



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 10, 1997

Ms. Patricia A. Williams
Assistant City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR97-0303

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103592.

The City of Plano (the "city") received a request for the documents which comprise:

. . . [E]ach vendor's flow data resulting from the flow metering test and the analysis of the data that was performed by the City. Also, we are requesting a copy of each proposal received by the City in response to CSP#: B9606-159.

The bidding is now closed and a contract has been awarded. The city has provided copies of the responsive documents to the requestor from three of four participating vendors. The city indicates one vendor, American Sigma, Inc. ("Sigma"), raised objections to the release of any of the material in the bid proposal. Consequently, pursuant to section 552.305 of the Government Code, we notified Sigma of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. Sigma's response asserts that "the test data performed by the City of Plano on the Sigma meter is excepted from public disclosure," as Sigma questions the city's testing methods as well as the reliability of the results. The city submitted the Sigma bid proposal, the raw data and the Sigma flow test data and asserts that the information may be proprietary information thus excepted under section 552.110.

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets, and (2) commercial or financial information, and each part must be considered separately.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be property acquired or duplicated by others.

Id.; *see also* Open Records Decision No. 522 (1989).

However, this office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. See Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information).

Nor has the governmental body or Sigma shown that the submitted information comes within the commercial or financial aspect of section 552.110. A "mere conclusory assertion of a possibility of commercial harm" is insufficient to show that the applicability of section 552.110. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted), "the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." In this situation, the trademark provision of section 552.110 has not been shown to be applicable to the information at issue.

In Open Records Decision No. 639 (1996), the Attorney General held that the case of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir.1974), which interprets exemption four of the federal Freedom of Information Act ("FOIA), was a "judicial decision" for purposes of section 552.110 of the Government Code. The *National Parks & Conservation Ass'n* case treats commercial or financial information as confidential

[i]f disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F.2d at 770 (footnote omitted). Moreover, "[t]o prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. V. Block*, 755 F.2d 397, 399 (5th cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted); Open Records Decision No. 639 (1996) at 4. To be held confidential under *National Parks & Conservation Ass'n*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks & Conservation Ass'n*, 498 F.2d at 766.

We have reviewed the documents at issue and considered the response and conclude that Sigma did not meet its burden under commercial or financial information. Consequently, we conclude that the city may not withhold any of the information at issue under section 552.110 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet J. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 103592

Enclosures: Submitted information

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