



May 19, 1999

Ms. Judy Ponder
General Counsel
General Services Commission
1711 San Jacinto
Austin, Texas 78711-3047

OR99-1387

Dear Ms. Ponder:

You ask this office to reconsider our ruling in Open Records Letter No. 99-0647 (1999). Your request was assigned ID# 124824.

The General Services Commission (the "commission") received a request for a copy of SCC Communications Corporation's ("SCC") response to the commission's request for offer for 9-1-1 Database and AIN Network Services. In Open Records Letter No. 99-0647, we concluded that the commission must withhold portions of SCC's bid proposal from disclosure under section 552.110 as commercial or financial information. In your request for reconsideration, you explain that certain responsive documents were not addressed in the previous ruling. Without taking a position on the release of this information, you ask whether these documents must also be withheld from disclosure under section 552.110.

SCC argues that certain responses or portions of responses to proposal questions and two submitted diagrams are protected from disclosure under section 552.110. Section 552.110 protects the property interests of third 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. SCC has made arguments against disclosure under both prongs of section 552.110.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 of 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). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).¹

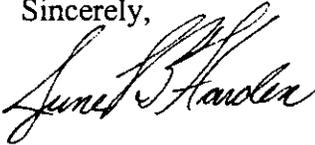
In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 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

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* We have reviewed SCC's arguments for withholding the information at issue. We agree that section 552.110 excepts from disclosure most of the information SCC wishes to withhold. The commission must, therefore, withhold the following responses under section 552.110: 1, 2 (bracketed portion only), 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33 (bracketed portion only), 34, 35, 36, 37, 40, 42, the Data Management Diagram, and the Network Diagram.

If you have any questions regarding this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink that reads "June B. Harden". The signature is written in a cursive, flowing style.

June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 124824

encl. Marked documents

cc: Ms. Dineen J. Majcher
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(w/o enclosures)