



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2012

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

OR2012-06401

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# 452540.

The Texas Department of Transportation (the "department") received a request for the bid tabulation related to a specified request for proposals. You state some information is being released. Although the department takes no position regarding whether the submitted information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Alamo 1; Protect Environmental; Sam's Plumbing and Environmental Control, LLC; Talon LPE; Tetra Tech NUS, Inc. ("Tetra Tech"); TRC Environmental Corporation; and USA Environmental. Accordingly, you state you have notified these third parties of the request and their right to submit arguments to this office. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Tetra Tech. We have considered the submitted arguments and reviewed the submitted information.

We first note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code § 552.305(d)(2)(B)*. As of the

date of this ruling, we have received comments only from Tetra Tech. Thus, we have no basis to conclude the remaining third parties have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the department may not withhold any of the information at issue on the basis of any proprietary interests the remaining third parties may have in the information.

Tetra Tech raises section 552.110(b) of the Government Code for portions of its information. 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). 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* ORD 661 (business must show by specific factual evidence that release of particular information at issue would cause substantial competitive injury).

In advancing its arguments, Tetra Tech raises the test 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, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). 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 the 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 Tetra Tech’s interests in its information.

Upon review, we find Tetra Tech has established that release of its pricing information would cause the company substantial competitive injury for purposes of section 552.110(b). *See* ORD 661. Therefore, the department must withhold the information we have marked under

section 552.110(b) of the Government Code. As Tetra Tech raises no exceptions to disclosure for the remaining information, it must be released to the requestor.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 452540

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Talon LPE
17170 Jordan Road, Suite 102
Selma, Texas 78154
(w/o enclosures)

c: USA Environmental
10234 Lucore Street
Houston, Texas 77017
(w/o enclosures)

- c: Mr. Mark Matranga, P.G.
Houston Operations Manager
Tetra Tech Inc.
2901 Wilcrest Drive
Houston, Texas 77042
(w/o enclosures)

- c: Sam's Plumbing and Environmental Control L.L.C.
7239 Dale Road
El Paso, Texas 79915
(w/o enclosures)

- c: Alamo 1
10843 Gulfdale
San Antonio, Texas 78216
(w/o enclosures)

- c: Protect Environmental
6504 Midway Road, Suite 200
Haltom City, Texas 76117
(w/o enclosures)

- c: TRC Environmental Corporation
505 East Huntland Drive, Suite 250
Austin, Texas 78752
(w/o enclosures)