



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 20, 2009

Mr. Ed C. Jones  
County Attorney  
Angelina County  
P.O. Box 1845  
Lufkin, Texas 75902-1845

OR2009-14824

Dear Mr. Jones:

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# 358898.

Angelina County (the "county") received a request for proposals submitted in response to a specified RFP. Although you take no position with respect to the public availability of the submitted information, you notified SCS Engineers ("SCS") and Element Markets, LLC ("Element Markets") of the request 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* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered comments from SCS and Element Markets and reviewed the submitted information.

We note that both SCS and Element Markets have submitted arguments to this office regarding information the county did not submit for our review. Because such information was not submitted by the county, this ruling does not address that information and is limited

to the information submitted as responsive to the request by the county. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

SCS asserts that portions of its information are excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the county does not seek to withhold any information pursuant to this exception, we find that section 552.104 is not applicable to SCS's proposal. *See* ORD 592 (governmental body may waive section 552.104).

SCS and Element Markets claim portions of their respective information are excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[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* Open Records Decision No. 661 at 5-6 (1999).

In advancing its arguments, SCS relies, in part, on 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 future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only SCS's interests in its information.

Having considered the submitted arguments and reviewed the information at issue, we conclude SCS and Element Markets have established their pricing information constitutes commercial or financial information, the release of which would result in substantial competitive injury; therefore, the county must withhold this information, which we have marked, under section 552.110(b). However, we find neither SCS nor Element Markets has made the specific factual or evidentiary showing required by section 552.110(b) establishing that the release of any of the remaining information would cause either company substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Therefore, the county may not withhold any of the remaining information under section 552.110 of the Government Code. As no other exceptions to disclosure have been raised, 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](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,



Matt Entsminger  
Assistant Attorney General  
Open Records Division

MRE/dls

Ref: ID# 358898

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Thomas W. A. Barham  
Senior Vice President and General Counsel  
SCS Engineers  
11260 Roger Bacon Drive  
Reston, Virginia 20190-5282  
(w/o enclosures)

Mr. John McMullan  
General Counsel  
Element Markets  
3555 Timmons Lane, Suite 900  
Houston, Texas 77027  
(w/o enclosures)