



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 12, 1996

Ms. Brenda Jenkins
Executive Director
Public Utility Commission of Texas
7800 Shoal Creek Blvd.
Austin, Texas 78757-1098

OR96-2374

Dear Ms. Jenkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102327.

The Public Utility Commission of Texas (the "commission") has received a request for "a list of phone locations of our competitive companies," listing two companies: Pay Phone Sales and Service and Stefek Enterprises. On behalf of these two companies, you raise sections 552.101, 552.104, and 552.110 of the Government Code as exceptions to required public disclosure.

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth calendar day after the date of receiving the written request. The commission received the written request for information on August 26, 1996. You did not request a decision from this office until September 17, 1996, more than ten days after the requestor's written request. Therefore, we conclude that the commission failed to meet its ten-day deadline for requesting an opinion from this office.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. In this instance, we believe that

compelling reasons do exist for withholding the requested information under section 552.110 of the Government Code.

Pursuant to section 552.305, we notified the two companies of this open records request. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). By mutual counsel, both companies responded to our notification by asserting that the requested information contains trade secrets and confidential commercial information excepted from public disclosure under section 552.110 of the Government Code.

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 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

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). In addition, "[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*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks*, 498 F.2d at 766. In the case at hand, we find that Pay Phone Sales and Service and Stefek Enterprises have made a specific showing that they actually face competition and that substantial competitive injury would likely result from disclosure of this information. Consequently, we conclude that the commission must withhold the information Pay Phone Sales and Service and Stefek Enterprises seek to withhold as confidential under section 552.110 of the Government Code.¹

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

¹As we resolve this matter under the "commercial or financial information" prong of section 552.110, we need not consider whether the information is also a trade secret. Also, we need not consider the applicability of sections 552.101 and 552.104, as the requested information is deemed confidential pursuant to section 552.110.

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 I. Monteros
Assistant Attorney General
Open Records Division

JIM/RTR/ch

Ref.: ID# 102327

Enclosures: Submitted documents

cc: Mr. Timothy Mashburn
Felts, Mashburn & Contreras, P.C.
P.O. Box 2207
Austin, Texas 78768-2207
(w/o enclosures)

