



ATTORNEY GENERAL OF TEXAS  
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Mr. Frank J. Garza  
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OR2012-03184

Dear Mr. Garza:

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# 447138.

The Brownsville Public Utility Board (the "board"), which you represent, received a request for four categories of information relating to IFP 042-11. You state the board does not maintain information responsive to one of the specified categories.<sup>1</sup> You state that the board will release some of the requested information. We understand you to claim portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Further, you state the submitted documents may contain proprietary information of third parties subject to exception under the Act. Accordingly, the board notified Dell SecureWorks ("DSW"), Network & Security Technologies, Inc. ("NST"), and Proven Compliance Solutions ("PCS") 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 applicability of exception to disclosure in certain circumstances). We

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 362 at 2 (1983).

have received correspondence from NST and PCS.<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.

You argue that the release of customer lists within the submitted proposals will have a chilling effect on the board's ability to obtain qualified contractors to respond to the board's future requests for proposals. In advancing this argument, you appear to rely 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 the information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. However, section 552.110(b) of the Government Code 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.* Although we understand you to argue the customer lists within the submitted proposals are excepted under section 552.110, we note this exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address your arguments under section 552.110. However, we will address the proprietary interests of DSW, NST, and PCS in the submitted information.

We note that 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 decision, this office has received no correspondence from DSW. Thus, DSW has not demonstrated that any of its information is proprietary for purposes of the Act. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3. Accordingly, the board may not withhold any of DSW's information on the basis of any proprietary interest DSW may have in its information.

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<sup>2</sup>We note PCS argues against the disclosure of information that is not responsive to the request. This ruling only addresses the responsive information that the board submitted to this office. *See* Gov't Code § 552.301(e)(1)(D).

NST and PCS each claim section 552.110(b) of the Government Code for portions of the submitted information. This exception protects the proprietary interests of private parties with respect to “commercial 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). Section 552.110(b) 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 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

NST claims its customer information constitutes commercial information protected by section 552.110(b). PCS claims section 552.110(b) for portions of its proposal. Upon review, we conclude NST has established that release of its customer information would cause it substantial competitive injury; therefore, the board must withhold this information, which we have marked, under section 552.110(b). We find PCS has also demonstrated its customer information constitutes commercial information, the release of which would cause its company substantial competitive injury. Accordingly, the board must withhold this information, which we have marked, under section 552.110(b) of the Government Code. We note PCS was the winning bidder with respect to the contract at issue, and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. Furthermore, we note PCS has made some of the information they seek to except publicly available on its website. Because PCS itself published this information, we are unable to conclude such information is proprietary. We find PCS has made only conclusory allegations that the release of its remaining information would result in substantial harm to its competitive position. *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), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

We note some of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the board must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining submitted information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

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,



Charles Galindo Jr.  
Assistant Attorney General  
Open Records Division

CG/som

Ref: ID# 447138

Enc. Submitted documents

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