Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 6, 1996

William G. Burnett, P.E.
Executive Director
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 East 11th Street
Austin, Texas 78701-2483

Open Records Decision No. 639

Re: Reconsideration of Open Records Decision No. 592 (1991) (OR-38618) formerly (RQ-739)

Dear Mr. Burnett:

You have requested that this office reconsider its conclusion in Open Records Letter No. 94-234 (1994). Open Records Letter No. 94-234 (1994) held that section 552.110 of the Government Code did not prohibit the release of certain company information submitted to the Texas Department of Transportation in connection with applications for Disadvantaged Business Enterprise status, except for tax return information made confidential by federal statute. In so holding, Open Records Letter No. 94-234 (1994) implicitly relied upon the reading of section 552.110's "commercial or financial information" exception articulated by this office in Open Records Decision No. 592 (1991), to the effect that such information must be confidential under the common or statutory law of Texas in order to be excepted from required public disclosure. In essence, then, you are asking that we reconsider our holding in Open Records Decision No. 592 (1991).

Section 552.110 excepts from disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." We are concerned here with only the second prong of section 552.110, "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision."

Two divergent lines of decisions came from this office in an attempt to clarify the "by statute or judicial decision" language. Attorney General Opinion H-258 (1974) and its progeny read this language to subsume former V.T.C.S. article 6252-17a, section 3(a)(10) under former section 3(a)(1), which excepted information made confidential by law. *See* Open Records Decision Nos. 402 (1983), 347 (1982), 319 (1982), 246 (1980),

233 (1980), 231 (1979), 180 (1977). Accordingly, these opinions held that it was "unlikely" that any material not excepted from disclosure by former section 3(a)(1) was excepted by former section 3(a)(10). Attorney General Opinion H-258 (1974) at 6. In practice, this line of decisions did not find that any statutes or judicial decisions made confidential commercial or financial information obtained from a person.

A contrary line of decisions began with Open Records Decision No. 107 (1975), which found former section 3(a)(10) and Exemption Four of the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), to be "virtually identical," and followed federal court decisions interpreting Exemption Four. This and subsequent open records decisions laid no emphasis on the "statute or judicial decision" language. Rather, Open Records Decision No. 107 (1975) asserted that "[w]hen the legislature adopts language from another jurisdiction it is presumed that the legislature intended it to have the same meaning." Open Records Decision No. 107 (1975) at 2 (citing *State v. Weiss*, 171 S.W.2d 848, 851 (Tex. 1943)); *accord Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ). Based on its finding that former section 3(a)(10) and Exemption Four of FOIA were virtually identical, Open Records Decision No. 107 (1975) held certain inventory information to be confidential and excepted from public disclosure although there was no specific statutory restriction on public disclosure, and there were no Texas cases on the issue. Open Records Decision No. 107 (1975) at 3. Rather, Open Records Decision No. 107 (1975) and its progeny followed federal case law in excepting certain financial information from disclosure, notwithstanding that the "by statute or judicial decision" language does not appear in FOIA, *see* 5 U.S.C. § 552(b)(4).

Open Records Decision No. 309 (1982) attempted to reconcile the inconsistency between the two lines of opinions by reasoning that a federal case, *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), was a judicial decision for purposes of former section 3(a)(10). Open Records Decision No. 592 (1991) at 6. On this basis, the *National Parks & Conservation Ass'n* test was used as a standard for judging the confidentiality of "commercial or financial information."

National Parks & Conservation Ass'n was, and is, the principal federal case interpreting Exemption Four of FOIA. The *National Parks & Conservation Ass'n* case treats commercial or financial information as 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.

498 F. 2d at 770 (footnote omitted).

This standard was overturned by Open Records Decision No. 592 (1991), which averred that *National Parks & Conservation Ass'n* "is in no way an expression of the common law of privilege or confidentiality." Open Records Decision No. 592 (1191) at 6. The Office of the Attorney General in Open Records Decision No. 592 (1991) therefore read the language "by statute or judicial decision" to mean "[according to] the common or statutory law of Texas." *Id.* at 7.

Open Records Decision No. 592 (1991) had little effect on the trade secret prong of former section 3(a)(10), since the law of trade secrets was well developed in Texas. Outside the limited context of civil discovery, however, *see, e.g., Maresca v. Marks*, 362 S.W.2d 299 (Tex. 1962); *Crane v. Tunks*, 328 S.W.2d 434 (Tex. 1959), we have determined since Open Records Decision No. 592 (1991) that the common or statutory law of Texas does not contain any such well developed rule concerning the confidentiality of commercial or financial information.

We believe, however, that the legislature meant to offer protection to this class of information. The Texas Supreme Court has recently recognized that the legislature loosely patterned the Texas Open Records Act after FOIA. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995). Furthermore, in holding that the comptroller could withhold certain tax information under section 552.108 of the Government Code, the court in *A & T Consultants, Inc.* construed section 552.108 as generally having the same scope as section 552(b)(7) of FOIA even though the language of the two exemptions is not identical. *Id.* at 678; *see also Gilbreath*, 842 S.W.2d at 412-13 (noting that Gov't Code § 552.111 is generally construed to have same scope as § 552(b)(5) of FOIA even though exemptions are not identical). We are compelled to follow the Texas Supreme Court's rationale and acknowledge the *National Parks & Conservation Ass'n* court's interpretation of Exemption Four of FOIA on which section 552.110 was patterned, even though the language of section 552.110 is not identical to Exemption Four. Accordingly, we conclude that *National Parks & Conservation Ass'n* is a "judicial decision" for the purposes of section 552.110 of the Government Code.[1]

---

[1]This view is, we believe, bolstered by *Apodaca v. Montes*, 606 S.W.2d 734 (Tex. Civ. App.–El Paso 1980, no writ), which Open Records Decision No. 309 (1982) cited as support for the proposition that *National Parks & Conservation Ass'n* was a judicial decision for these purposes. Open Records Decision No. 309 (1982) at 2, stated that

> the court did not reject appellant's argument that it is appropriate to use the National Parks test in determining whether information may be excepted under section 3(a)(10). By failing to do so, the court, in our opinion, impliedly sanctioned that argument. Clearly, it left the door open for trial courts to apply that test and determine that the disclosure of particular information may not be compelled because its release would cause "substantial harm" to the submitter's competitive position.

We note, however, that 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," 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."[2]

The businesses whose records are at issue here were, of course, unable to make any such factual and particularized showing, since they could not have been aware that this office was returning to the *National Parks & Conservation Ass'n* test. This office will therefore grant them fourteen days from the date of receipt of this Open Records Decision to make such a showing.

---

[2]We note that the United States Court of Appeals for the District of Columbia Circuit, in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993), has modified the *National Parks & Conservation Ass'n* test for information voluntarily submitted to the government. However, since the material in question here was submitted in order to obtain a benefit, and is therefore not voluntarily submitted, *see* OFFICE OF INFO. & PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 103 (1993), we need not consider whether to follow the *Critical Mass Energy Project* case here.

SUMMARY

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), which established a two-prong test for the confidentiality of commercial or financial information, is a "judicial decision" for the purpose of section 552.110 of the Government Code. Open Records Decision No. 592 (1991) is overruled to the extent that it conflicts with this decision.

Yours very truly,

Dan Morales

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

SANDRA L. COAXUM
Chief, Open Records Division

Prepared by James Tourtelott
Assistant Attorney General