

January 25, 1999



OFFICE OF THE
ATTORNEY GENERAL
STATE OF TEXAS

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Ms. Nanette G. Williams
Assistant City Attorney
Office of The city Attorney
The City of El paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR99-0240

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121391.

The City of El Paso (the city) received a request for any information concerning "the network build of e.spire Communications (formerly ACSI)." You explain that release of the requested information may implicate the proprietary rights of a private third party. The responsive information consists of several maps or drawings depicting fiber optic networks in certain areas of the city. You ask pursuant to section 552.305 of the Government Code whether the requested information must be released. You have provided a copy of the requested information.¹

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified e.spire Communications, Inc. ("e.spire") about the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested

¹You also question whether the city properly copied the requested information for submission to this office. The requested information contains a provision forbidding the reproduction of the documents without consent. Information is not confidential under the Open Records Act simply because the private party submitting it anticipates or requests that it be kept confidential. Open Records Decision Nos. 575 (1990), 479 (1987). Section 552.301(b) of the Government Code requires a governmental body seeking an attorney general decision to provide a copy of the specific information requested. The requested information submitted to the attorney general is not released by this office. Any information determined to be available to the public by this office is not disclosed by the attorney general; instead, the governmental body is responsible for such disclosure.

information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). E.spire responded to our notice by arguing that its network maps are confidential commercial or financial information under section 552.110 of the Government Code.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption four to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption four to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 at 4 (1996). 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. *Id.*

E.spire argues that if the information is released, it would provide a competitor an advantage because the company could avoid the financial costs of developing its own network plan. The company states that the maps contain confidential customer information, network capacity, and routing information, release of which could diminish its market share. E.spire claims that the maps are the result of hundreds of engineering hours and a substantial investment in company resources. There is no legitimate need for the information, the company argues, except to solicit e.spire's customers and duplicate the company's network. No party argues any public interest in the release of the information. After examining the submitted arguments and documents, we conclude that e.spire has demonstrated that release of the requested information is likely to cause substantial harm to its competitive position. Open Records Letter No. 96-0756 (1996). The requested information must be withheld as confidential commercial information under section 552.110.

We are resolving this matter with an 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 should 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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/nc

Ref: ID# 121391

Enclosures: Submitted documents

cc: Ms. Donna J. Lee
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(w/o enclosures)

Mr. Charles H. N. Kallenbach

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