



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 15, 1997

Ms. Myra A. McDaniel
Bickerstaff, Heath, Smiley, Pollan,
Kever & McDaniel, L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR97-0825

Dear Ms. McDaniel:

On behalf of the Austin Community College ("ACC"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105518.

ACC received a request for information pertaining to RFO28-019708MS-Telephone Services Switch Replacement Contract and the Williams Telecommunications Company, Inc. ("WilTel"). You assert that certain WilTel financial information is excepted from required public disclosure based on sections 552.101 and 552.110 of the Government Code. We notified WilTel of this request so that WilTel would have the opportunity to submit reasons why the information should not be released. Gov't Code § 552.305.

Section 552.110 excepts from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision."¹ ACC asserts that the requested information fits both categories. WilTel states that the financial information is proprietary and protected from public disclosure based on section 552.110 and Open Records Decision No. 514 (1988).

¹Section 552.101 of the Government Code excepts from required public disclosure information that is deemed confidential by law, either constitutional, statutory or by judicial decision. Because section 552.110 requires that excepted information be made confidential by statute or judicial decision, it is redundant with section 552.101. Attorney General Opinion H-258 (1974) at 6.

In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is 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. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). 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, 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. Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985).

We believe ACC has established that WilTel actually faces competition and that, with the exception of the first page of the information, the release of the information would cause WilTel substantial competitive injury. Consequently, except for the first page of the information, ACC must withhold the requested information from public disclosure based on section 552.110 of the Government Code.

We are resolving this matter with this 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 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,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 105518

Enclosures: Submitted documents

cc: Mr. David Herndon
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(w/o enclosures)

