



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 5, 1997

Ms. Katherine B. Cahill
Senior Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR97-0244

Dear Ms. Cahill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103427.

The San Antonio Water System ("SAWS") received a request for

1. Copies of all proposals to provide state and federal labor law representation to the San Antonio Water System;
2. The names of all firms interviewed as candidates for provision of state and federal labor law representation to the System, and the names of their representatives at those interviews; and
3. The name or names of the firm or firms selected [to] provide state and labor and employment law representation to the San Antonio Water System.

You explain that you have released the information responsive to request numbers two and three above. You claim, however, that the proposals submitted to SAWS by third parties may be proprietary in nature and protected from disclosure by section 552.110 of the Government Code. You have submitted the requested proposals to this office for review.

Since the property and privacy rights of third parties are implicated by the release of the requested information here, this office notified the eleven law firms who submitted

proposals to SAWS for state and federal labor law representation. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested 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). Five of the law firms responded to the notice. The law firm of Denton, McKamie and Navarro states that it does not object to release of the information concerning its firm. Further, because six of the firms, Burns, O'Gorman, Black and Weyland; Cox and Smith; Foster, Heller and Kilgore; Oppenheimer, Blind, Harrison and Tate; Villarreal, Moreno and Ruiz and Small, Craig and Werkenthin; and Wickliff and Hall did not respond to our notice, we have no basis to conclude that these firms' information is excepted from disclosure. *See* Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party 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), 552 (1990) at 5 (party must establish prima facie case that information is trade secret). The proposals of the seven firms named above, must therefore, be released to the requestor.

The Joint Venture of the Kleberg Law Firm and Danielle Hargrove and the offices of Edward Pina and Dan Naranjo have responded to this office's notice by claiming that the requested proposals are protected from disclosure by section 552.104 of the Government Code. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As SAWS does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *E.g.*, Open Records Decision Nos. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. The requested proposals may not be withheld under section 552.104.

Mr. Pina also argues that section 552.101 protects the requested information from disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." After reviewing the requested documents, we do not believe that the information is confidential based on a right of privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (common-law privacy); Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)) (constitutional privacy). Moreover, we do not find nor does any firm point to a statute that would deem the information confidential. We conclude that the information may not be withheld based on section 552.101.

Jenkins, Gilchrist and Groce, Locke and Hebdon; The Kleberg Law Firm and Danielle Hargrove; Edward Pina and Dan Naranjo; and Wells, Pinckey and McHugh, each raise section 552.110 as an exception to disclosure of their respective proposals. Section 552.110 protects the property interests of private persons 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.

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 (1990) at 5.¹

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

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* (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. 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.*

Jenkins and Gilchrist and Groce, Locke and Hebdon argue that the information within its proposal which reveals client information or billing information must be withheld. We do not believe that the firm has established that the client information is either a trade secret or commercial or financial information that must be withheld. We find, however, that the firm has met its burden under the commercial and financial information prong of section 552.110 for its billing information on pages 7-8 and 14 of its proposal. We have marked the information that must be withheld in this proposal.

The Joint Venture of the Kleberg Law Firm and Danielle Hargrove argues that special project information, billing information, and client lists are protected from disclosure by section 552.110. We conclude the joint venture has established that its billing information is protected by the commercial and financial information prong of section 552.110. We do not believe that the joint venture has established that its client lists must be withheld. Finally, we are unable to identify and the joint venture did not mark any specific "special project information" within the proposal. We conclude that the joint venture has not met its burden for protecting any such information in this case. We have marked the information that the SAWS must withhold under section 552.110 in this proposal.

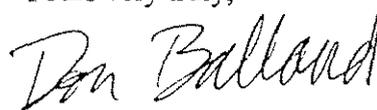
Edward Pina and Dan Naranjo argue that their proposal is excepted from disclosure as trade secret information. They have not, however, demonstrated that the requested information constitutes information protected by section 552.110. Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party 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), 552 (1990) at 5 (party must establish a prima facie case that information is trade secret). Therefore, this proposal must be released to the requestor.

Finally, Wells, Pinckney and McHugh argues that three types of information in its proposal are protected under the *National Parks* standard. The firms seeks to protect its billing information, non-public client lists, and the firm's racial, ethnic and gender information. After reviewing the firm's submitted arguments and the requested information, we conclude that Wells, Pinckney and McHugh has met its burden under the commercial and financial information prong of section 552.110 for the billing information and for the firm's racial, ethnic and gender information. The firm has not established that the non-public client lists must be withheld under section 552.110. We have marked the information that the SAWS must withhold under section 552.110 in this proposal.

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/ch

Ref: ID# 103427

Enclosures: Submitted documents

cc: Ms. Mary F. Radicke
Firm Administrator
Foster, Heller & Kilgore
4040 Broadway, Suite 401
San Antonio, Texas 78209-6352
(w/o enclosures)

Burns, O'Gorman, Black & Weyland
A Limited Liability Company
750 Rittiman Road
San Antonio, Texas 78209-5596
(w/o enclosures)

Cox & Smith, Inc.
112 East Pecan Street, Suite 1800
San Antonio, Texas 78205-1521
(w/o enclosures)

Denton, McKarnie & Navarro
A Professional Corporation
1700 Tower Life Building
310 South St. Mary's Street
San Antonio, Texas 78205-3111
(w/o enclosures)

Jenkins & Gilchrist, Groce, Locke & Hebdon
A Professional Corporation
1800 Frost Bank Tower
San Antonio, Texas 78203
(w/o enclosures)

Foster, Heller & Kilgore
A Professional Corporation
4040 Broadway, Suite 401
San Antonio, Texas 78209-6362
(w/o enclosures)

The Kleger Law Firm/Ms. Danielle L. Hargrove
Joint Venture
112 E. Pecan, Suite 2200
San Antonio, Texas 78205
(w/o enclosures)

Oppenheimer, Blend, Harrison & Tate, Inc.
Law Offices
711 Navarro, Sixth Floor
San Antonio, Texas 78205-1796
(w/o enclosures)

Mr. Edward L. Pina, Esq.
A Joint Venture of Professional Corporations
8118 Datapoint Drive
San Antonio, Texas 78229
(w/o enclosures)

Mr. Dan A. Naranjo, Esq.
A Joint Venture of Professional Corporations
8118 Datapoint Drive
San Antonio, Texas 78229
(w/o enclosures)

Villareal, Moreno & Ruiz
Travis Park Plaza Building
711 Navarro, Suite 360
San Antonio, Texas 78205
(w/o enclosures)

Small, Criag & Werkenthin
300 Convent Street, Suite 1950
San Antonio, Texas 78205
(w/o enclosures)

Wells, Pinckney & McHugh
A Professional Corporation
800 One Alamo Street
106 S. St. Mary's Street
San Antonio, Texas 78205-3603
(w/o enclosures)

Wickliff & Hall
Riverview Towers
111 Soledad, Suite 2001
San Antonio, Texas 78205-2297
(w/o enclosures)