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ATTORNEY GENERAL OF TEXAS

June 26, 2015

Ms. Elizabeth West
Senior Attorney
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2015-12719

Dear Ms. West:

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# 569964 (TCEQ PIR No. 15-21513).

The Texas Commission on Environmental Quality (the "commission") received a request for all bids received by the commission for a specified solicitation and the commission's scoring of those bids. You state the commission is releasing some responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code and protected by copyright. In addition, you state release of this information may implicate the proprietary interests of CGI Technologies & Solutions, Inc. ("CGI"). Accordingly, you state, and provide documentation showing, you notified CGI of the request for information and of its 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* 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 considered the exceptions you claim and reviewed the submitted information.

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. The commission raises section 552.101 in conjunction with the federal Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552. FOIA applies to an "agency,"

which is defined as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]” *See id.* § 552a(a)(1) (referring to 5 U.S.C. § 552(e) for definition of “agency”). In this instance, the information at issue was created for and is maintained by the commission, which is a state, and not a federal, agency. This office and the courts have stated FOIA applies only to federal agencies and not to state or local agencies. *See Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments not subject to FOIA); Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). Accordingly, the commission may not withhold the submitted information under section 552.101 of the Government Code in conjunction with FOIA.

Next, the commission argues that release of the submitted information would result in a “reduced pool of proposers or vendors for any future solicitation involving All Fusion Maintenance” and, if it is required to release the submitted information, then “CGI may elect not to participate in future [commission] solicitation, and that would be a loss for the agency.” Based on the foregoing, we understand the commission to assert the submitted information is protected from disclosure under 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 FOIA 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 the future. *National Parks*, 498 F.2d at 770. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110 of the Government Code, 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, the commission may not withhold any of the submitted information under section 552.101 of the Government Code on this basis and we will consider only CGI’s interest in the submitted information.

Although the commission raises section 552.110 of the Government Code for the submitted information, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the commission’s argument under section 552.110. We further note an interested third party is allowed ten business days after

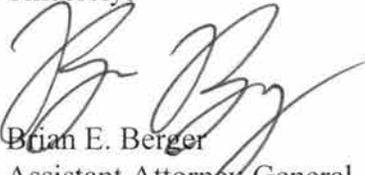
the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from CGI explaining why its information should not be released. Therefore, we have no basis to conclude CGI has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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 commission may not withhold any of the information at issue on the basis of any proprietary interest CGI may have in it.

The commission claims the submitted information is confidential under the Federal Copyright Act, title 17 of the United States Code. However, copyright law does not make information confidential under the Act. *See generally* Open Records Decision No. 660 at 5 (1999) (Federal Copyright Act does not make information confidential, but rather gives copyright holder exclusive right to reproduce his work, subject to another person's right to make fair use of it). Furthermore, upon careful review of the submitted information, we find no evidence of copyright protection. Therefore, the commission must release the submitted information 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.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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 569964

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)