



February 19, 2015

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2015-03333

Dear Ms. Cost:

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# 554066 (DPS PIR Nos. 14-2578, 14-2722, 14-3272, 14-3667, and 14-4985).

The Texas Department of Public Safety (the "department") received five requests for the notices provided to the State Emergency Response Commission pursuant to a specified emergency order. Although you take no position as to whether the submitted information is excepted under the Act, you indicate release of the submitted information may implicate the proprietary interests of BNSF Railway ("BNSF") and Kansas City Southern ("KCS").¹ Accordingly, you state, and provide documentation showing, you notified these third parties of the requests for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also*

¹You inform us, and provide documentation showing, the Department of Transportation ("DOT"), after consultation with the Department of Homeland Security and the Transportation Security Administration ("TSA"), has determined the requested information does not contain sensitive security information as defined by either DOT or TSA regulations. *See* 79 Fed. Reg. 59892 (2014); Open Records Letter No. 2014-15674 (2014).

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 KCS. We have also received and considered comments from representatives of two of the requestors. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

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 id.* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from BNSF explaining why its information should not be released. Thus, we have no basis to conclude BNSF has a protected proprietary interest in 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 submitted information on the basis of any proprietary interest BNSF may have in the information.

KCS raises section 11904 of title 49 of the United States Code. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 11904 of title 49 of the United States Code, which provides, in relevant part, as follows:

(a) A –

(1) rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation Board] under this part, or an officer, agent or employee of that rail carrier, or another person authorized to receive information from that rail carrier, that knowingly discloses to another person . . . information described in subsection (b) without the consent of the shipper or consignee shall be fined not more than \$1,000.

(b) The information referred to in subsection (a) is information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation provided under this part, or information about the contents of a contract authorized under section 10709 of this title, that may be used to the detriment of the shipper or consignee or

may disclose improperly, to a competitor, the business transactions of the shipper or consignee.

49 U.S.C. § 11904(a)(1), (b). Section 11904 of title 49 prohibits disclosure, without consent of the shipper or consignee, of certain information that may be used to the detriment of the shipper or consignee or may improperly disclose the business transactions of the shipper or consignee to a competitor. *See id.* Upon review, we find KCS has not shown the detriment that would be suffered by its shippers or consignees if the information at issue were released to the public, nor has KCS demonstrated that release of the information at issue under the Act would improperly disclose the business transactions of its shippers or consignees to a competitor. Thus, we find KCS has failed to demonstrate the applicability of section 11904 of title 49 of the United States Code to the information at issue. Therefore, the department may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with section 11904 of title 49 of the United States Code.²

KCS claims its 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 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm). Upon review, we find KCS has failed to demonstrate the release of any of its information would result in substantial harm to its competitive position. *See id.* Accordingly, the department may not withhold any of KCS’s information under section 552.110(b). As no further exceptions to disclosure have been raised, the department must release the submitted information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

²As we are able to make this determination, we need not address KCS’s preemption assertion under section 10501(b) of title 49 of the United States Code, which pertains to remedies provided with respect to the regulation of rail transportation. *See* 49 U.S.C. § 10501(b).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/cbz

Ref: ID# 554066

Enc. Submitted documents

c: 5 Requestors
(w/o enclosures)

Mr. Patrick Brady
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(w/o enclosures)

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