moore:

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# 404767 (TAMU 10-535).

The Texas A&M University (the "university") received a request for the test results of a specified test conducted by the university. Although you take no position on whether the requested information is excepted from disclosure, you state release of this information may implicate the proprietary interests of DriTherm International, Inc. ("DriTherm"). Accordingly, you have notified DriTherm of the request and of its right to submit arguments to this office as to why its 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); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from DriTherm. We have also received comments 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 the submitted arguments and reviewed the submitted information.

Initially, DriTherm raises section 552.101 of the Government Code in conjunction with the holding in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The holding in *National Parks* pertains 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. The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *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 ORD 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 consider only DriTherm's interest in its information.

Next, we consider DriTherm's arguments against disclosure of its information under section 552.110 of the Government Code. Section 552.110 of the Government Code protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. See *id.* § 552.110(a). 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 information was obtained[.]" Gov't Code § 552.110(b). DriTherm raises section 552.110 for the submitted test results. However, we note the submitted information was not "obtained from a person," but instead consists of the results of a test conducted by the university. Thus, section 552.110 is not applicable to the submitted test results, and the university may not withhold any portion of the submitted information under section 552.110. See Gov't Code § 552.110(a), (b). As no further exceptions to disclosure have been raised, the submitted 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, toll free at (888) 672-6787.

Sincerely,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 404767

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Ms. Julia Cook
Schlanger, Silver, Barg & Paine, L.L.P.
For DriTherm International, Inc.
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(Third party w/o enclosures)