



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 11, 1997

Mr. Patrick Lindner  
Davidson & Troilo  
7550 IH-10 West, Suite 800  
San Antonio, Texas 78229-5815

OR97-0772

Dear Mr. Lindner:

On behalf of the Public Utilities Board of Brownsville, Texas ("the PUB"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105197.

PUB received a request for "a copy of the contract between the city of Brownsville and Tenaska Power Services Co. ("Tenaska") for the sale of electricity to the city of Brownsville," and for "a copy of any request for proposals for repowering projects with the City of Brownsville that have been issued in the last two years." You state that you have advised the PUB to produce the requests for proposals. However, you assert that paragraphs six and seven of the "Power Exchange Agreement," as well as certain financial and commercial information in the "Agreement for Marketing and Ancillary Services" are excepted from required public disclosure based on sections 552.101, 552.104 and 552.110 of the Government Code. This office notified Tenaska of this request in order to provide it an opportunity to state reasons why the requested information should be excepted from required public disclosure. *See* Gov't Code § 552.305. Tenaska asserts that paragraphs six and seven of the "Power Exchange Agreement," as well as the "Agreement for Marketing and Ancillary Services" are excepted from required public disclosure based on sections 552.101 and 552.110 of the Government Code.

Section 552.110 excepts from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Tenaska asserts that the requested information fits into both categories of information.

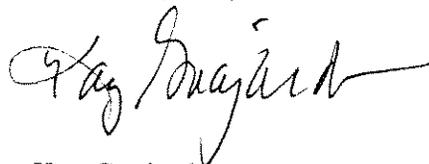
In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if 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. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass'n* claim by mere conclusory assertion of a possibility of commercial harm. "To 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. Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985)).

We have considered the arguments of Tenaska and the PUB and have reviewed the information and conclude that the PUB must withhold paragraphs six and seven of the "Power Exchange Agreement" and the highlighted portions of the "Agreement for Marketing and Ancillary Services" based on section 552.110 as confidential commercial and financial information.

In light of our decision under section 552.110, it is not necessary to consider the other arguments of the PUB or Tenaska at this time. 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,



Kay Guajardo  
Assistant Attorney General  
Open Records Division

KHG/rho

Ref.: ID# 105197

Enclosures: Submitted documents

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(w/o enclosures)